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Chair

Mr. Ed Fast

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● (1110)

[*English*]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call the meeting to order.

This is meeting 25 of the Standing Committee on Justice and Human Rights. For the record, today is Thursday, June 17, 2010.

Before we go on to the business at hand, the items on the agenda, I want to say something. This is probably our last meeting before the summer break, and there are a number of people who help us at our committee meetings who often don't get the credit they deserve.

First of all I want to recognize our clerks, who work so hard to keep us on task. Sometimes I'm sure they're frazzled with the number of requests they receive and the last-minute changes to the agenda. I want to thank the clerks for their work.

I also want to thank the interpreters. They often have a very difficult time keeping up to our witnesses and they do yeoman service for our committee, so I want to thank them as well.

As well, I want to thank our analysts, who serve us well in providing us with information on the bills that we consider here. I also want to thank the House of Commons staff, who serve so faithfully in setting up these rooms and making sure that some of the needs for water and food are provided for. l wish you all a very healthy, restful summer break.

You have before you the agenda for today. Today we're continuing with our review of Bill C-4, Sébastien's law, an act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other acts.

We have a motion from Mr. Murphy. You've received a copy of it.

Do you want to introduce that right now?

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Yes, but I'll be brief. I don't want to stand in the way of the witnesses' testimony.

We heard that there were round table discussions and we'd like to have the report from those round table discussions. I don't think there's any dispute as to that. There's no definite timetable, but I think it gives the department the summer to do that. It also is protective of any privacy rights or protection rights that people who participated in the round tables might have.

I think it gives the minister and the department a fair amount of leeway in preparing a report that would be useful to us in our deliberations when we return.

That's all I really have to say to the motion.

The Chair: Members, you have a written copy of the motion before you.

Go ahead, Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): I'm sorry. This is a point of order, Mr. Chair.

If it's here, I've just not been able to find it. May I have another copy?

The Chair: We'll provide you with a copy. It's in both official languages, so it's in order.

Mr. Brian Murphy: Would it be helpful if I read it?

The Chair: Would you like it read into the record?

Mr. Stephen Woodworth: I'm not asking that. I'm just asking if I might see a copy so I may read it for myself.

The Chair: Yes.

Mr. Brian Murphy: Because the room was late clearing out and because we have some important witnesses, can we deal with this for five minutes at the end of the meeting?

The Chair: Well, now that we're into it, let's just dispose of it. Whether it's at the beginning or the end doesn't matter; we still have the same amount of time with witnesses.

All right, you have copies of the motion before you. Is there any other discussion?

Go ahead, Mr. Dechert.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

I'd just like to thank Mr. Murphy for the motion and say we support it.

The Chair: All right.

Is there any other discussion? Seeing none, I'll call the question.

(Motion agreed to) [See *Minutes of Proceedings*]

The Chair: Excellent.

We'll get back to Bill C-4. To help us with our review, we have a number of witnesses.

As an individual, we have Merlin Nunn, a retired justice of the Supreme Court of Nova Scotia. Welcome.

We also have the Government of Alberta, represented by Joshua Hawkes, director of policy for the appeals, education and policy branch of the Department of Justice and Attorney General. Welcome.

We have the Government of Nova Scotia, represented by Ronald MacDonald, senior crown counsel and criminal law policy adviser in the policy, planning, and research branch in the Department of Justice. Welcome.

Finally, we have the Government of Manitoba, represented by David Greening, who is executive director of policy development and analysis in the Department of Justice.

Welcome to all four of you. I think you've been told that you each have ten minutes to present, and then we'll open the floor to questions.

I'll ask those who have cellphones or other hand-held devices to please put them on vibrate or turn them off completely and to please take any telephone calls outside the room.

Why don't we start with Justice Nunn?

Mr. Merlin Nunn (Retired Justice of the Supreme Court of Nova Scotia, As an Individual): I thought you might do that.

I have a problem. I was only asked to come here on Monday, as a result of my report, so I spent the last three days reading my report again because it was four years since I had really been involved with it. Before I was involved with it, I had no experience with the Youth Criminal Justice Act, nor the Young Offenders Act, nor the Juvenile Delinquents Act, because I never had a youth in my court. I was in the Supreme Court and we were dealing with the adult situations. In Halifax, there was always a youth court of some kind. Once I started with the inquiry, I learned a tremendous amount about the Youth Criminal Justice Act and about youth justice. While I'm not an expert on the Youth Criminal Justice Act, I think I know an awful lot about youth and how they are dealt with and what problems they have and why they have them, and I'd just like to pass on to you what happened in the inquiry that I had.

As witnesses, I had police officers, I had RCMP officers, I had social workers, I had people who looked after group homes for children who had no other home, I had educators, I had mental health people, I had physical health people. I leaned about attention deficit disorder. I was fortunate that the expert from the U.S.A. was in Halifax that weekend and I attended his lectures, and so on, and I learned things that I really never had any idea about before. They all indicated to me that the problem is to deal with the child and understand the underlying factors that lead to the child being the way he is. That doesn't cover every situation, but it covers probably 98% of the youth who are being dealt with under the act—and maybe more.

I learned then that the Youth Criminal Justice Act really created a new justice system for youth. There are people in Canada who are opposed to that and still are opposed to that and think that every child who's convicted of something should be in jail. That's an attitude that I think comes from a lack of knowledge. If they understand the purpose of the act and they understand how it's working and the successes it has, the act is successful 90-something percent of the time. It sometimes needed to be tweaked a little bit so that we cover something that happened to not work. I had 50 days of that testimony that I spoke of, and not one of the witnesses turned around and said that this is a bad act, that this is an act that shouldn't have been passed. They all were supportive of it. They all wanted the thing to work; they all were trying to make it work. There are systemic problems in the institutions themselves that help to cause youth problems and to allow youth problems to develop further. One of those is delay. One of the biggest ones is delay.

The centre of attraction of my report was a young boy who, at 16 years of age, in a stolen vehicle, in a Halifax city street, was speeding to avoid the police and he crashed—it was a T-bar situation—directly into the driver's side of a car and flipped it in the air and drove it 20 or 30 feet and killed the driver, who was a supplementary aid teacher in a school—Theresa McEvoy. The boy had been in custody just a short time for stealing another car and leading the Mounties in a chase at 160 or 180 kilometres an hour at 12:30 at night down a highway towards Windsor.

● (1115)

He was released from custody on one morning. Two days after, in the morning, he stole another car and that's when he killed Theresa McEvoy. That boy had 38 outstanding charges against him and had never been in jail other than by being in custody for a week or two, really by his own agreement, to await the outcome of what was going to happen. There wasn't communication between people. The system faltered. As a result, the people of Nova Scotia were in an uproar. How could a boy have 38 outstanding charges and not be in jail, or not be somewhere, not be looked after? That was the situation that I had.

Now, for your guidance—and I'm not a preacher, and as I said, I've only come into this again since Monday—I think you have to understand certain things. You have to understand that the act is a complete new justice system for youth and that the treatment of youth is different from the treatment for adults. The reason children do what they are doing is based on their minds and how their minds work, and they work very differently than adults' minds. So you can't think in adult terms of how children should be dealt with. I think you should be aware that one of the underlying principles is that Canada is a party to the United Nations Convention on the Rights of the Child, and that convention, really, among other things, indicates that the best interests of the child are a primary consideration, and also that custody is a last resort and should be for as short a period as is appropriate for the situation and for the person.

Now, because of the situation I was in, I came to the conclusion that the act was deficient, in that it deprived the court from taking the child and dealing with him at an early stage. In the area where I grew up, it was about grabbing him by the scruff of the neck and bringing him up short. It wasn't just to put him in prison. It was so that he'd become aware that the court and the police and authorities mean business, that they're not going to let him get away with these things. And a lot of it, as I say, was based on delay. My thrust, as I said, was for pre-trial custody only. I didn't really do anything about post-trial custody.

If you keep in mind that rehabilitation of the youth is the real aim, and you understand that that's happening in over 90% of the cases, then you have to realize that the act is working. Increasing custody in other circumstances or even in pre-trial for long periods of time is not really the way to go. The way to go is rehabilitation. That's what the act is designed to do and that's what we have to do. There are deficiencies, and the deficiencies are in funding, in what's available in the various provinces, and in what's available to provide the support and the professional people needed.

So I think that the Youth Criminal Justice Act, and you should appreciate this, contains the concepts and approaches to youth justice that should make all Canadians proud, and I think we're miles ahead of other countries in our dealing with youth justice.

● (1120)

Occasionally there's a horrendous case that develops and the media jump into the horrendous case, and they're like a starving lion attacking another animal. They're ready to just pounce on this thing for days and days in the media, and all they're doing is inciting those people—and I think it's a real minority—who are against the Youth Criminal Justice Act and are happy to have something to complain about.

Those were the general remarks. I don't propose to know very much about the actual wording that's there, because I haven't looked at it from that point of view, and I think I'll leave that to others. But I think the wording should follow the intent and theme of the act itself. That's my main point.

Thank you.

● (1125)

The Chair: Thank you.

We'll move on to Mr. Hawkes for ten minutes.

Mr. MacDonald, I'm sorry.

Mr. Ronald MacDonald (Senior Crown Counsel and Criminal Law Policy Advisor, Policy, Planning and Research, Department of Justice, Government of Nova Scotia): Yes, please. We've kind of organized it that way, if that's all right.

The Chair: All right. Sure, that's fine.

Mr. Ronald MacDonald: Thank you.

Thank you very much for giving us an opportunity to be heard today.

My name is Ron MacDonald. I come before you today as a representative of the Nova Scotia government, in my capacity as criminal law policy adviser, but also as a person who was 24 years on the front lines as defence and then crown counsel. In particular, I worked for 17 years in a small community in Nova Scotia at the very front line of justice in a way that allowed me to deal with young people, not simply in court, but I could see them the next day, the next week, the next two months on the streets, and you could see the results of what you did or didn't do in court. It's a very instructive way to learn about the justice system. I quite frankly, quite literally, one day could be doing a murder case, and the next day prosecuting youths for underage drinking.

We've heard from Justice Nunn this morning, and he talked about his inquiry, which came about as a result of Ms. McEvoy's death in 2004. Just a little more detail on that inquiry: it was heard over 32 days, heard from 47 witnesses, and heard three more by way of written statements. He heard from front-line crowns and defence, academic and practice experts, court administrators, the police, policy advisers, etc. We believe that his inquiry was one of the most comprehensive studies of youth justice ever done.

The Chair: Mr. MacDonald, I'm just going to get you to slow down a little bit, because the interpreters are trying to keep up.

Mr. Ronald MacDonald: Sorry; I'm too cognizant of the ten minutes. Thank you.

Justice Nunn made a total of 34 recommendations, seven of which related specifically to the YCJA. One passage that I think should stand out for all of us is this one:

> Aside from the misunderstandings and missteps that occurred in relation to AB, many of which were procedural in nature, the real culprit, which failed to provide an adequate response to AB's behaviour and, indeed, to society's rightful expectations, was the Youth Criminal Justice Act itself.

As a result of that, Mr. Justice Nunn made seven specific recommendations related to the act, including these: to make protection of the public a primary goal; to change the definition of violent offence; to make pretrial detention provisions stand alone; and to allow courts to consider a youth's prior findings of guilt and outstanding charges in pretrial detention.

There were a few other ones as well, including those relevant to “responsible person” undertakings and attendance at non-residential community centres. This was the tweaking that Justice Nunn today spoke about.

The recommendations related to pretrial detention and the definition of violent offence have been a particular focus of Nova Scotia's representations. Justice Nunn didn't advocate, and Nova Scotia isn't advocating, changes that necessarily call for greater incarceration of youths. Rather, our submissions emphasize that sometimes youths are out of control, and courts must have the appropriate tools available to them to protect the public and assist the youths. These tools must include the practical ability to place a youth in custody, both pretrial and post-trial, for an appropriate range of offences and fact circumstances.

A failure to give the courts these tools leads to increased risk to public safety and the public's loss of respect for the administration of justice. It also results in the loss of an opportunity to intervene into the life of an out-of-control youth, an intervention that could well make a great difference in the life of a youth—I have seen that personally on several different occasions—simply as a result of short periods of pretrial custody.

In general, Nova Scotia supports the statements of policy made by Minister Nicholson in Parliament when speaking to Bill C-4. For example, he said:

> Sébastien's law will make the protection of society a primary goal of our youth criminal justice system, and it will give Canadians greater confidence that violent and repeat young offenders will be held accountable through sentences that are proportionate to the severity of their crimes.

He later also talks about violent and repeat offenders needing to be kept off the streets while awaiting trial when necessary, and about reducing barriers to custody for those violent and repeat offenders where appropriate.

Nova Scotia supports those policy goals and suggests that they reflect some of the comments of Justice Nunn in his report—for example, on page 230 of his report, where he indeed talks about "enlarging the gateways to custody".

Justice Nunn also states:

> I cannot overestimate the importance of taking a balanced approach. Parts of the YCJA must be changed in order to create a workable and effective approach to handling repeat young offenders in a manner based upon protection of the public as a primary concern, as well as providing a means to step in to halt unacceptable criminal behaviour in a timely manner. This is not an option. It is crucial.

Simply put, while it is right to say that in principle we don't want any more youths than necessary in custody, it does not mean the system should have restrictions that effectively block that custody when it's necessary. I will be speaking today primarily about pretrial detention and how that can occur.

First of all, Nova Scotia would like to note that the changes intended to be made to the principles of the act by Bill C-4, to provide that protection of the public is an immediate goal of the act, is supported by Nova Scotia and is indeed consistent with Justice Nunn's recommendation.

We also support the changes planned to the definition of violent offence—namely, to include offences that have bodily harm as an element or where life is endangered by substantial risk of bodily harm. Those too are consistent, we suggest, with Justice Nunn's recommendations.

● (1130)

They recognize that an offence that involves a substantial risk of bodily harm to someone is as serious and significant as when a youth takes actions to intentionally cause bodily harm. In some ways they place the general public more at risk, because general dangerous behaviour can affect the public, whereas intentional violent behaviour is more often directed at persons known to the accused.

We strongly suggest, however, that the actual wording, the legislative wording of Bill C-4, does not meet the stated policy goals in three significant areas: pre-trial detention, deferred custody, and adult sentencing. These drafting issues, we suggest, must be corrected to ensure the government's intent is met and to ensure the amendments do not create what we believe will be very crucial problems to the youth justice system.

With respect to pre-trial detention, the bill provides clause 29 as stand-alone provisions, which we support. We note that the test the crown will have to meet will still be very significant, and we support that as well. However, we suggest the current wording of the bill contains a very serious problem. While it provides that pre-trial custody is available should the strict test be met, it is only with cases that could carry a maximum sentence of five years or more for adults. What this means is that offences such as theft under $5,000, breach of dispositions, failure to comply, escape from lawful custody, committing an indecent act, damage to property, fraud under $5,000, inciting hatred, corrupting children, etc., are offences that are completely ineligible for custody. These are the very offences that youth are most prone to commit. This means that the bill does not deal with the repeat offenders, as the justice minister had hoped. It allows youths to repeatedly commit these offences, be arrested, and be released again. There would be no remedy for the public, pre-trial. It would allow an out-of-control youth to continue in a downward spiral without the system being able to step in and impose the needed control.

The amendments fail to consider that less serious offences, which on their own should not justify pre-trial custody, when committed in conjunction with many others can give you a very serious situation. Let me give you an example. A youth walks down Sparks Street, breaks every single pane of window glass on a block, is picked up by the police, and is taken to court. They must release him; they have no choice. He gets out. He tells the judge he has no intention of following the rules and does it again the next day. This type of behaviour could continue. While you might say that's an extreme example, what we know about human and indeed youth behaviour is that those types of examples are out there.

Currently the act provides that those offences are eligible for detention, although there's a presumption against detention. We suggest that this portion of the bill must be amended or the act will contain provisions that will allow a youth to commit offences with no pre-trial consequence available. There does not appear to have been any case law or other explanation for this change, as currently these cases are eligible for detention, as I've mentioned, albeit subject to a presumption against detention. We are very concerned that this will create a situation where the community will lose confidence in the very system designed to protect it.

On the issues of deferred custody and adult sentencing, my colleague Josh Hawkes will be discussing those details.

I just wish to say this in closing. You've heard from many witnesses who have suggested the proposed changes to the act will result in greater incarceration of youth. We come before you today to indicate that in fact the changes that Mr. Hawkes will discuss do the opposite. They will greatly increase the opportunities for youth to avoid custody in situations of crimes of serious violence by being granted a deferred sentence, which is the same effect as a conditional sentence for an adult. They'll also make having a youth sentenced as an adult much less likely. Our comments are not based on a general concern about policy; rather, they're based on the impact from legislative drafting.

● (1135)

I come before you as a person who works with legislative drafting and has done so on the ground. These changes will take a current practice, about which no one was concerned, and will make it more difficult to have youth placed in custody in the context of acts the public already sees as being too difficult. We are submitting that this is contrary to the submitted intent of the government and is in effect an error that must be corrected before these amendments become law.

I will leave it to Mr. Hawkes to explain those details.

Thank you, Mr. Chair. I am pleased to answer any questions.

The Chair: Thank you.

We will move on to Mr. Hawkes for ten minutes.

Mr. Joshua Hawkes (Director of Policy, Appeals, Education and Policy Branch, Department of Justice and Attorney General, Government of Alberta): Thank you very much, Mr. Chair.

Members of the committee, I am appearing on behalf of Alberta Justice. I am a prosecutor and am currently the director of the policy unit in Alberta Justice. I bring 20 years of experience as a trial and appellate counsel, so my perspective is very much, as is Mr. MacDonald's, from the front lines.

We agree with the stated policy intentions that Minister Nicholson indicated when he appeared before this committee. In particular, Alberta agrees with the added emphasis on public safety, with the addition of the concepts of individual deterrence and denunciation sentencing principles.

We appreciate that the focus of these changes is to allow the act to more precisely and in a calibrated way target that small percentage of youth, approximately 5% to 10%—which Dr. Croisdale spoke about before this committee—who commit the overwhelming majority of offences. Some of those offences are exceptionally serious.

There are two particular aspects to the bill that in our view significantly undermine those policy objectives and will in fact frustrate the ability of the act to respond effectively to violent crime and to that small section of youth who should receive adult sentences.

Typically, when we are speaking of that group of youthful offenders, we're speaking of very serious homicides. Those are almost exclusively the adult sentence transfers. There are some for other offences, but in my experience, well over 95% of the applications for adult sentences deal with homicides, and of those, most are very aggravated. Typically, the youth involved in those circumstances are older. We tend to be dealing at that stage with youth who are 16 to just under 18 years of age, typically.

As a result of these difficulties, particularly with the adult sentencing provisions and the deferred custody sentencing provisions, Alberta cannot support the bill as it is presently drafted. Our concerns are that serious.

We have, to the extent possible, reviewed the written transcripts of the evidence that has been presented before the committee. At least to date, from the transcribed evidence, we haven't seen that these issues have been raised or deliberated, so we feel that it's important as practitioners who are on the front lines and who will be dealing with the litigation that arises out of whatever legislation is passed to bring that perspective to this committee.

I'll move now to address the first difficulty that arises, and that is with respect to deferred custody sentences.

In my submission, the difficulty here is a manifestation of one of the overall problems with the act. We don't have difficulty with the policy objectives of the act, but it is one of the most complex, and with respect, poorly drafted pieces of legislation that I've had the misfortune of trying to use a practitioner. It's an exceedingly difficult act to follow. It's exceptionally complicated. Most of the provisions are intertwined in that you have to refer to several other sections before you can find out what the meaning or the implication of something will be. This problem is an exact example of why that is difficult and creates a problem.

Paragraph 42(5)(a) of the current act provides that an offender may receive a deferred custody sentence for an offence that is not a serious violent offence. Those sentences, deferred custody sentences, cannot exceed six months. In some ways, they're analogous to adult conditional sentences, although the penalties for breach are quicker. There's no judicial hearing required. If you breach a deferred custody sentence, you can be incarcerated for the balance of that sentence more quickly than if you were an adult.

● (1140)

At present, “serious violent offence” is defined broadly. It refers to offences in the commission of which bodily harm is caused or attempted. A hearing is required where a judge must determine if this particular offence will be categorized as a serious violent offence. The crown bears the burden of proving that the offence is a serious violent offence beyond a reasonable doubt. Once those thresholds have been passed, a deferred custody sentence is not available for those offences.

There has been a constitutional challenge to that limitation, and that constitutional challenge was dismissed. So the current state of the law is, and it's constitutionally sound, that you cannot get a deferred custody sentence for an offence of that kind.

The difficulty is that with the changes to the definition of serious violent offence proposed by the bill, that category of serious violent offence is now a closed category of the most serious offences—murder, attempted murder, aggravated assault, aggravated sexual assault. And that's it. So the result is that deferred custody sentences will now be available for many other very serious kinds of conduct.

I'm sorry—earlier I said that the definition of serious violent offence would apply to aggravated assault. It doesn't. It's aggravated sexual assault. So a deferred custody sentence would be available for aggravated assault, for dangerous driving causing death, criminal negligence causing death—many circumstances where it's not now currently available. As I read the proceedings in relation to this bill, it's not the intent of the bill to make it available. It's not the intent to broaden the availability of that very short sentence. We're dealing with a sentence of six months. Yet that is the effect of the way this bill is drafted.

The most difficult issue that arises with respect to the act as drafted arises in clause 18, which deals with adult sentences. In particular, this section attempts to codify a decision of the Supreme Court of Canada that struck down provisions that reversed the onus for receiving an adult sentence on a youth. Unfortunately, clause 18 goes much further than that. It proposes an entirely new test and articulates that the standard of proof for that test will be proof beyond a reasonable doubt. Now that's the highest standard known to law. That was not the standard previously with respect to any of these sections.

The Supreme Court in 2008 in D.B. overturned the presumptive sentencing regime. Cases subsequent to D.B. from the Alberta Court of Appeal, the Ontario Court of Appeal, and the Quebec Court of Appeal all held that the decision of the Supreme Court of Canada does not mean that the standard of proof is beyond a reasonable doubt. So by entrenching that in the legislation, this section goes much further than what is required by the Supreme Court of Canada, and in fact imposes an almost intractable proof problem on the crown. Because we're not talking about proving particular factors about an offence that has particular facts. Was it premeditated? Did you have a weapon? The code and the charter already recognize that if I as a prosecutor want to rely on aggravating facts, facts about the offence or the offender, I have to prove those beyond a reasonable doubt. That's well established and well understood. The difference is we are now talking about having to establish that principles have been satisfied beyond a reasonable doubt, not facts, and that will cause a very great difficulty.

The other problem is that clause 18 removes much of the specific guidance that was given to courts about the factors that they should consider. Right now section 71 of the act gives a very broad range of considerations for the court. They have to consider the age and the circumstances and the maturity. It's not an exclusive list, but it gives some direction and some guidance. That section is removed by clause 18, and the clause simply says that the crown must rebut "the presumption of diminished moral blameworthiness" beyond a reasonable doubt.

● (1145)

That term, "the presumption of diminished moral blameworthiness", is not defined anywhere in the act. It is a very expansive term. No one is entirely sure what the precise confines of that term are. It will be exceedingly difficult, as a practitioner, to be able to say to a judge, "I rebutted a presumption beyond a reasonable doubt", when we can't even agree on the precise scope of what the presumption is. The bill as drafted gives no assistance in that regard, and what's worse, removes the assistance that was previously there for trial judges.

Thank you very much.

The Chair: Thank you very much.

Mr. Greening, you have ten minutes.

Mr. David Greening (Executive Director, Policy Development and Analysis, Department of Justice, Government of Manitoba): Thank you.

By way of background, I am the executive director of policy development and analysis for Manitoba Justice. I have been doing criminal law policy work now for a bit over 14 years, and prior to that I was defence counsel, dealing with both adult criminal cases and youth court cases for roughly five years.

I'm pleased to be here today to speak to the committee about the Manitoba government's position on YCJA reform and its concerns about Bill C-4 and its approach to reform of the Youth Criminal Justice Act. Manitoba has longstanding concerns about youth crime and the YCJA. Since 2006 it has been advocating for reforms to enhance the bail and sentencing provisions of the YCJA to ensure that serious and repeat young offenders can be more easily held in custody upon arrest and face jail sentences for their crimes.

To clarify, Manitoba is not suggesting that all alleged young offenders should be detained in custody or sentenced to custody, but just that judges be allowed the opportunity to consider the circumstances of each case and to make appropriate decisions based upon the youth's behaviour and the risk they pose to the public, rather than having their hands tied and being prevented from doing so by the existing YCJA presumptions against pre-trial detention and custodial sentences. Being unable to keep out-of-control youth in custody not only creates a public safety risk, but also undermines public confidence in the justice system, as the public begins to see it as a revolving door catch-and-release exercise.

In addition to Manitoba raising its concerns at meetings of federal-provincial-territorial ministers responsible for justice, and in meetings with the federal Minister of Justice, in September 2007 Manitoba's then Premier and Minister of Justice led a non-partisan "Mission to Ottawa" delegation, including Manitoba's opposition leaders, the mayors and chiefs of police of Winnipeg and Brandon, and community leaders to press the Prime Minister, the federal Minister of Justice, the federal Liberal caucus, the federal New Democratic Party caucus, and Manitoba members of Parliament to amend the YCJA to address Manitoba's concerns.

A key impetus for Manitoba's concerns and for the "Mission to Ottawa" delegation was a trend of escalating reckless and dangerous conduct associated with motor vehicle theft, which is one of the offences for which the YCJA currently provides a presumption against denial of bail and a presumption against the imposition of a custodial sentence. In the first seven months of 2007, in Winnipeg, there were four incidents where persons were killed or seriously injured as a result of being struck by vehicles driven by youth motor vehicle thieves.

In fact, one of the participants in the mission to Ottawa was Kelly Van Camp, a jogger who was deliberately targeted by a youth driving a stolen vehicle, was struck by the vehicle, and was hospitalized with broken bones and serious head injuries. There were further serious injuries and fatalities caused by out-of-control youth car thieves in 2008 and 2009 and there have been circumstances in which the police have been targeted for collisions, both while in their vehicles and while on foot. Although we have had great success in reducing the overall incidence of motor vehicle theft—down by over 75%—we still need amendments to the YCJA to address this problem.

Turning to Bill C-4, although the bill implements some of Manitoba's longstanding YCJA reform recommendations, such as recognizing deterrence and denunciation as valid principles for sentencing young offenders, in other respects it does not address Manitoba's concerns but is actually a step backwards that worsens the ability of the youth justice system to deal with serious out-of-control young offenders. I want to clarify, much like previous speakers, that certainly we do support the intent and the policy thrust behind Bill C-4, but there are serious concerns we have about some of the provisions.

Again, this is going to sound a bit repetitious, and I'm going to try to streamline my comments so I don't repeat the fine comments of colleagues to my left. Manitoba definitely shares their view that there are three key problems with Bill C-4. The first one is the amendments related to pre-trial detention, the second is the amendments related to adult sentences, and the third is the amendments related to deferred custody sentences.

I should also note that those three concerns have also been identified and championed in terms of trying to find a solution by the western Attorneys General and Solicitors General in Canada.

● (1150)

In terms of pre-trial detention, instead of eliminating the presumption against pre-trial detention outright, Bill C-4 actually creates what is in effect a mandatory release provision that prevents judges from denying bail for offences that do not fall within the new limited category of serious offences and offences such as committing an indecent act, damage to property, theft of a vehicle worth less than $5,000. Unless Bill S-9 is passed and proclaimed—it creates a new offence—violating bail conditions or other court orders, or escaping from custody or failing to return to a custody facility when required to do so, regardless of how many times this conduct is repeated, won't fall within the definition. At a minimum, the definition of "serious offence" in Bill C-4 needs to be removed or changed to allow a broader range of offences to be considered for denial of bail and thereby prevent re-offending with impunity.

In terms of the adult sentencing provisions, Manitoba shares the view expressed today that Bill C-4 goes beyond what is necessary to address the Supreme Court of Canada's concerns in the R. v. D.B. case and that the proposed new proof beyond a reasonable doubt standard for determining when an adult sentence should be imposed will make obtaining an adult sentence virtually impossible except in the rarest of cases. The adult sentence provision of Bill C-4 should be amended to remove the reasonable doubt standard of proof requirement and restore the existing list of factors in terms of providing guidance to the court about when an adult sentence should be imposed, such as age, maturity, background and prior record of the offender, and circumstances of the offence. All of those should be considered by the court in determining whether an adult sentence should be imposed.

In terms of deferred custody, Manitoba's view—and again, this is the same as my colleagues' from Alberta and Nova Scotia—is that there is no justification for allowing the YCJA equivalent of conditional sentences to be available for serious violent offences that are now excluded from consideration. Doing so jeopardizes both public safety and public confidence in the justice system. Bill C-4 should be changed to ensure that the deferred custody sentences remain unavailable for situations in which a young person causes or attempts to cause serious bodily harm. Also, at the very least, there is a need for consistency with the legislation on the adult side in relation to where conditional sentences are prohibited.

In conclusion, I would ask the committee to give serious consideration to the concerns I have identified about Bill C-4 and to amend the bill to rectify them before the bill proceeds any further.

Thank you, and I will take whatever questions you have.

● (1155)

The Chair: Thank you very much.

We'll open the floor to questions, beginning with Monsieur LeBlanc, for seven minutes.

Hon. Dominic LeBlanc (Beauséjour, Lib.): Thank you, Mr. Chairman.

Thank you, gentlemen, for what I found to be a thorough and detailed presentation. The record of your evidence and your testimony will certainly be very important for us when we're looking at actual clause-by-clause amendments when we get to that stage. I appreciate the effort all of you have made.

I'd like to begin by asking a question to Justice Nunn and welcoming him to the justice committee of the House of Commons.

Justice Nunn, your report has for many of us served as a very important benchmark for how we can, as you may have said, tweak or adjust the Youth Criminal Justice Act. I share your view, Justice Nunn, that 90% of it is working well. We have talked many times at this table and have certainly heard evidence from your colleagues on the panel this morning about areas in which it can be improved. No piece of legislation—and I think, Mr. Hawkes, you said it well—as complicated and as awkwardly drafted to be generous is easy, and that's why I think it's useful for the government to have brought forward suggestions. I think we can constantly try to improve it. My own view is that after a relatively short period of time, we shouldn't make massive changes. We should allow courts and judges to apply it for a longer period before we throw large portions of it out. But I think we all agree there can be adjustments.

Justice Nunn, one of the areas that worries us—or worries me and I think worries my colleagues in the Liberal Party—is this business of the protection of the public, of society, as being one of the factors inserted fairly high up at the beginning of the legislation. In other words, we're concerned about the order of objectives of the act. You had spoken in your report, and I think correctly, of how that has to be and should properly be one of the objectives of criminal justice legislation. I don't think we disagree with that, but we worry that changing the long-term protection of the public—which in our view spoke to rehabilitation—and making it simply the protection of the public and moving it higher up in the wording of the legislation could lead courts to increased incarceration of young people—in closed custody—in circumstances where otherwise it wouldn't be warranted.

In other words, we all speak of repeat violent youth offenders and the tragic example of which your inquiry spoke, Justice Nunn. I don't think anybody would disagree that clearly the system failed in that circumstance. We want to be careful that in changing the wording we don't inadvertently tie the hands of judges in subsequent cases to incarcerate or to lean to incarceration where other more rehabilitative measures are appropriate and would work.

When you talked about the protection of the public as an objective, how did you imagine that being inserted into the act, and how would you imagine future courts considering that factor? How do we get the balance right so we don't tie the hands of future courts to incarcerate or to have a propensity to incarcerate when in fact other measures would be appropriate?

● (1200)

Mr. Merlin Nunn: If I could remember where it was in the book, I'd be able to deal with it a little better.

I can tell you it stemmed from appearances before me of police, particularly the deputy chief of the Halifax police force, who impressed me very much at the time, I must admit. He attended almost every day of our sessions even though he was called as a witness on only one day.

I don't think it opens a door that would allow judges or give judges great discretion to do something. It's just one of the factors for the judge to consider in dealing with the particular case that he has. I can't really remember too much about the details of putting it in, but it wasn't put in to open the door to a whole host of increased sentences and so on. It wasn't that. I think it was all in the notion that we have to do something to protect the public from these strange situations.

Now, if you've been listening, you've heard that in Manitoba there have been three or four people killed or severely injured, and each incident involved a stolen vehicle. We are in another world if we think that perpetrator stole only one vehicle.

Hon. Dominic LeBlanc: That it was his first stolen car.

Mr. Merlin Nunn: Yes, it was his first one—this is always the way. This is the unfortunate part when you're dealing with them.

My guy had 38 offences, of which 15 or 20 involved stolen cars. He got out of jail for stealing a car and stole another one two days later when he killed a woman. Those are the kinds of situations we're trying to get into the pre-trial custody and make it easier for the judge to do that, so he can, as I say, grab the kid by the scruff of the neck, bring him into court, and say “You're going to go to jail for a little while, while we deal with you”.

I don't know if I said it in there, but their attitude was that YCJA means you can't jail anyone. That's the way it was treated by the courts. It was extremely difficult to put somebody in jail. As was said here, you have one section that you can do it by, but that section refers to another section and refers to another section, and by the time you've gone through all of those, you say you can't do it.

The prosecutor in Halifax who had great experience with youth made an application to put this kid in jail, and he said to the judge, "Look, I don't think you can do it but I'd like you to do it". That's the kind of thing that happens. It's not the murderer who's going out to murder. He generally does murder one person. But the car thief is stealing cars every time for a joyride, and in the course of one or another of those, he kills somebody. That's the reason we're saying give us the tools to cut that person off short.

The Chair: Thank you.

We're out of time on that question, so we'll move on to Mr. Ménard for seven minutes.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): I also have very little time. However, I do wish to tell you before beginning how much I appreciated the brief that the ministers of Justice from Alberta and Nova Scotia sent us. I do however note that the Alberta Department of Justice wandered off topic somewhat, which is to say they dealt with other issues. The Nova Scotia brief remained more faithful to the subject. It is obvious that this brief was written by professionals who know the subject well and who have suggestions to make. I read it and thought about it a great deal, and I feel the need to reread it and think about it again.

I was also very impressed by Mr. Justice Nunn's conclusions. I will not say any more, because it is not the role of lawyers to judge judges. That could be dangerous, don't you think? I very much admire your reasoning. And in fact, I would like to ask you my first question.

In your recommendation 20, you suggest adding a provision to clause 3 that would establish the principles of the act. However, the amendments that have been proposed by the government do not constitute an addition, but rather a replacement. Your objective was to keep the first paragraph of clause 3, while adding what you state in your recommendation 20 to it. You want to add the principle. It is true that in what follows, there are other references to rehabilitation and reintegration programs. However, we can see that the text has been somewhat cleaned up. Now, reintegration is no longer being recommended, but being promoted. The government is therefore, from the outset, making a change that you would not like to see, it seems to me.

Am I right to believe that?

● (1205)

[*English*]

Mr. Merlin Nunn: If I understand, the public perception...

[*Translation*]

Mr. Serge Ménard: Let me sum up my thinking in a few words.

You proposed an addition, and the government responded with a replacement.

Did you understand my question?

[*English*]

Mr. Merlin Nunn: No.

[*Translation*]

Mr. Serge Ménard: It was not translated. And yet, I tried to speak slowly.

I understand that my time will be credited to me.

First of all, I want to thank you. I found your work to be very impressive, but as a lawyer, I do not wish to risk judging a judge.

Some hon. members: Oh, oh!

Mr. Serge Ménard: All right, I see that the interpretation service is working properly now.

In recommendation 20, you recommended that the government add a provision according to which the protection of the public would become a primary goal. However, the amendment that the government has proposed is intended to withdraw the first paragraph in order to replace it with this clause.

If I understand correctly, you wanted to add this clause, and not to take something away in order to replace it with something else.

[*English*]

Mr. Merlin Nunn: I was saying that should be added to the existing section 3.

[*Translation*]

Mr. Serge Ménard: In fact, in the following subparagraphs, there are references to rehabilitation programs. They are promoted, whereas currently, they are part of the primary goals.

[*English*]

Mr. Merlin Nunn: The words that I suggested be put in were in the original act before they passed it, and they were taken out: "protection of the public". We thought they should be there as one of the reasons to supplement the judge's concerns when he's dealing with someone—

[*Translation*]

Mr. Serge Ménard: We all agree. As I have very little time, I would like to ask you my second question.

When you carried out your inquiry, did you consult the report by Mr. Justice Jasmin, the Associate Chief Justice of Quebec, on the system for dealing with young offenders?

● (1210)

[*English*]

Mr. Merlin Nunn: I did not, and nobody suggested that I do.

[*Translation*]

Mr. Serge Ménard: Were you aware at that time that Quebec had changed its way of dealing with young offenders, at the beginning of the 1980s, and that since 1985, the youth crime rate in Quebec has regularly been less than the Canadian rate, and that in some years, it was even less than half of the Canadian rate?

[*English*]

Mr. Merlin Nunn: I was aware that there was a difference in Quebec, but that was about all. Nobody brought it up before me and I didn't ask for it.

[*Translation*]

Mr. Serge Ménard: Let us go back to the brief that I so admired. What I see essentially is that the federal legislation is fine to a certain degree, but that the most important thing in fighting youth crime is the way in which the provinces apply it.

[*English*]

Mr. Ronald MacDonald: Our concern with the pre-trial detention provision is that it takes us so far, but then it stops with respect to certain offences and doesn't allow the provinces to deal at all with certain offences in terms of pre-trial detention. That's our grave concern, because those are the very types of offences youth tend to commit. You heard evidence that if youth begin early and keep going, the more they commit, the more likely they are to continue to commit.

[*Translation*]

Mr. Serge Ménard: I will now come back to Mr. Justice Nunn. If I understand correctly, the resources that a province invests will probably be what contributes the most to decreasing the youth crime rate.

[*English*]

Mr. Merlin Nunn: I agree. One of the witnesses I had was the deputy of social services, I think. With social services at the time, the heaviest thrust was for child abuse, but there wasn't a way to help mothers or single parents who were having trouble with their children.

I asked him how much his budget was for the year. I think he told me it was $965 million. My eyes got huge, and I said if you've got that, why can't you put some money where it's needed? He said “If we had more money, sir, I could do that”. I gave him a rough time as a witness.

But it is about money. There have to be the systems to accommodate it.

The Chair: Thank you.

Monsieur Ménard, you had a total of nine minutes, so I think you've been treated fairly.

Mr. Comartin, seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I don't get nine, too?

An hon. member: No.

Mr. Joe Comartin: I always ask the best questions. That's why you're not willing to let me have more than my seven minutes.

Thank you, gentlemen, for being here, in particular the respective provincial representatives.

I echo Mr. Ménard's comments. The brief is exceptional. I give Mr. Murphy, who has just come in, some credit for having caught one of the points you raised, but I don't think we had seen the other two points you raised. We certainly appreciate it.

I want to pick up from Mr. Ménard, though, and ask you the same point about the provisions around protection of the public.

Mr. MacDonald, you indicated you've had drafting experience. The way it's worded is that they haven't just moved protection of the public in as one of the considerations, it is the primary consideration. It screens all of the other considerations. That's the way I read the new section. Is that not accurate?

Mr. Ronald MacDonald: I would agree. If I were a counsel in court, I would suggest that under paragraph 3(1)(a) the court is to assess (i) through (iii) in terms of overall protection of the public. I would also suggest, though, that protection of the public includes long-term protection of the public but short-term protection of the public as well. Certainly, as a crown, we would hate to see the courts move away from the idea of rehabilitation and reintegration. Those are very important principles with youths.

● (1215)

Mr. Joe Comartin: Wouldn't it have been better drafting, though, to simply put protection of the public on the list—I don't know how many subsections there are—with the others? Going back to Mr. Hawkes' point about how difficult the existing law is—and I agree with you—wouldn't that have been a better drafting methodology?

Mr. Ronald MacDonald: It certainly would have been another methodology.

Justice Nunn's report specifically says it should be a primary goal of the act.

Mr. Joe Comartin: He said, and I will quote here—

Mr. Ronald MacDonald: Sorry, it's one of the primary goals of the act. You're right. That could have been reflected. There are certainly a variety of ways to do it.

Mr. Greening may have a point.

Mr. David Greening: I just want to add that I think it's important to recognize—and this picks up on the comments by the member earlier—the need to achieve balance.

One of the reasons Manitoba would support the way it's drafted now, and also the inclusion of deterrence and denunciation, is because we had a fairly notorious case called "the eight ball case". A youth had a billiard ball in a sock, hit an Iraqi immigrant in the back of the head, caused serious injuries, and he was killed.

The person who wielded the eight ball received one day in custody for what was in essence a murder. The rationale was because the Youth Criminal Justice Act didn't specify that deterrence and denunciation was an aspect of sentencing that could be considered, and that was confirmed by the Manitoba Court of Appeal.

I think in the interest of achieving a balance, where you have somebody who commits a very serious offence or an out-of-control youth, you need to have the full range, the full spectrum, the full continuum of options available to the court.

In Manitoba's view, I think this doesn't detract from rehabilitation for the vast majority of young offenders, but for the ones who are serious repeat and out-of-control offenders it's necessary to have the full range available. This type of wording achieves the balance.

Mr. Joe Comartin: I think my response to that is that it's also a good example of poor judicial decision-making, but let me go on.

Mr. MacDonald, the concern that you raised around the youth out of control and how... That's what this is all about. I think both from the government side and our side we recognize that 5%, if Mr. Hawkes is right on the percentage, and it's probably pretty close, 5% or 7%... The difficulty I have is I started practising when the Juvenile Delinquents Act was still in effect, and then the Young Offenders Act came in—

Hon. Dominic LeBlanc: That was the 1800s, wasn't it?

Mr. Joe Comartin: Actually, the Juvenile Delinquents Act did go back to the 1800s, Mr. LeBlanc, but I wasn't practising at that time.

The concern that I got from what you said is that you would be using a similar standard, and the "out of control" that was used under the Juvenile Delinquents Act was primarily used against girls who simply wouldn't go home at night and listen to their parents in the vast majority of cases at that point. I don't know.

I guess what I'm really suggesting is that I don't want to go back to that kind of wording. Do you have some kind of wording as opposed to what's in the proposed legislation now, which is obviously inadequate? Do you have any actual wording? You didn't have it in your brief.

Mr. Ronald MacDonald: No, we haven't drafted anything along those lines.

I would like to think that the fact that the act still includes principles that talk about rehabilitation and reintegration and that section 39 still includes clauses that say custody is still essentially the last resort will continue to push forward the general principles that are concerned mostly with those aspects of rehabilitation and reintegration.

I appreciate that you're talking about the 5%, so no, we don't have specific legislative drafting. This is one of the things that perhaps if there were consultation on legislative drafting, it would give the mechanics—in other words, the provinces who work with the automobile—the opportunity to have input. That is one of the concerns we have; it's talked about in the paper, the lack of legislative consultation.

Mr. Joe Comartin: I saw that. If I understand what happened, there were ministerial meetings in 2008, but flowing from that, which this bill did subsequently, there was no discussion at that mechanic's level?

● (1220)

Mr. Ronald MacDonald: That's absolutely correct.

Mr. Joe Comartin: Can I conclude from that as well that you did not see this bill or any part of it before it came forward?

Mr. Ronald MacDonald: None. There was nothing. We saw it when the public saw it, on March 16.

Mr. Joe Comartin: Those are all the questions, Mr. Chair.

Thank you.

The Chair: Thank you, Mr. Comartin.

We'll move on to Mr. Rathgeber for seven minutes.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair.

Thank you to all of the witnesses for your attendance here today. I enjoyed them all, and I concur with my friends from the other side that the written report provided by the respective attorneys general was very helpful.

I must also say, Mr. Justice Nunn, that I read your report, and I agree with Mr. LeBlanc that, certainly from a philosophical perspective, it sets out what I think the benchmark should be for dealing with young persons who run afoul the law.

I would like to start with you, Mr. Justice Nunn, concerning one of your recommendations, recommendation 20. This is following up on Mr. Ménard's questioning with respect to your recommendation that the protection of the public become one of the primary goals of the act. Given that the current act does mention long-term protection of the public, I guess I have two questions. Why did you believe that protection of the public, being one of the primary goals of the act, needed to be reformed as a basis of one of your recommendations? Specifically, I'm assuming that by protection you meant short-term protection and therefore pre-trial detention.

Mr. Merlin Nunn: That's what I meant in the short term, yes. The difficulty of the long-term protection of the public was that it was basically interpreted as being through rehabilitation. There was no short-term stuff to deal with people who needed to be dealt with to protect the public.

If my fellow AB had been taken by the time he got to his tenth, twelfth, or thirteenth charge, if they had taken him and put him in jail, Theresa McEvoy might be alive today, because the person would have been dealt with, and the rehabilitation efforts would have been put into place. I think long-term rehabilitation was not considered to be adequate.

Mr. Brent Rathgeber: Thank you.

Mr. MacDonald, I found your testimony very instructive with respect to the list of offences that would not qualify, or at least where there would be a presumption against custody. You named a number of them: theft under $5,000, fraud under $5,000, and escape from lawful custody, all offences, I think you said, that young offenders are statistically very likely to commit.

So as I read the current legislation and the proposed amendments in Bill C-4, I stumble on the definition of "serious offence", which is what I think we're debating. If you were advising the federal Attorney General rather than the Attorney General of Nova Scotia, how would you define "serious offence" to include many if not most of the offences that are currently omitted but you think ought to be included?

Mr. Ronald MacDonald: Just to be clear, regarding the offences I listed, there isn't just a presumption against detention, but they are excluded completely.

There are two ways you could do it. You could open the availability of pre-trial detention to every offence, because the test, as it's set out for pre-trial detention, is quite strict. However, if as a policy you wanted to distinguish the serious offences from the less serious ones, you could do that by perhaps having a presumption against detention, which there currently is, but at least give the crown the ability. If that were the case, I would suggest that the current way the presumption is drafted be revisited somewhat, because that presumption has been interpreted by the courts as very, very strict, and some courts have even said it's not rebuttable—although that varies.

So I would suggest that for the less serious offences, you still allow for pre-trial detention, but perhaps you might have a presumption. And then for the others, you have the regular test. That would be a way to do it.

I think, overall, we would like to see the court have the discretion and the tool to deal with any offence based on its facts in terms of pre-trial detention, and not have a presumption at all.

● (1225)

Mr. Brent Rathgeber: Thank you.

Mr. Greening, I know Winnipeg has had an epidemic of issues with respect to car theft. I think you mentioned that. And Mr. Justice Nunn, your report was predicated on a serial car-stealing individual.

What about the issue of volume? Is there some room for that within the definition of repeat offences? Can that form part of the test for pre-trial detention, as opposed to how this legislation defines serious and less serious offences? What about a volume or serial-based test?

Do you have any comments on that, Mr. Greening, from your experience in Manitoba?

Mr. David Greening: I guess the difficulty is with respect to dealing with the youth motor vehicle thieves. We've had some success with our Winnipeg auto theft suppression strategy, and I indicated in my comments that we have had a 75% reduction in auto theft. So we achieved some progress on that. But to answer your question directly, in terms of getting into whether it should be a number of repeat offences that qualify, there are issues that come into play, including issues of proof. The difficulty from Manitoba's perspective and the reason we've advanced a very straightforward argument that there should be no presumptions in terms of both pre-trial detention and custodial sentencing is that where we've got into trouble with the YCJA is in trying to figure out special rules and criteria that prosecutors have to jump through, as it were, in order to get custody in a particular situation. I think it's very difficult to structure it, because there is always going to be the case that doesn't quite fit, and then you have an issue of public confidence in the justice system.

From our perspective in Manitoba, our view since 2006 has been that we shouldn't tinker with the wording of a presumption or some type of requirement. I think we should recognize that we should never say never to a custodial sentence for the out-of-control youth in an extreme case, and that either the definition of a serious offence should be very broad or, as Manitoba has recommended, there shouldn't be a presumption at all.

Mr. Brent Rathgeber: Thank you.

Mr. Hawkes, I'm assuming you live in Edmonton, as I do.

Mr. Joshua Hawkes: Actually, it's Calgary. Sorry.

Mr. Brent Rathgeber: In Edmonton, the last time we had a break week around the long weekend in May, there were three murders, and all three were alleged to have been committed by youth. I don't know if you're familiar with any of those. I'm sure you've heard of them in the newspaper or otherwise.

Does Alberta support denunciation and deterrence as appropriate sentencing principles when it comes to youth?

Mr. Joshua Hawkes: Yes, we do. There have been a number of comments in the testimony and from the committee on the addition of those factors. We see them as additions to a very long list of sentencing factors. It's not as though they displace what is already there. It's as though you're conducting an orchestra: we've added two new instruments to the orchestra, but we haven't changed the band.

So that gives the judge, in the appropriate circumstance, the ability to resort to those instruments if needed, but it doesn't change the whole nature of the act. It gives us that additional tool to deal with those circumstances where we have to get at that issue.

The Chair: Thank you.

Mr. Brent Rathgeber: I thank you all for your excellent testimony this morning.

The Chair: We'll move on to Mr. Bagnell for five minutes.

Hon. Larry Bagnell (Yukon, Lib.): It's great to see you, Mr. Justice Nunn. I think our party really appreciates all your recommendations and would like to implement most if not all of them. Custodial, pre-trial, etc., for dangerous offenders, we agree with all of you on that.

I was on the justice committee last year, and we saw a disturbing trend. Witness after witness suggested there was a lack of consultation, suggesting a serious problem in policy development. I wasn't surprised when you said in your brief, "It should also be noted that there was no consultation with the provinces"—and I hope you meant provinces and territories—"on any of these specific issues prior to the introduction of the Bill. ...there have been no consultations with provincial officials and prosecutors regarding the proposals advanced in this Bill. We suggest this type of consultation is particularly useful given the fact that provinces have both the practical expertise in this area, and bear the operational and other costs associated with the implementation of this legislation."

I'm assuming if they didn't consult you, their closest partners, they probably didn't consult any other experts in the justice system in your province, or people who would have...

Mr. Joshua Hawkes: I know there were the round tables in 2008, but my understanding was that those were pitched at a very high level in terms of conceptual... Certainly there haven't been any discussions with anybody at my level or anybody who deals operationally with the act from the prosecution side. That gives rise to the kinds of difficulties we've highlighted in the paper, when you get things drafted that will have the opposite of the intended effect.

● (1230)

Hon. Larry Bagnell: On pre-trial detention, of course we agree we have to fix that up for the serious people, no problem. I think one of the things inhibiting that, though, and also related to the two for one, the reason that we had two for one and three for one was the lack of ability for rehabilitation, anger management, addiction, education, and everything in that pre-trial period, when, as Mr. MacDonald said, rehabilitation is very important. That's almost a negative factor. If that could be improved, maybe there'd be more support for pre-trial.

Mr. Joshua Hawkes: I wonder if I could respond very briefly before my colleague.

We saw that in the testimony of some of the witnesses. In fact, at least in Alberta, there is the same accessibility to treatment for someone in remand as a youth as there is for someone serving a youth sentence, so there is no difference in terms of what treatment and programming are available.

Mr. Ronald MacDonald: That's the same in Nova Scotia. The treatment program, which is excellent for youth in Nova Scotia, is the same at the youth detention facility, whether you're on detention or not. Granted, if you're only there for a few weeks it doesn't get as much of a chance to get going, but programming is available.

Hon. Larry Bagnell: Are we surprised with the emphasis on deterrence? All the experts before committee have said that no youth is going to read these changes in the act, and they're not going to know the difference, so it's really not going to have a deterrence effect. The deterrence effect is from people's belief that they'll be caught. So it's not really a huge issue. I'm glad Mr. Hawkes said it was just adding one to the menu, so that's fine.

Mr. Merlin Nunn: I'm not so sure it's a good idea. This is where I depart from my friend. I never thought it was a great thing, other than to try to put some pressure on the judge, even on the adult side.

If you rob a bank and you get convicted and you're sent to prison for eight years or whatever the term might be, and I think I might rob a bank too, I'm not being deterred by the fact that you're there. I can say to myself, I'm smarter, I'm not going to get caught.

So I don't think that deterrence, in a general public sense, is very much. Personally, for the offender, deterrence might have some effect, but the very fact that he's being dealt with is enough deterrence. I don't think you need it.

Hon. Larry Bagnell: That was my point.

My last point is on the conditional sentences and the fact that there is more ability here. I applaud the minister for this, because of the vastly improved recidivism reduction and rehabilitation, which Mr. MacDonald said was an objective. Conditional sentences, leaving that option open to the judges, where in those particular cases society is still protected, would actually make society safer.

Mr. Joshua Hawkes: The difficulty is that we're not simply leaving it open. We're dramatically opening the gateway to that. We're opening it to a whole new range of offences where it's not currently available. The comparison between the youth and the adult sentences is difficult, because the duration of a youth deferred custody sentence is so short that really you can't get much meaningful treatment or rehabilitation in during that six-month window. It's really a short, sharp shock. That's what it's designed for. It's not really designed for the kinds of offences it could now be applied to.

The Chair: Thank you.

We'll move on to Mr. Woodworth for five minutes.

Mr. Stephen Woodworth: Thank you very much, Mr. Chair.

I want to commend all the witnesses for being here today. It's really very refreshing to hear from people who have front-line experience and legal reasoning. I can't tell you how frustrating it is to listen to witness after witness come and make suggestions about what's in the bill, which are totally without foundation. I've appreciated what you have all had to say. You've made a good case for the fact that the pre-trial detention provisions of Bill C-4 don't go as far as you would like, and the adult sentencing provisions actually make it more difficult to give a young offender an adult sentence. In fact, the deferred sentencing provisions make it easier to give young offenders a deferred or conditional sentence. So thank you for all of that.

I'd like to ask Mr. Hawkes a question. If I'm not mistaken, he has a copy of the existing act in front of him. No?

● (1235)

Mr. Joshua Hawkes: I have bits and pieces of the existing act.

Mr. Stephen Woodworth: Actually, I'll ask Mr. MacDonald, since he's got it in his hands. Am I right that paragraph 3.(1)(a) of the existing act has in fact reference to protection of the public?

Mr. Ronald MacDonald: As a long-term goal, that's correct.

Mr. Stephen Woodworth: Right.

And am I right that in this existing act, that reference to protection of the public is a controlling factor or an interpretive factor over items (i), (ii), and (iii) in paragraph 3.(1)(a)?

Mr. Ronald MacDonald: Yes, items (i), (ii), and (iii) are supposed to be interpreted with the idea of long-term protection of the public in mind.

Mr. Stephen Woodworth: Would I be correct to say that the only thing that Bill C-4 does in that respect is to refer to just simply protection of the public, rather than long-term protection, and maybe move that up a couple of lines in the paragraph?

Mr. Ronald MacDonald: It would appear to suggest, with the current bill, that the three items must be interpreted in terms of protection of the public—short-term, long-term, medium, all sorts of goals.

Mr. Stephen Woodworth: Just to be clear, though, the previous act also indicated that those three items were to be interpreted with a view to promoting the protection of the public, only it was long-term. Correct?

Mr. Ronald MacDonald: Yes.

Mr. Stephen Woodworth: Thank you.

I tried to make that point around this table, and it's good to have some legal confirmation. Further to that, am I correct that even in the Bill C-4 formulation, that issue of protection of the public is not going to supersede the nine factors referred to in paragraphs (b), (c), and (d) of subclause 3.(1)?

Mr. Ronald MacDonald: No, they remain.

Mr. Stephen Woodworth: That's right. And protection of the public has no paramountcy over them, does it?

Mr. Ronald MacDonald: No.

Mr. Stephen Woodworth: Thank you.

I'd like to ask you a little bit about the issue of adult sentencing. As I understand it, the decision of the Supreme Court of Canada in R. v. D.B. indicated that the reverse onus presumption for adult custody was in fact unconstitutional. Correct?

Mr. Joshua Hawkes: That is correct.

Mr. Stephen Woodworth: At this point I just need the yes or no on that.

Mr. Joshua Hawkes: Yes.

Mr. Stephen Woodworth: I'm going to pursue it with you, because my time is so short.

Am I correct that in fact the Supreme Court of Canada held that this reverse onus was unconstitutional because it violated the fundamental principle of justice that aggravating factors on sentencing should be proved beyond a reasonable doubt?

Mr. Joshua Hawkes: Aggravating facts relating to the offence or the offender...yes.

Mr. Stephen Woodworth: Okay.

I'd like you to be as clear as you can when you explain how it is that you don't agree with making the overall test provable beyond a reasonable doubt when the Supreme Court of Canada is saying that aggravating facts need to be proved beyond a reasonable doubt.

Mr. Joshua Hawkes: Certainly.

First of all, it's not just me who says that, it's the Ontario Court of Appeal, the Alberta Court of Appeal, and the Quebec Court of Appeal.

Mr. Stephen Woodworth: If I could just challenge you on that, were those decisions not prior to D.B.?

Mr. Joshua Hawkes: Well, the decision of the Ontario Court of Appeal was.

The decision of the Quebec Court of Appeal straddled D.B. So the Court of Appeal in Quebec decided prior to D.B. There was, however, a leave application to the Supreme Court of Canada after D.B., and the Supreme Court refused leave. So if the Supreme Court had thought that the Quebec Court of Appeal got it wrong with respect to the test, that was the perfect opportunity to tell them so, and they didn't.

Mr. Stephen Woodworth: That's helpful.

Mr. Joshua Hawkes: And the Alberta Court of Appeal was after.

Mr. Stephen Woodworth: Excellent. I appreciate that.

The Chair: Thank you.

Mr. Stephen Woodworth: Am I out of time?

The Chair: Yes, you are.

I'm going to go to Monsieur Lemay. I skipped him, and either he's exceedingly generous or he just missed it.

Monsieur Lemay, you have five minutes.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I understood that this is our last day, Mr. Chair, and that you wanted to make my colleagues happy. Mr. Woodworth asked good questions. Having said that, I knew that I would get my turn.

Gentlemen, Mr. Justice, I congratulate you. Thank you for the report. It is going to be very useful to us. Gentlemen, you may tell your respective employers that not only was your presence useful, it was in fact necessary to our understanding of Bill C-4.

I am going to ask you a question while attempting to be very precise. I also worked on the front lines for many years. I am going to give you a practical example and...

● (1240)

[*English*]

The Chair: One moment.

[*Translation*]

Mr. Marc Lemay: Really! Put my time back to zero.

[*English*]

The Chair: Just hear me out for a second.

The translation had you saying it was “useless”. In fact what you wanted to say was “useful”, correct?

[*Translation*]

Mr. Marc Lemay: That explains it. No wonder you were not happy with me.

Mr. Ronald MacDonald: I understand.

[*English*]

The Chair: Okay.

Monsieur Lemay, continue.

[*Translation*]

Mr. Marc Lemay: That is how wars have started: because people did not understand each other. So we will go slowly and try to understand each other.

I have a practical case for you, Mr. Hawkes or Mr. MacDonald. I truly want to understand. I read your brief very carefully. You emphasized clause 4 of the bill. As a result, I am providing you with a practical example. Suppose a youth commits a robbery, an armed robbery. That constitutes a serious offence. He is released with certain conditions. This youth continues to commit thefts. His friends go along with him, he commits petty thefts and takes joy rides, etc. Did you actually tell us that, in such a case, this youth could not be kept in custody?

I would like to discuss section 524, I believe. In fact, I am referring to the section of the Criminal Code that states that the release of a person can be reviewed. I am wondering. Under this section, a youth could continue to commit offences for as long as his trial has not yet been held, because he has been released. Moreover, he could not be incarcerated or have his release revoked while waiting for his trial even if he commits a series of thefts. Is that what I heard you say?

[*English*]

Mr. Joshua Hawkes: It's a little bit more complicated than that. This is at page 4 of the paper, the second paragraph from the bottom on page 4. Essentially, the situation is this: if you're released on a very serious charge that you would be eligible for detention on but you're not detained, and then you commit another whole series of offences that fall below the threshold, so you can't be detained for those offences, the crown can bring you back and have the bail reviewed under section 524 to try to have your original release cancelled or revoked. But we cannot detain you on all of the new charges, no matter how many new charges there are, if they fall below the threshold of “serious offence” as it's defined in the bill.

[*Translation*]

Mr. Marc Lemay: All of that under what is provided here, under the proposed amendment to the bill?

[*English*]

Mr. Joshua Hawkes: Yes.

[*Translation*]

Mr. Marc Lemay: You can count on us. We are going to scrutinize this closely, I promise you. I have always held that rehabilitation, particularly with young offenders, could begin during pre-trial detention. If we cannot manage to get the young offender to stop behaving in this way, we risk facing a real problem at some point in time.

The other subject that interests me is detention. It is referred to in clause 18 of Bill C-4. You had started answering Mr. Woodworth, but personally, I want to understand the Supreme Court decision in R. v. D.B. You say the following about clause 18: “However, clause 18 goes further. It proposes a new test for imposing an adult sentence, and stipulates that the standard of proof in relation to this test is proof beyond a reasonable doubt.”

Are you saying that in order to impose an adult sentence, a standard of proof should not necessarily be beyond a reasonable doubt, but that it could be as it is defined in the current legislation?

● (1245)

[*English*]

Mr. Joshua Hawkes: Two different kinds of considerations would apply when you are having a hearing to determine whether there is an adult sentence. When you are dealing with specific factual allegations—was this planned and deliberate; did you bring a weapon with you; had you been previously warned not to do this?—yes, the crown must prove those beyond a reasonable doubt. But right now, in order to get an adult sentence, you have to look at the other sections of the act, section 38 and section 3, to see if in balancing the principles in those sections you can get a sentence that is of sufficient length to hold the youth accountable. It is the balancing of principles that can't be proven beyond a reasonable doubt. Those aren't the kinds of things you prove or disprove. That's why the language in the current act says “if the court is of the opinion that”. That is the critical language—“of the opinion that”—and that is what distinguishes those principled considerations from factual considerations.

In the brief there is a quote from the Supreme Court of Canada in R. v. M. (S.H.), which draws that distinction. I appreciate that it is under the previous Young Offenders Act, but the distinction remains between fact and principle.

The Chair: Thank you.

We will go to Mr. Murphy, for four minutes.

Mr. Brian Murphy: I want to ask Justice Nunn to follow up on Mr. Woodworth's point. The act itself says, in the declaration of principle, which is to be "liberally construed"—there is no partisanship here, it is right in the act—in subsection 3(1): "The following principles apply in this Act". There are a lot of layers there in the declaration of principle to be liberally construed. Then the following principles apply. The youth criminal justice system is intended to prevent crime, rehabilitate young persons, and make young people appreciate the meaningful consequences of their actions "in order to promote long-term protection of the public". You've studied that. You understand how that might be interpreted by judges.

The proposed legislation says that this is all to be replaced. There is no wording about the act being liberally construed or conservatively construed or whatever, but it starts right off by saying " the youth criminal justice system is intended to protect the public". It is not intended to prevent crime or rehabilitate. It's quite different. Then it talks about "intended to protect the public" by holding persons accountable, promoting rehabilitation, and supporting prevention of crime.

Mr. Woodworth would suggest that other than the omission of the long term, they are exactly the same. I'm sorry, I find them incredibly different. I'm only a lawyer of 25 years. You're a judge of many years and a lawyer of many more years. I don't want to lay the age thing on you, but you're the sage of Cape Breton here. Could you please tell me, in your opinion, whether those are exactly the same, as Mr. Woodworth would have us believe?

Mr. Stephen Woodworth: Mr. Chair, on a point of order—

The Chair: Mr. Woodworth.

Mr. Stephen Woodworth: —I don't believe at any time I used the word "exactly". I just pointed out that they both in fact address the promotion of public protection and that neither one gives it any different degree of priority. I didn't say they were exactly the same. That would be ridiculous.

Mr. Brian Murphy: My position would be that they're remarkably different—

Mr. Stephen Woodworth: The wording is not exactly the same, but the effect is.

The Chair: Hold on.

Mr. Brian Murphy: It's not a point of order, it's a point of reference.

The Chair: Both of you, hold on.

Mr. Woodworth, that's not a point of order.

Continue, Mr. Murphy.

● (1250)

Mr. Stephen Woodworth: Mr. Chair, with respect, I want to continue the point of order to say that when a member poses a question with an inaccurate premise to a witness, it is a matter of process.

The Chair: Mr. Woodworth, the Speaker of the House has many times ruled that matters that are in dispute, facts that are in dispute, debates that are in dispute are not points of order. So I am going to rule accordingly.

Mr. Murphy, please.

Mr. Brian Murphy: I wonder how you feel about seeing an objection dealt with rather than dealing with it yourself, Milord.

The point I am making—and I admit, I'm making a submission, just as Mr. Woodworth made his—is that I find them remarkably different. We had another judge in camera who suggested that perhaps judges would interpret those competing provisions differently. The result would be—in my view, in my submission—different, in that a judge would put, as the words say, the "protection of the public" primordially, and that might lead to more incarceration. I think we all agree that when a person's locked up, they're not out on the street. That's axiomatic. It's not necessarily good for the long-term protection of society, etc., and it doesn't further rehabilitation sometimes.

I'd like to have your view on how those are different—if you think they are vastly different.

Mr. Merlin Nunn: Well, I think they're different. I think what was intended, certainly by my approach, was that by adding the words "protection of the public", it added some ammunition to the judge and the prosecutor who would be dealing with pre-trial sentence.

I mean, you've got to have the authority to get him there. The protection of the public that I intended was just another phrase to be added in to the existing one. It would give scope to short-term protection of the public. I wasn't recommending any changes in the...

The long-term protection of the public is based on rehabilitation—that's the only meaning you can give to it—whereas the protection of the public that I was talking about was short-term.

The Chair: Thank you.

We'll go on to Mr. Norlock, for four minutes.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for appearing. I'll be a little on the quick side in my questions.

I imagine that you gentlemen read the blues testimony of previous witnesses. The testimony from actually a pantheon of witnesses was basically that not only was the intent of this regulation wrong, but the wording was wrong. They said—reluctantly—that there were a few saving graces, but overall we were better not to address the issue.

I don't know what your reading of their testimony was, but I think you, or anyone, would find it difficult to argue that it was decidedly different from what you gentlemen have said today—with the exception that you've said that the wording of the bill does not render the intent the way it should.

Am I correct there? Perhaps Mr. MacDonald could speak to that.

Mr. Ronald MacDonald: I think you're right; our concern is that the wording doesn't capture the intent.

Mr. Rick Norlock: Okay.

I'm going to be very quick, because Mr. Woodworth has a couple more questions.

I'm going to make a request of you. My request is that to assist this committee, would you, either individually or collectively, provide the clerk with your suggested wording or suggested amendments to this? You could give it to the clerk for perhaps our researchers to look at.

That would really assist me and, I think, this committee. You agreed that the policy and the intent that the minister gave was...you agreed with it, but it was the wording. Could you please attempt to give us some direction on perhaps wording or amendments that we could do?

That would go through the clerk, of course. She will ensure that it's in both official languages.

Mr. Joshua Hawkes: Speaking only for myself—with the two heads nodding beside me—none of us are legislative drafters. We're practitioners who do this on the front line. I'd certainly be happy to give you my views on behalf of the department, but I'm not a legislative drafter; I'm a practitioner. With that caveat, I'm happy to give it a shot.

Mr. Rick Norlock: Thank you.

Mr. Ronald MacDonald: We'll give it a whirl.

The Chair: Mr. Greening, do you want to add anything?

Mr. David Greening: My only comment is on timing. There will be a meeting of deputy ministers responsible for justice next week. Some direction may come out of that. Perhaps the timing could be flexible to allow us to give some thought to a possible response.

Mr. Rick Norlock: We won't be meeting until the fall.

The Chair: We're still hearing quite a number of witnesses on the bill, so my guess is we won't be moving to clause-by-clause until some time in October at least.

We'll move on to Mr. Woodworth for one last question. Now you may enter the debate.

● (1255)

Mr. Stephen Woodworth: Thank you. I only meant to ensure that the witnesses were not mistreated by being asked unfair questions. I think I've made that point.

To Mr. Hawkes, I have possession of a letter dated May 12, 2010, from the Attorneys General of Manitoba, Saskatchewan, Alberta, and British Columbia, setting out their position on this act. Are you familiar with that letter?

Mr. Joshua Hawkes: I am.

Mr. Stephen Woodworth: I understand that the attorneys general for those provinces, as the democratically elected representatives, on behalf of the people of those provinces, fully support the notion of moving public safety to the forefront of the act's principles, if we did that. Is that correct?

You have to say yes or no, I guess.

Mr. Joshua Hawkes: Yes.

Mr. Stephen Woodworth: I understand that those attorneys general, on behalf of the peoples of those four provinces, also fully support expanding the definition of "violent offence" to include offences endangering the lives or safety of others. Is that correct?

Mr. Joshua Hawkes: That is correct.

Mr. Stephen Woodworth: I understand that those four attorneys general, on behalf of the peoples of those four provinces, also support adding specific deterrence and denunciation as sentencing objectives. Is that correct?

Mr. Joshua Hawkes: That is correct.

Mr. Stephen Woodworth: Those four attorneys general also support simplifying the bail process by separating it from considerations based on whether a custody or adult sentence might result from conviction. Is that correct?

Mr. Joshua Hawkes: That is correct.

Mr. Stephen Woodworth: But I do understand from your submission that you think Bill C-4 does not go far enough in giving judges the option to keep people in pre-trial custody. Is that correct?

Mr. Joshua Hawkes: That's one of the main concerns, yes.

Mr. Stephen Woodworth: Your province also does not believe that Bill C-4 goes far enough in allowing judges to employ adult sentences where no other sentence is appropriate. Is that correct?

Mr. Joshua Hawkes: It's not a question of it not going far enough, sir. It's a question of it going backwards in a dramatic way and reversing well-established legal principles.

Mr. Stephen Woodworth: All right. I think those are my questions.

The Chair: Thank you very much.

Before you go, I have one quick question. Three of you have raised the issue of denunciation and deterrence. You support including those principles in the bill, correct? I don't know if Justice Nunn opined on that. I don't recall that he did.

Hon. Larry Bagnell: He did.

The Chair: Okay.

But on denunciation, and specifically deterrence, many of the witnesses who represent social service organizations that focus on rehabilitation have asked us not to include deterrence. They suggest that deterrence doesn't work, or certainly doesn't work as well with youth as it does with adults.

I note that the bill itself refers to specific deterrence, not general deterrence. It's focused on one specific offender, and it's just another tool in the arsenal of tools that would be available to a judge.

Do you agree with my characterization?

Mr. Joshua Hawkes: It's critical to differentiate between general and specific deterrence. The vast majority of social science literature that challenges deterrence challenges the notion of general deterrence. I can deter you by punishing Mr. MacDonald more severely, but the question of whether I can deter your behaviour or Mr. MacDonald's by dealing with him directly is a different question. There is some evidence that it does have an impact.

The Chair: Thank you.

I'm going to thank all four of you for your input today. Your evidence is certainly going to be helpful as we move forward in debating this bill and eventually move to clause-by-clause.

Thanks to all of you.

We're adjourned.

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