House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 038 • 3rd SESSION • 40th PARLIAMENT

EVIDENCE

Thursday, November 25, 2010

Chair

Mr. Ed Fast

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call the meeting to order. This is meeting number 38 of the Standing Committee on Justice and Human Rights. Today is Thursday, November 25, 2010.

We are welcoming a new temporary member to our committee, Meili Faille.

Welcome.

You have before you the agenda for today. We're beginning our review of Bill C-21, An Act to amend the Criminal Code (sentencing for fraud).

Just so you know, during the second hour of our meeting, or at the end of dealing with our witnesses, we will proceed to clause-by-clause consideration of the bill, as agreed at our last meeting. I trust that you've been able to submit all of your amendments to the clerk. Right now, we have five amendments that we will be dealing with.

To go back to Bill C-21, we have with us two witnesses: Joseph Groia, a lawyer, and Lincoln Caylor, who is with Bennett Jones.

Just as a reminder to those of you are here in the room and have BlackBerrys or other kinds of devices, please turn them to vibrate or turn them off.

Mr. Caylor, would you like to start? You have 10 minutes.

Mr. Lincoln Caylor (Lawyer, Bennett Jones, As an Individual): Thank you very much.

Thank you for inviting me here today.

I'm a commercial litigation lawyer, so I'm a civil lawyer, not a criminal defence lawyer. I practise, as the chair said, at Bennett Jones, a firm in Toronto. The focus of my practice is commercial fraud litigation, so I act for victims of fraud—typically, corporate victims of fraud. In the last number of years, in addition to that I have acted in a number of cases in what I classify as consumer fraud, investment-type fraud, and telemarketing-type fraud.

So while most of my practice is for corporations, I've also had quite a bit of experience with individuals who have been defrauded in what I call a consumer or investment type of fraud. In those cases, the key is to attempt to get the money back for the victims, so I can speak a bit about that. In my experience with respect to these consumer frauds and the corporate frauds, I've also dealt with law enforcement and the crowns for a number of years and with how they deal with these types of consumer frauds.

With respect to the bill you're considering, I agree that Canada needs to change its focus in how it deals with white-collar crime. The bill is a step in the right direction. However, it is not something that will completely deal with white-collar crime or comprehensively deal with it, in my view. My concern is that, on its own, it deals with only one small aspect of white-collar crime—the sentencing part.

My concern is that once we get to sentencing currently in Canada, while there has been and is a perception that sentences are light, with the well-prosecuted, well-investigated cases, the sentences have been certainly more than two years. You'll see a number of examples in the materials that have been circulated. My concern goes to the first two steps before you get to sentencing, which are law enforcement's investigation of white-collar crime in Canada, and then, once a crime is investigated and gets to the crown's office, the crown's ability to prosecute that type of case.

Those are my general concerns. With respect to specifics, I would raise two concerns. One has to do with the $1-million threshold. This means that when you get to the crown part of the criminal process, you're asking the crown's office to deal with quantifying a fraud, which crowns are typically not well equipped to do.

If you're going to add a layer of complexity at the crown's office, you need to back that up with more resources. The concern with respect to adding the $1-million threshold they have to establish is that if you're making the prosecution of white-collar crime more complex, fewer cases will get prosecuted, which would be the opposite of what I understand the intent of the bill to be. If you're prosecuting them, they will take longer to prosecute, and the delay inherent in the more complex frauds may result in more cases being withdrawn because of the constitutional infringement of the right to a speedy trial.

The second concern I'll address is with respect to the mandatory consideration of restitution. In reading the Hansard notes and the presentations made to you by victims of fraud, the concern I have is that people will assume that the criminal sentencing process will get them their money back. It does not, and it will not under this bill.

The draft bill you're considering provides a form for victims to fill out, and then says that the sentencing judge "shall consider" restitution. The problem there is that it does not change the law with respect to when a sentencing judge can grant restitution. I'm not suggesting that it should be changed, but the problem is that the criminal process and the criminal courts are not an adequate way for victims to get restitution or to get their money back. So to the extent that the bill raises expectations in that area, I think that is a concern.

Those are my general themes. I am prepared to talk about any of the other areas that you'd like to question me about, but that is the extent of my presentation.

Thank you, Mr. Chairman.

The Chair: Thank you.

We'll move to Mr. Groia for 10 minutes.

Mr. Joseph Groia (Lawyer, Groia & Company, As an Individual): Thank you.

These are interesting, challenging, and even dangerous times, I would say, in the Canadian capital markets. Never in my 30 years of being involved in the enforcement business of securities offences have I seen as much uncertainty as we're facing today.

I'd like to address just two aspects of Bill C-21. The first is the mandatory sentencing provisions for fraud. The second is restitution provisions.

About the mandatory sentencing provisions, I have three observations. First, they are not necessary. Second, they won't do what you hope they will do. Third, they are counterproductive. I say that having a background as a former head of enforcement at the Ontario Securities Commission and also now as a lawyer who represents both victims of fraud and those sometimes accused of fraud.

Second, I'd like to say a word about the restitution provisions. I believe they are a step in the right direction, but, like Mr. Caylor, I don't think they go far enough, and I would ask this committee to consider perhaps going further than is currently proposed in this bill.

Mandatory sentencing provisions for fraud are not necessary, because the cases you have heard about have all resulted in jail sentences far in excess of a two-year minimum. Mr. Jones was convicted in February of 2010 and received a sentence of 11 years. Vincent Lacroix of Norbourg was convicted in 2009 and received, effectively, a sentence of 18 years. In perhaps one of the most well-known and publicized prosecutions in the last decade, Mr. Drabinsky and Mr. Gottlieb, of Cineplex, received sentences of seven years and six years.

I can tell you that my experience is that judges and prosecutors take white-collar fraud very seriously. Although we call this the Standing up for Victims of White Collar Crime Act, I can tell you that every day in my practice prosecutors are doing exactly that, the best they can and with the resources they have.

Second, a mandatory jail sentence will not solve the problem. If we want to improve the protection of investors in Canada, we need to look at provisions and approaches to this problem that are much more comprehensive than those found in Bill C-21.

I'm encouraged by the efforts of Parliament to move forward with a national securities commission, not because I care about the filing of prospectuses or the raising of capital, but because I think we're long overdue for the introduction of a national enforcement agency that is concerned with the successful detection and prosecution of white-collar crime across the country. I hope that a national securities commission will do what IMET has been unable to do, which is to bring to bear specialized resources that will protect Canadian investors.

Thirdly, mandatory minimum sentences are counterproductive. Chief Justice McRuer said 58 years ago that a mandatory sentence "tends to corrupt the administration of justice by creating a will to circumvent it". The danger you will need to consider as a committee is that the application of mandatory sentences will do exactly the opposite of what you hope to accomplish.

In the United States of America, which is perhaps the genesis of mandatory sentences and approaches to sentencing guidelines, they are moving away, under the Obama administration, from mandatory sentences and moving towards a Canadian style of system, where we attempt to have justice fit the crime, the victim, and the criminal. I would say that a mandatory approach to this problem is not the solution, and indeed, I worry that if you go forward on that basis, you will make it worse rather than better.

● (1540)

Secondly, the restitutionary powers that are being proposed in many respects are simply an adjunct to what is already required under the Criminal Code. When we look at restitution, there is no more important aspect, as Lincoln said, than ensuring that victims of crime are compensated as a result of their losses. We are talking about the hard-earned savings of families and of Canadians who can't afford to have their college fund or retirement fund stolen by white-collar criminals.

The difficulty, of course, is that by the time law enforcement gets there, we often see that the money is long gone. It resides in secrecy havens or resides elsewhere where it will never be found. When we talk about restitution, what we need to be talking about is a much broader approach to looking at how we compensate injured investors. Saying to the criminal that as part of her sentence she is going to have to pay the money back sounds good, but is completely ineffective.

What I think we have to look at, if we're interested in approaching this problem on a more sympathetic and a more effective basis, is how we get self-regulatory agencies and securities commissions, and other deep pockets that may have been involved in authorizing, permitting, or acquiescing in the activities of the criminals, to contribute towards a solution. I would encourage you, when you look at this bill, to ask what really we want to accomplish, and whether or not we get there under Bill C-21.

Finally, for those who might say that this is an approach to the problem that is soft on crime, my answer would be no, it's an approach to the problem that is smart about policing crime.

Thank you very much. I'd be happy to entertain questions.

● (1545)

The Chair: Thank you.

We'll start with Mr. Murphy.

You have seven minutes.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Mr. Chair.

Thank you, witnesses.

I'm not going to comment or ask questions on the mandatory minimums. In what feels like a sort of graduate course for me, we've been discussing mandatory minimums over the past five years. If I discuss them once more, my head is going to explode.

I do want to get at the issue of restitution in sections 738, 739, and 740 of the Criminal Code. You have précised very correctly what this act does. I'm not sure that anybody objects to anything in the act. I guess my argument most of the time with the government is, "You're not really getting at what you are telling Canadians you're getting at". I think that's the substance of your testimony.

So I'm going to do something a bit unusual for us in questioning here. I'm going to take extremely little time in putting it to you to expand on your suggested I think improvements to restitution, which in my view is what is really at the nub of this.

Partly what you said is that the provinces have to step up, that the policing agencies, the regulatory agencies, have to step up. I consider it part of the job of the Attorney General for the Government of Canada to work hand in glove with that and encourage it. The other part, however, is that most of what is written in the Criminal Code is about the situation after conviction. There's very little in the way of pre-emptive forfeiture or the seizing of assets; I know as a lawyer that it's not done easily. What you have both said on behalf of victims is that the money is gone by the time you get a conviction.

So what specific improvements can be made to the latter part of the Criminal Code? And what can we do as a justice committee to encourage the government to help the provincial end of this to keep the money, get the money, and redistribute the money?

Mr. Lincoln Caylor: I'm not sure how you'd work it into the Criminal Code, other than with respect to the national regulator that has been proposed. To the extent that it doesn't go ahead, the local securities regulators have the power to seize assets. In civil litigation, victims have the power to seize assets, although they have to use people like Mr. Groia and me to do it, so it can be expensive.

In my view, the criminal process is not going to be a process that can take those steps efficiently. I think it's overburdened and under-resourced right now. If you add on the types of things we're talking about that the regulators can do, which is receiverships and freezing money, I don't think it's going to work through the criminal process.

I think you have to encourage the regulatory bodies that have those powers currently to start using them more aggressively, and especially, if you end up with a national regulator, resource that regulator to take those aggressive pre-emptive steps, as I think you called them, to secure the money in advance. Because as we know, the sentencing comes much later, and by then, as Mr. Groia said, the money is long gone.

My initial view is that I don't think the crown's office and the Criminal Code is the place to do it, but the regulatory bodies are.

Mr. Joseph Groia: There is, however, an interesting debate going on in the United States arising out of the Madoff disaster. What you see in these kinds of cases, particularly in the Ponzi scheme, is that so much of the distribution of the money that has been stolen from investors is done by the criminal himself. Often, at the very end of a Ponzi scheme, when the person realizes they're about to be arrested, they start to make large payments to various friends, relatives, and other people they want the money to go to. We saw that with Mr. Madoff, who, near the end, paid out very large sums of money to some of his favourite clients.

I've advocated for a number of years that what the law should do is to say to the victims of a Ponzi scheme that they are going to share in this loss together. What that would mean is that, if you were lucky enough to be paid back not only your principal but the enormous rate of return you'd been promised three months before the music stopped and there were no more chairs to sit down on, then we're going to allow you to keep your principal, but we're going to make you pay back for a period, I would say, of five years, if it went that long. Everyone who participated in it will get their money back, if they were paid out, but they will have to repay into the fund that would be established by the receiver any profit they made.

In a situation like the Earl Jones case in Montreal, you would significantly increase the amount of money that would be available for distribution to the injured group by requiring that the persons who were paid out shortly before the end of the fiasco were not entitled to essentially keep their gains.

It's interesting that in the United States a number of investors have sued for their profits. Knowing that it was a Ponzi scheme, they've started a class action wanting to be paid their profits even after they knew Mr. Madoff was stealing money from other investors.

● (1550)

Mr. Brian Murphy: Is this Ponzi clawback in place in New York, or all states, or where?

Mr. Joseph Groia: It's being implemented in the United States in connection with Madoff and is being done by the trustee in bankruptcy who's trying to administer the estate. He has commenced a number of lawsuits to try to recover moneys, but there have been voluntary repayments by a number of funds that benefited from Mr. Madoff.

Mr. Brian Murphy: Are you suggesting that it's a particular procedure in a particular incident and is not in any way a law or regulation but ought to be? Is that what you're saying?

Mr. Joseph Groia: I'm not an expert on American bankruptcy law, but my understanding is that, as in Canadian bankruptcy law, a trustee in bankruptcy can go back and essentially set aside transactions for a period of three or five years.

What I'd ask you to consider is whether we could establish, as part of the restitution process, some way by which we could essentially reallocate those losses in a more equitable way, so that some people don't end up getting all their money back with an enormous rate of return and other people get nothing. I don't think that's fair and I don't think it helps our capital markets.

Mr. Brian Murphy: Great.

Those are all the questions I have.

The Chair: Thank you.

We'll move on to Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you.

It is really very gratifying to hear from people who are experts in their field. You are certainly giving us a a lot of insight.

From what you are basically telling us, I think I gather that criminal law has a philosophy, as well as objectives and methods that are totally different from those in civil law. Criminal law is not actually a good system for providing victims of fraud with a fair share of anything that may remain from a fraudster's activities.

Is that an adequate summary of your thoughts?

[*English*]

Mr. Lincoln Caylor: With respect to the distribution of the proceeds of the fraud that you do get and who gets them and how, you are correct that it's my view that the criminal procedure and process are ill-equipped to do it. The process Mr. Groia was talking about is quite often done in a receivership or through a trustee, which is separate from the criminal process. My concern, which I expressed in my opening statement, is that the victims are misunderstanding the bill, such that they think they're going to get their money back through the restitutionary process set out in the bill.

Mr. Groia is correct. You're not really changing the current restitutionary schedule in the Criminal Code. You're beefing it up a bit, but you're not making it run along the lines that were explained, whereby people will have different varying claims to profit, to their principal, and to who gets what ahead of whom in the priority of what is found. So if you find a certain amount of money, who gets to share in it is not dealt with through the criminal process currently, and I don't think it ought to be, because I don't think the criminal process can deal with it.

● (1555)

[*Translation*]

Mr. Serge Ménard: No. I actually practised criminal law myself and, really, in this very complex system, I have a hard time seeing criminal court judges starting to decide who has to get what from anything that remains.

But this bill will apply not only to huge frauds with a lot of victims but also to frauds with only one, two or three victims.

In your practice, I suppose that you have come across similar cases, whether as a crown prosecutor or in one of the other positions you have held, am I right?

[*English*]

Mr. Lincoln Caylor: If I understand the question correctly, sometimes the criminal process does work quite well when there is a small number of victims, and the rest—

[*Translation*]

Mr. Serge Ménard: No. Actually, it was a lead-up question to another one. I just want to make sure that it is correct to say that you have seen similar cases, whether as a crown prosecutor or in another capacity. I will get to the question right away.

When there are victims, judges very often use the time between the end of the trial and the sentencing to see whether the accused is actually doing anything to right the wrong he did to the victims.

[*English*]

Mr. Lincoln Caylor: So you mean the impact with respect to repaying victims and its impact on the criminal sentencing?

[*Translation*]

Mr. Serge Ménard: Yes, definitely. That is usual, isn't it?

[*English*]

Mr. Joseph Groia: Indeed, as a white-collar defence lawyer, you will almost inevitably have a discussion with your client about their ability to repay, their willingness to repay, and the consequences if they choose not to repay.

You're absolutely correct. It is very common for judges, if they have convicted a person, to telegraph, sometimes obliquely and sometimes not obliquely, the importance of that happening. That happens even without the threat of restitution. It happens as one of the factors already included in the code for sentencing.

To put it simply, I say to clients that if they are able to repay all or substantially all of the money they have been found to have stolen, their chances of being sentenced to jail will be substantially reduced as a result of that payment.

[*Translation*]

Mr. Serge Ménard: So you have never actually seen an individual who has been sentenced to prison reimburse the money that was fraudulently obtained, correct?

[*English*]

Mr. Joseph Groia: One of the sad realities of jail is that is difficult to make money there to repay. In that sense, one of the difficulties with jail sentences is that they actually work against the restitutionary interests you have.

[*Translation*]

Mr. Serge Ménard: I do not have much time, and I have even less because of the delays with the interpretation. There's something that we should be compensated for from time to time.

That said, for fraud, as for all the offences in the Criminal Code, there are accessories of different kinds, some of whom play a very minor role. Take, for example, a secretary or a receptionist working in what seems to be a perfectly legal company, like Vincent Lacroix's. At some point, she begins to have doubts about the legality of what Mr. Lacroix is doing, but she stays with the company anyway and therefore becomes complicit because she understands that people are being defrauded.

So we could see people convicted for major frauds though they played a minor role. Clearly, the judge would take that into consideration and might not impose a prison sentence, although there would still be a penalty. Am I correct?

● (1600)

[*English*]

Mr. Joseph Groia: Certainly, under the existing sentencing guidelines and the factors to be considered, that is correct. One of the concerns you've heard expressed by the Canadian Bar Association is that this provision, with the mandatory minimum, would result in that secretary being sent to jail for at least two years.

The Chair: Thank you.

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

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

Thank you, gentlemen, for being here.

I was the one who asked to have you come in. I did so because of the CBC news article a week and a half ago, which was talking about the Ponzi scheme in Toronto. I realize that neither one of you was directly involved in that, but coming out of that story was the message that you've recounted again today about the lack of resources in terms of ability to prosecute.

I'd like to ask both of you if you've had clients in your offices who have been victims of that type of scheme. Have you had cases in which it appeared to you that prosecution should have gone ahead, but did not, simply because the crown and/or the police did not have the necessary resources to prepare the case?

Mr. Lincoln Caylor: I can answer that. Clearly, yes, we have. I have had a number of corporate clients with large-scale losses well in excess of $1 million. We're talking about tens of millions of dollars. Financial institutions have lost large amounts of money. They've hired us to go after the money, put together briefs, and brief the crowns, and the crowns have been unable to prosecute the cases because of the lack of resources and/or lack of priority given to cases of white-collar crime.

It's a bit about how the crown is forced to allocate the resources they have. Are they going to pursue a particular white-collar criminal or are they going to pursue assault or other physical crimes? They typically go for the latter.

Mr. Joe Comartin: Do they say that to you?

Mr. Lincoln Caylor: No. All we hear is that the case is not being prosecuted and that the charges will be withdrawn because too much time has gone by. They don't proceed with the case.

Mr. Joe Comartin: Have any white-collar crime cases actually been thrown out by the courts because of a lack of timely prosecution?

Mr. Lincoln Caylor: I can't think of any. Maybe Mr. Groia can think of some.

Mr. Joseph Groia: No. I think a filtering process goes on and the real roadblock is between the regulatory or investigatory side and the prosecutorial side.

The example that the CBC reported on is a relatively extreme example. As you know, the Attorney General has said that he's looking into it.

I can say from my experience, although I won't reveal my sources, that I've had a number of police agencies, regulatory agencies, and investigators express frustration to me. I can tell you that in my practice, when I'm on the side of the investors, I've been frustrated not in getting the cases investigated, but in getting a prosecutor to take them on.

When they do take them on, my experience generally has been that they see them through. When the 2004 amendments came in and IMET was created, I was personally encouraged by that initiative, because what I've seen since I was at the securities commission 20 years ago is a need for a specialized commercial crime prosecution agency. Somewhere between the national IMET, which is funded by the federal government, and the provincial attorneys general, there is a disconnect. I am seeing a difficulty in getting prosecutors to take cases forward that are brought to them by the Ontario Securities Commission, for example.

Mr. Joe Comartin: Let me pursue that with you. I'm not in favour of the national securities commission, but setting that aside, I also have a very clear understanding of how long it will take, given the opposition from Alberta and Quebec and the likelihood that it will end up before the Supreme Court. We're five or six years down the road, even if the government proceeds with it, and I'm not sure they're going to.

That five- or six-year time period seems to be an inevitable delay, given the constitutional litigation that will come. Is there anything you can recommend that the government do with regard with IMET to in effect make them efficient?

● (1605)

Mr. Joseph Groia: Leaving aside the issues that relate to the administration of criminal justice and the historic separation between the provinces and the federal government, I know of no reason IMET could not have attached to it a prosecution agency dedicated to prosecuting the cases they bring forward, and to do so using experienced securities and commercial prosecutors, people who understand the way the stock market works.

I want to be clear that I'm not denigrating my friends in the Attorney General's office. Until very recently, the prosecutors I dealt with would go from a drunk driving case, to a break and enter, to a securities market manipulation case. That's a terribly ineffective way of dealing with it. As a result of that, our experience in Ontario has been that the securities commission has tended to prosecute those matters under the provincial statute rather than under the criminal statute.

Mr. Joe Comartin: With regard to this legislation—and this question is for either one of you or both of you—do you see anything in it that will facilitate the prosecution of these types of crimes and the Ponzi scheme in particular?

Mr. Joseph Groia: I have to say I see just the opposite. What I see happening is that there are some other smaller aspects to the bill that I'm not going to really comment on, but the experience in the United States shows and all the academic literature says that the effect of mandatory minimum jail sentences is that you significantly increase the number of trials and significantly reduce the number of guilty pleas. That will add strain to the system.

And where we're already hearing that the system is being overloaded, to put into it a requirement such that this secretary mentioned by the vice-chairman would now be looking at a jail sentence is going to result in one of two things. Either she's going to have to defend—at her life savings and peril—or the prosecutor will say, "I'm just not going to go ahead with this case".

Mr. Joe Comartin: What about some of the duties we're imposing on the prosecution here? I'm looking at things like proposed subsection 380.3(2), where the crown is now obligated to explain to the court what they've done in the way of seeking out whether a restitution order should be sought.

So there's an additional investigative role, I guess, for them to play there—for whoever their investigators are, police or otherwise—and there's the role the prosecutors themselves will have to undertake to analyze that evidence. Is that another discouragement?

Mr. Lincoln Caylor: A lot of that already goes on. As Mr. Groia said, when a crown is on the case, they're cooperating and dealing with the victims, so already a lot of that is happening. Some cases do fall through the cracks, if the law enforcement investigator or the crown has not been in touch with all of the victims, say, or with enough of them, but typically this already occurs.

By making it mandatory, in the case where the crown decides to exercise discretion that in this particular case it's not appropriate to go after restitution, you're now taking that discretion away. So in that area, it will burden the system more, because they are then required to take those steps even though, for instance, there's no chance of restitution, there's no money available, or it's unlikely, in their view, that the judge is going to grant restitution as part of the sentence.

The Chair: Thank you.

We'll move to Mr. Dechert, for seven minutes.

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

Gentlemen, thanks for being here and sharing your views with us today.

I'd like to start with Mr. Caylor. You mentioned—and I took your point—that in order to properly prosecute white-collar crimes, the courts need more resources. The prosecutors need more resources. The investigators need more resources. We certainly think that is a priority the provinces should focus on. As you know, administration of the courts is their direct responsibility.

Since 2006 our government has increased the provincial transfer payments by $12.7 billion, and in fact in the 2010 budget we increased the transfer payments to the provinces by a further $2.4 billion. Part of the reason for that is to give them the resources to do these sorts of things, which obviously will require forensic accounting, and to give them more resources for the courts. As we've seen in Toronto and other places, these trials take a long time, and there are a lot of cases before the courts.

In addition to the financial assistance to the provinces to help them deal with the increased case burden, you may know that we've also introduced Bill C-53, the Fair and Efficient Criminal Trials Act. It's a list of a number of procedures that will assist judges and case managers to speed up the criminal trial process. There are 14 or 15 different specific procedures. I won't go through them in detail, but this strengthens case management, reduces duplication of processes, and improves general criminal procedures. Our hope is that this law, when passed, will make these kinds of trials more efficient when you're dealing with multiple and similar kinds of cases and a number of victims—for example, in a white-collar crime case involving many victims.

Hopefully, the combination of those things will address the issue you raised. Do you have any comments on Bill C-53?

Mr. Lincoln Caylor: No.

Mr. Bob Dechert: All right. Thanks.

Mr. Groia, I appreciate your comments about mandatory minimums. Can you tell me if you're familiar with the following cases? They are R. v. Cioffi, R. v. Toman, and R. v. Campbell.

● (1610)

Mr. Joseph Groia: I'm familiar with R. v. Campbell. I'm not sure I'm familiar with the other two.

Mr. Bob Dechert: Okay. I have a list. I can go through them: R. v. Campbell, R. v. Coffin, R. v. Dobis, R. v. Leefe, R. v. Massoudinia, R. v. McCarthy, R. v. McCullough, and R. v. Nottingham. These are all cases in which the fraud was over a million dollars and the accused received a sentence of less than two years. This was between 2002 and 2009. I also have a list of another 11 cases in which the accused committed a fraud of between $500,000 and $1 million and received a sentence of less than two years.

Right there are 21 cases in the last eight years in which the accused committed a white-collar crime of the type that we're discussing today and had a sentence of less than two years imposed. You mentioned in your comments that you didn't think it was necessary to have a two-year minimum because you thought that most of these cases resulted in a sentence of more than two years. So how do you explain those cases?

Mr. Joseph Groia: Well, I'm sorry if that's the impression I left you with. What I want to emphasize is that trial judges, under the current criminal justice regime, are entitled to consider all of the circumstances of the crime and the victim and to consider what the appropriate sentence is.

I have no doubt that if a single mother steals money from her employer in order to feed the drug habit of an abusive husband, she might steal a million dollars. Should she spend two years in a federal penitentiary and put the court in a position of being unable to consider all the particular circumstances? I can't debate those cases, but I accept fully, sir, that they exist.

Maybe you're familiar with the Angelos case in the United States. In this case, under the California three-strikes law, a person received 55 years in jail for selling $90 worth of stolen batteries. As I indicated, the literature in the United States says that they now believe, supported by the Supreme Court of the United States, that the difficulty with minimum requirements is that they are corrupting the way judges try to do their work.

As for me, I'm confident that our judges do their jobs, and I'm confident that they are treating this problem seriously.

Mr. Bob Dechert: We can have a difference of opinion on this. Obviously our view is that 21 cases are too many. In these cases, a minimum sentence of at least two years should have been imposed. We're drawing a line and going forward. Everyone knows what the law is and they should conduct themselves accordingly.

I want to move on to another point you raised, and I think Mr. Caylor raised it as well. It was with respect to a national securities regulator. You indicated that in your view having a national securities regulator in Canada would be helpful in enforcing securities laws and in investigating and prosecuting these kinds of white-collar crimes. Could you go into more detail on exactly how a national securities regulator would be helpful?

Mr. Joseph Groia: Absolutely. As I said, I come to this from the enforcement perspective. I come to this as someone who is concerned, as I believe we all are, with the integrity of our capital markets, and there's no more important initiative now being discussed than a national securities enforcement program.

As I say, I'm not here to talk about who should register and regulate brokers and how they do their business. Why we need a national enforcement agency is because our market is increasingly international in scope and we are not at the table with the national regulators of other G countries, and we need to be there. We also need to avoid the enormous duplication that I see in the enforcement programs of the provinces and territories. I can tell you that cases I deal with every day in my practice may involve securities commissions of three different provinces, and those securities commissions are duplicating their efforts, at great cost to all of us. I fully support the initiative that we have on a national enforcement agency to do exactly that, because I think that in an unusual way, I also have to say that I think it's fairer to persons who are accused. because they only have to deal with one agency.

I have been supporting that since I left the commission in 1990, and to the extent that I can commend the work of the committee and the House, that is the most important initiative I've seen in my 25 years as a securities lawyer.

● (1615)

The Chair: Thank you.

We're going to move to Ms. Jennings.

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

I'll be very brief. I'm going to give you a bit of information and you can comment on it or not, as you wish.

The parliamentary secretary raised the importance of this particular piece of legislation. I'd like to inform the witnesses that in the previous Parliament—in fact, it was in the second session of the 40th Parliament, which means before the prorogation of December 2009—the government tabled this bill. It only sat at first reading for one day before the government minister moved second reading. It was debated for four days—it spent four days in the House for second reading debate—and then was sent to the committee.

Unfortunately, the Prime Minister prorogued the House, and in so doing killed this piece of legislation. When the House resumed on March 31, the government waited 61 days before the minister again moved first reading. He then waited 154 days before moving second reading.

Now, you may not be familiar with parliamentary procedure, but opposition parties have no control over what government legislation is tabled or when the government decides, in its wisdom, to move debate at second reading so that debate can actually begin. It controls all of that, so I'm giving you this information. In fact, after the government let it sit at first reading for 154 days and finally moved second reading, we only debated it for two days in the House, because the opposition parties clearly wanted to deal with this legislation with some importance and give it priority.

You may wish to comment on that information and these facts, or you may not wish to comment. That is your privilege.

I have one question. There has been debate on an ongoing basis in this Parliament and in previous Parliaments about the issue of early release at one-sixth of the sentence. The government did not bring forth any kind of measure in this particular bill.

Because that has also been an irritant: you have had offenders convicted of white-collar crime who are released at one-sixth of their sentence. I'd like to know if you have any comments about whether you believe that should have been found in this bill.

Mr. Lincoln Caylor: I have no comments with respect to the partisan aspect of how the bill has made its way through the House. With respect—

Hon. Marlene Jennings: May I interrupt you a moment?

That's not partisan. That's fact. The days I gave you are fact. There is no partisanship in that. The days I gave you and the delays are facts.

Mr. Lincoln Caylor: And I have no comments with respect to the delays.

Hon. Marlene Jennings: Thank you.

Mr. Lincoln Caylor: With respect to the one-sixth sentence issue, the perception with respect to sentencing and white-collar crime needs to be maintained: that we are tough on crime, and in particular white-collar crime. To the extent that the bill can be considered in that light, I would support it.

● (1620)

Mr. Joseph Groia: Let me comment on the one-sixth question, because as the former head of enforcement at the securities commission, one of the issues I had to deal with was the allocation of resources. There is a dynamic tension that exists when you're the head of a regulatory agency, a tension between trying to do what is necessary to protect the integrity of the market and trying to help injured investors get their money back.

When you look at the incarceration rates of white-collar criminals you have to look at the effect they have on both of those issues. I certainly am no expert on the effect of the deterrence value of putting Conrad Black or people like him in jail, but I can tell you that doing so makes it much more difficult for investors to hope to ever see their money back. To some extent, that is a choice the House will have to make as it considers this issue, because there's no easy answer for what to do on those issues.

Hon. Marlene Jennings: May I have just a moment, Chair?

I find the point you raise quite interesting. My understanding, if one simply follows the media coverage and statements of crown prosecutors, police officers, and victims, etc., in highly media-cized white-collar crime, is that victims generally don't really get much back. Am I mistaken?

Mr. Joseph Groia: I think you have to look at that on a case-by-case basis. Lawyers like Mr. Caylor are very skilled at finding ways of trying to recover losses—not always from the offender. More often, you're looking at the accessories, the people around the offender. You probably are aware, for example, that there's ongoing litigation arising out of the Earl Jones case in Quebec.

What I had to do as the head of enforcement was make difficult choices. If a person who had stolen money from shareholders and who had done a very effective job of hiding it somewhere offshore was prepared to make a deal to pay back the victims, was I going to reject that offer out of hand? Was I going to simply say no, that I was going to stick to the purity of the principle and ignore the recovery?

There's no easy answer. I have a great deal of empathy for commercial prosecutors who are dealing with hundreds of people who have lost their life savings.

The Chair: Thank you.

We'll go to Monsieur Ménard for five minutes.

[*Translation*]

Mr. Serge Ménard: Thank you.

You were a prosecutor. What is your immediate reaction when you find a sentence inappropriate to a significant extent?

[*English*]

Mr. Joseph Groia: I would hope that there would be an appeal and I would be confident that the court of appeal would fix it.

[*Translation*]

Mr. Serge Ménard: Thank you.

Now, in all the cases that have been mentioned, do you recall one that has been appealed?

[*English*]

Mr. Joseph Groia: I'm sorry; as I indicated, I'm not familiar with the facts or circumstances of these. I'd be happy to comment if someone explained them to me.

[*Translation*]

Mr. Serge Ménard: So do you agree with me that you would need to look at the facts of those cases to be able to judge whether or not the penalties were justified under the circumstances?

[*English*]

Mr. Joseph Groia: Yes, sir, that's correct.

[*Translation*]

Mr. Serge Ménard: If they were not, would you agree that there would have to be a reason for not taking them to appeal?

[*English*]

Mr. Joseph Groia: Yes.

[*Translation*]

Mr. Serge Ménard: Twenty-one cases in one short year. Is that a lot in terms of the number of fraud cases in Canada?

[*English*]

Mr. Joseph Groia: No, my guess is that it would be a fraction of 1%.

Mr. Serge Ménard: If that.

Mr. Joseph Groia: If that. Yes.

[*Translation*]

Mr. Serge Ménard: Right.

I just wanted to be sure that I understand your position. Here we have legislation that comes to grips with a real problem, that is big and getting bigger, in my opinion. However, instead of its intended goal, it achieves exactly the opposite of what it should be achieving. This is because it greatly complicates the work of prosecutors, it greatly adds to the work of judges and prosecutors, which is likely to result in them being able to deal with fewer cases and give no real hope to victims. So the victims who want to turn to the courts for restitution have only false hopes, whereas they should be able to find another way of getting reasonable restitution. Is that your view in a nutshell?

● (1625)

[*English*]

Mr. Lincoln Caylor: I'll speak to the restitution comments you made at the end.

You have accurately summarized my comments with respect to that issue, with one exception, and maybe I didn't make this clear in my opening comments. There are cases in which restitution is appropriate and victims seek it and are paid back through the criminal process; however, those are rare.

So to the extent that this bill enhances that process, it is a positive thing. That has to be weighed against the complexity of the restitution process, to the extent that it makes the procedure more complex.

[*Translation*]

Mr. Serge Ménard: Do you think that this bill is going to allow more victims to be compensated, or will the situation stay the same?

[*English*]

Mr. Lincoln Caylor: My view is that without the resources to investigate and prosecute these cases, this bill will have little impact.

[*Translation*]

Mr. Serge Ménard: Thank you.

[*English*]

The Chair: All right. Thank you.

I believe the government side is waiving its right to ask another question.

I'm going to take the extraordinary step of making just one comment. There was some reference to the absence of accelerated release legislation. In fact, the government has actually tabled accelerated release legislation under Bill C-39, and that was referred to the public safety committee on October 20. That would eliminate accelerated release for non-violent first-time offenders.

Thank you. We're at the end of our first hour, so we're going to move to clause-by-clause. I want to thank our witnesses for appearing.

Your testimony has been very helpful and I appreciate your attending.

We'll suspend for two minutes while the witnesses can be released.

● (1625)

(Pause)

● (1630)

The Chair: I'll reconvene the meeting. We're moving to clause-by-clause on Bill C-21.

Pursuant to Standing Order 75(1), consideration of clause 1 is postponed, so I'm calling clause 2.

(On clause 2)

The Chair: There are three amendments proposed to clause 2. We'll do them in the order in which they fit.

Mr. Comartin, did you want to introduce amendment NDP-1?

Mr. Joe Comartin: I'd actually like the consent of the committee to withdraw it.

The Chair: Is it agreed?

Some hon. members: Agreed.

(Amendment withdrawn)

The Chair: All right. We'll move, then, to amendment NDP-2.

Mr. Comartin, unfortunately, I'm going to be ruling it out of order.

Mr. Joe Comartin: I was going to make the same request in any event, Mr. Chair.

The Chair: Oh, were you? Were you going to withdraw?

Mr. Joe Comartin: Yes, on consent.

The Chair: All right. Is there consent that it be withdrawn? If there is, I don't have to make the ruling.

Some hon. members: Agreed.

(Amendment withdrawn)

The Chair: All right. Amendment NDP-2 is withdrawn.

[*Translation*]

Mr. Serge Ménard: I am just pointing out that we do an enormous amount of preparatory work on these amendments, and then they are withdrawn. That's okay—

[*English*]

The Chair: Well, I understand that, but each one of us as a member has the liberty to introduce amendments right at the meeting and also to withdraw them. When we hear from witnesses, sometimes our minds are changed. I believe we do have consent on the second NDP amendment.

We'll now move to Liberal amendment 1.

Ms. Jennings, are you introducing it?

Hon. Marlene Jennings: Yes, I move it.

The Chair: Do you want to introduce it and speak to it?

Hon. Marlene Jennings: Yes, thank you.

I brought this amendment forward because clause 2 of Bill C-21 says very specifically that:

> Section 380 of the Criminal Code is amended by adding the following after subsection (1):
>
> (1.1) When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

Well, if one goes to section 380, subsection 380(1) talks about *fraude*.

● (1635)

[*Translation*]

The subsection of the Criminal Code says this: 380. (1) Every one who, by deceit, falsehood or other fraudulent means…

[*English*]

I'm sorry. I'm reading with a magnifier because I can barely read this.

[*Translation*]

It continues:

> …whether or not it is a false pretence within the meaning of this act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (*a*) is guilty of an indictable offence…

[*English*]

If we go to subsection 380(2),

[*Translation*]

as you see, the heading is “affecting public market”.

[*English*]

Subsection 380(2) says:

[*Translation*]

> (2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[*English*]

That isn't covered by Bill C-21. I believe that it should be covered. In the previous session of the 40th Parliament, when this bill was originally tabled, we heard from witnesses who were victims, organizations, representatives of organizations representing victims, and law enforcement. I specifically asked if they believed that Bill C-21 covered stock manipulation, etc., which we find in subsection 380(2).

They all thought it did. When I informed them otherwise and actually read out clause 2 of Bill C-52, as I believe it was at that time, they were all surprised. They said they thought it should be very clear that this section on stock manipulation, etc., should be part of Bill C-21. That's the reasoning for bringing forth this amendment.

The Chair: Thank you.

Next is Mr. Ménard, and then I'll go to Mr. Dechert.

[*Translation*]

Mr. Serge Ménard: Once again, by wanting to set a minimum, we seem to be completely ignoring the fact that, when it comes to complicity, the provisions of the Criminal Code are extremely broad and, for a number of offences but particularly with fraud cases, they cover participants who can be at some distance from, and play a minor role in, the fraudulent operation.

Here is an example. Let us say that it is not the secretary who continues to send notices, to collect money and to make the fraudster's operation possible. Let us say that it is a broker who, in good faith, initiates activities for someone who decides to engage in fraudulent agiotage—that's the French word for this speculative kind of fraud. At the outset, he does not see that his client is involved in it. But he could still be charged because he did not get out of the agiotage operation quickly enough. I am sure that a judge would want to take that into consideration at the same time as he would sentence the main fraudster and anyone profiting from the agiotage to a lot more than the two years proposed here. Especially if the fraudulent speculation generated proceeds of more than a million dollars.

I see the same problem of injustice as I see in minimum sentences for any involvement, however minor, which is still an offence at the moment someone becomes aware that he or she is aiding the main player in committing the offence. That is what has to be understood when we set minimum sentences.

You design minimum sentences because you are thinking about serious matters and about the proceeds that offenders are getting from their illegal actions. But you forget that they have very often dragged people down with them, people working in good faith, but who have taken too long to realize that they ought to have gotten out of the situation.

Even with a sophisticated offence, like manipulating securities on the Stock Exchange, I am sure that you can see perfectly well that young brokers may have been dragged into something that they may not have gotten out quickly enough. But neither have they benefited from the main player's speculation. It seems to me that this is why we appoint judges who are supposed to be intelligent and independent so that they can listen to all the circumstances and decide on a sentence that is not only appropriate to the offence, but also appropriate for the victims and for the people who have been of only minor assistance to the principal player.

The Chair: Thank you.

Mr. Serge Ménard: That is why we are against this amendment.

● (1640)

[*English*]

The Chair: *Merci*.

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

I'd like to defer to Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much.

I would like to say first that I commend the intention with which Ms. Jennings has approached this issue; however, I think the difficulty in this particular case is that there is a very valid and important distinction between ordinary fraud and stock manipulation.

When it comes to ordinary fraud, the section clearly refers to depriving or defrauding the public of “property, money or valuable security”. The value of those things can be ascertained rather exactly if you defraud someone of money, property, or valuable security.

However, there is no direct link in the case of stock manipulation between the conduct and the results—at least, no necessary direct link. One can manipulate stock and not receive a million dollars, yet still cause more than a million dollars' worth of losses. Similarly, one might receive more than a million dollars but not cause a million dollars' worth of losses, because there are other factors at work in the market that determine the amounts of losses and gains.

It's like trying to put a square peg in a round hole to apply a sentencing provision based on the amount involved when we're talking about an open system that isn't specific to a particular piece of property, money, or valuable security. I think it's likely for that reason that the government has not proposed applying this mandatory minimum provision to the issue of stock manipulation.

That's my view; however, Mr. Chair, I think it would be useful for us to hear from Ms. Kane, our Department of Justice representative, for some further explanation of or comment on the potential implication of this amendment.

The Chair: Go ahead, Ms. Kane.

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

I think Mr. Woodworth has captured the rationale very well, so I'd only reiterate that: that this is not a gap. This was an intentional drafting of the MMP to apply only to subsection 380(1), because that offence has a monetary value attached to it and the others do not, so for practical reasons, it would be very difficult to determine the value of the public market manipulation.

The other point is that when we look at all the data about the offences that are charged, we see that there are very few, if any, charges under anything but subsection 380(1), so where there's an actual fraud that results, the fraud offence under subsection 380(1) is charged, rather than the other. So where the value can be attached to the fraud, that would be the applicable charge.

So for the other offences that involved perhaps more perhaps more preparatory conduct in terms of influencing the markets, where a person is charged and convicted, they would be subject to any penalty along the way, up to the maximum of 14 years, and all the aggravating factors that would apply would suggest that the sentence be increased in accordance with those aggravating factors and their applicability.

● (1645)

The Chair: Thank you.

Mr. Lee, you were on the speakers list. Do you still want to speak?

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Yes, and I did the last time, too, so thank you.

I have some questions.

I just want to confirm with Ms. Kane that the current wording of this amendment relying on subsection 380(1) would catch almost every case of someone who took money from people, for good or bad reasons, for pretence, but in the end defrauded them of the money. Because what I'm describing doesn't involve manipulating the stock market; it involves deceitfully taking money from individuals. That's fully covered by subsection 380(1), isn't it?

Ms. Catherine Kane: That's correct.

Mr. Derek Lee: Yes.

And then, I would have said to Mr. Woodworth that I would have thought it would be really easy to value a stock market fraud, because almost everything on the stock market has a listed value or has a value somewhere. In any event, that's probably moot.

But I did note that the amendment proposed by my colleague, unlike proposed subsection 380(1.1) that is proposed as an amendment, does not require the existence of an indictment. This penalty could apply with this amendment on a simple summary conviction. If that is the case—and as I read it, that appears to be the case—and my colleague is aiming at stock market fraud, then a prosecution summarily, based on the wording that I see now in the amendment, could result in the mandatory minimum two-year sentence if it's a million dollars or more.

I'm just wondering if in the rest of the Criminal Code we have at least some instances where there are mandatory minimum sentences for summary convictions.

Ms. Catherine Kane: I may have difficulty following your question, but I'll try to break it down.

Mr. Derek Lee: Okay.

Ms. Catherine Kane: When I looked at this amendment, I read it as applying only to subsection 380(2), which is a strictly indictable offence. Does that answer your concern?

Mr. Derek Lee: Okay. Yes, it completely answers it. Thank you.

The Chair: Thank you.

Is there anybody else?

We have Liberal amendment number 1. Seeing no further discussion, I'll call the question on the amendment. We'll do a recorded vote.

(Amendment negatived: nays 8; yeas, 3)

● (1650)

The Chair: The amendment fails. We'll move to clause 2, unamended. Unless there's further discussion on clause 2, I'll call the question.

Hearing none—

Go ahead on a point of order, Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard: I have already provided all my arguments on this, but, in my opinion, it applies perfectly. You are not thinking about all the accessories there can be in cases like this. Some of them do not even deserve prison. It is the odious nature…

Perhaps you can eventually consider what all Commonwealth countries do, I think. They allow judges to not apply minimum sentences in exceptional circumstances, but they require them to explain their reasons in writing. The minimum sentence that you have set is really very low in terms of what is usually imposed, and upheld in courts of appeal. With thousands of cases being decided every day in Canada, we can always find some that do not seem to be fair. But to assess that, we first need to know the facts on which the judges based the decision. Then, recourse in the face of bad decisions is first sought in a court of appeal. As legislators, we must become involved only when we do not agree with the principles issued by the courts of appeal.

Of course, we will vote against this provision for the same reason. Minimum sentences are rarely justified. I accept them in the case of murder, that is, when we are faced with the most serious acts. I accept them when they are not very severe, such as when we are dealing with repeat offences committed by ordinary people, like drunk driving. After all, when they are convicted the first time, they are warned that there will be a minimum sentence if they offend again.

But I am sure that this is going to result in injustices. If you believe the opposite, it is because you feel that the police or the prosecutors will not be rash enough to proceed with cases. I will not be voting for a bill if I think that it is so bad that neither police nor prosecutors will want to apply it.

[*English*]

The Chair: Thank you.

Is there anybody else...?

I'll call the question on clause 2. Do you want a recorded vote?

Mr. Serge Ménard: Yes.

The Chair: We'll call the vote.

(Clause 2 agreed to: yeas 8; nays 3)

The Chair: Clause 2 carries.

We'll move to clause 3. Is there any discussion on clause 3? There are no amendments on that one.

I'll call the question on clause 3.

Do you wish for a recorded vote on this one, Monsieur Ménard?

An hon. member: Call the vote.

(Clause 3 agreed to)

(On clause 4)

The Chair: We'll move to clause 4. We have Liberal amendment 1.1.

Mr. Lee.

Mr. Derek Lee: Before I move it, and I will move it, to go back in the section earlier than that, on proposed subsection 380.2(3), this is a question to Ms. Kane. It's about the ability of the court to vary one of these prohibition orders or restrictive orders. It's not clear on the face of it. It talks about a variance, so that would mean a variance up or a variance down. For example, if a person was prohibited from participating in sales of stolen bicycles, or just bicycles, or whatever the currency of the fraud was, for a period of three years, I take it from the wording here that the original court or a successor court could vary that up or down.

My question is a double-pronged question. That essentially becomes a variation in the sentence, as I see it. Is that appropriate? I could see why you might shrink the prohibition period, but is that appropriate? Secondly, can the prohibition period extend out beyond the sentence period? If it does, does that prohibition period actually become a part of the sentence? When does the sentence end?

● (1655)

Ms. Catherine Kane: In general, a prohibition period can extend beyond another sentence because sometimes it's only a prohibition that's imposed. Where they exist in other circumstances, we have other provisions in the code that prohibit convicted child sex offenders from being around playgrounds, from being anywhere near children, all those sorts of things.

We have recognizance under section 810. Those orders, in the variety of circumstances that they can be imposed, can be for particular lengths of time even though a person may spend much less of a period of time under a probation order, or in custody, or whatever the other part of the sentence is. It can extend a particular number of years.

With respect to your question regarding varying up or varying down, what was contemplated here was a varying in the terms of conditions prescribed, so it could be that the scope of the prohibition is changed. I would suggest that if the period were extended, then offenders may well be seeking a judicial review of that extension if they thought that was extending their sentence beyond what was originally contemplated.

This was drafted to permit the person to come back before the court and say, “I can't comply with that anymore because of the following circumstances”, so that the individual wouldn't then be in breach. There could be some variation, or because of some change in their behaviour, some steps they'd made, or some desire on their part to engage in some occupation that might put them in violation of this, so they'd be able to do so without running afoul of the prohibition order.

Mr. Derek Lee: Okay. I understand that part of it, but it's also possible, under these provisions, for the prosecutor to come back and look for a variance. I was concerned about the prosecutor reworking the sentence a bit because of community pressure in a smaller community. The guy who's been stealing cars for 10 years finally gets sentenced and he's prohibited from selling cars for five years—this is a trite example, I know—and then in year four the prosecutor decides that this guy is still hanging out in the garage and we have to extend the period of time he's prohibited from engaging in the sale of cars.

Under this provision, it appears to be doable, but something is making me nervous about that. It seems to me that if the person has been sentenced, you can't really go back and double up on the sentence, including the prohibition.

Ms. Catherine Kane: Well, bear in mind that the process requires that the application be brought back before the court and that both parties be heard. The judge would be looking at all those circumstances and would understand the grounds by which the crown is seeking this, and also the offender's reply to that, and would presumably come to the appropriate decision at the end on whether and how to change those conditions of the prohibition order.

Mr. Derek Lee: Okay. I'm asking you if the justice department is comfortable with this provision in this bill.

Ms. Catherine Kane: Yes, we are.

Mr. Derek Lee: Okay, then. Can I move my amendment now?

The Chair: Yes. On the merits, could you explain? You added these words: “If a victim seeks restitution and...”.

Mr. Derek Lee: Yes, and I regret I didn't have a chance to ask our witnesses a question about this. Proposed subsection 380.3(5) is saying that in every case a judge must give reasons for not making a restitution order—in every case, even where there isn't a request for a restitution order, even when the prosecution isn't looking for one.

It struck me as odd that we would impose on the judiciary an obligation to give reasons when in a particular case neither the prosecution nor the victims have requested, or wanted to request, a restitution order. That seems to me to be overdoing it.

What my amendment provides is that it's only when a victim seeks restitution and the court decides not to make a restitution order that the court has to give reasons. That would seem to be more appropriate, keeping in mind that, further up in the section, the victims must be asked if they wish to make a restitution request and the prosecutor is involved in that. There's a whole procedure set up in this section.

If all of that is set up to request of the victims whether or not they want restitution—and as I read the section, the court can decide even on its own to impose a restitution order—then I do not see the need to require the court to give reasons for not making a restitution order if nobody wants one, including the court, or the victim and the prosecutor.

My amendment is there to remove that 100% obligation of the court to give reasons every time it doesn't make a restitution order.

● (1700)

The Chair: Ms. Kane, do you want to comment?

Ms. Catherine Kane: I have just a few comments. There are a number of provisions included in this bill to basically strengthen the opportunity that restitution might be ordered for fraud cases. The first requirement is that the judge must consider restitution in such cases. In the general restitution provisions, there is no obligation on the court to consider restitution. It's a "may", and they "may" impose, but there's no obligation to consider.

So when you start off with the requirement that the judge "must" consider imposing restitution, it may well be not appropriate in the circumstances, but they have to turn their mind to it. And then, at the very end of that process, to ensure that this has been considered whether or not the victims have done the forms, indicated their losses and so on, it just completes that requirement that the judge then has to put on the record, "No restitution has been ordered".

It wouldn't be very burdensome to indicate that the reason is because no victims have sought restitution and that no ascertainable losses have been presented to the court, but it would at least guarantee for all involved that this had been considered. Obviously, where the victims have been identified and they have indicated what the losses are, and the judge may or may not be able to order restitution, given the other elements of the sentence or the amounts it involved—or may only be able to indicate partial restitution—that would also be set out.

I appreciate your amendment to relieve the burden on the judge to put reasons on the record where it seems obvious that there is no victim seeking restitution, but I think there are still benefits to having that requirement there. That will ensure that indeed restitution was considered.

The Chair: Mr. Rathgeber.

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

I agree with Ms. Kane. I think Mr. Lee's amendment is well intentioned, but the purpose of the bill is to protect victims of white-collar crime. In that vein, I think it's incumbent—

The Chair: Mr. Rathgeber, I'm sorry to interrupt.

Please proceed.

Mr. Brent Rathgeber: Given the purpose of the bill it's incumbent upon the trial judge or the sentencing judge to apply his or her mind to the issue of compensation. It may very well be that the reason that a compensation is not ordered is because none has been sought, and if that's simply the reason the judge will say it on the record and he will have completed his duty under this provision. I encourage all members to vote against this amendment.

Thank you.

The Chair: Thank you.

Is there any further discussion on Liberal amendment 1.1? I'll call the question. All in favour? All opposed?

(Amendment agreed to)

The Chair: The amendment carries. Shall clause 4 as amended carry?

(Clause 4 as amended agreed to)

(Clause 5 agreed to)

The Chair: There is an amendment that proposes a new clause, clause 5.1, and that's Liberal amendment 2.

Before I read a ruling from the chair, I did say that I was going to give Ms. Jennings an opportunity to explain this particular amendment.

● (1705)

Hon. Marlene Jennings: I appreciate that, Chair.

It's very simple. My particular amendment, which goes into the Corrections and Conditional Release Act, would ensure that anyone found guilty of the offences that are dealt with in Bill C-21 would not be eligible for release at one-sixth of their sentence, period.

The Chair: My ruling is actually addressing the parent act rule. I believe it's called the parent act rule. The amendment seeks to amend section 125 of the Corrections and Conditional Release Act.

House of Commons Procedure and Practice, second edition, states at pages 766 to 767 that "an amendment is inadmissible if it proposes to amend a statute that is not before the committee or a section of the parent Act, unless the latter is specifically amended by a clause of the bill".

Since section 125 of the Corrections and Conditional Release Act is not being amended by Bill C-21, it is inadmissible to propose such an amendment, and therefore the amendment is inadmissible.

Hon. Marlene Jennings: Mr. Chair, I challenge your ruling.

The Chair: The chair's ruling has been challenged. Shall the ruling of the chair be sustained?

An hon. member: I call for a recorded vote.

(Ruling of the chair sustained: yeas 7; nays 4)

The Chair: The ruling of the chair is sustained, so we'll move on to clause 6. There are no amendments to clause 6. Shall clause 6 carry?

(Clause 6 agreed to)

The Chair: Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

The Chair: Shall the chair report the bill as amended to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill as amended for the use of the House at report stage?

Some hon. members: Agreed.

The Chair: Thank you. We're adjourned.

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