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Chair

Mr. Kevin Sorenson

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● (1530)

[*English*]

The Chair (Mr. Kevin Sorenson (Crowfoot, CPC)): Good afternoon, everyone.

Fellow committee members, we welcome you back after a week in the constituencies.

Welcome to the 39th meeting of the Standing Committee on Public Safety and National Security. Today is Monday, November 15, 2010. Today we're continuing our study of Bill C-5, An Act to amend the International Transfer of Offenders Act.

Appearing as witnesses today we have, as individuals, Charis Lynn Williams, as well as John Conroy, a lawyer.

From the Canadian Bar Association, we have Gaylene Schellenberg, who works on legislation and law reform, and Paul Calarco, a member of the national criminal justice section.

From the Canadian Civil Liberties Association, we have—welcome back—Nathalie Des Rosiers, general counsel, and Lorne Waldman, lawyer.

I understand each of you has an opening statement. I've had an opportunity to meet most of you. We will just begin, and then I would remind you that we'll go into the first rounds of questioning, which are seven-minute rounds.

Because we're televised today, I would also ask those in the gallery to please turn off their cellphones and BlackBerrys. It just makes things a lot easier.

I see Mr. Davies with his hand in the air.

Mr. Davies.

Mr. Don Davies (Vancouver Kingsway, NDP): Thank you, Mr. Chairman.

Before we start hearing from the witnesses, Mr. Chairman, I would like to make a motion that our committee reserve 15 or 20 minutes at the end of the meeting for future business, if we could. I know there is an issue with what the committee is going to be discussing on Wednesday. I just want to get that out now at the beginning so we don't interrupt the witnesses' testimony.

The Chair: All right. We have a motion to go to committee business. My sense is that with regard to these motions, we should usually expect to be able to go to committee business. It's not on the order paper, but I think we can reserve some time to go to that, so yes, we'll do that.

All right. Let's begin with Ms. Williams.

Welcome.

Mrs. Charis Lynn Williams (As an Individual): Thank you.

Thanks for having me here. My name is Charis Lynn Williams. I'm the older sister of Brent James Curtis, U.S. federal inmate number 79979004, who is currently serving a 57-month sentence in Pecos, Texas, for conspiracy to traffic cocaine.

I'm opposed to Bill C-5 because of my experience over the last three years. I've become very well acquainted with the International Transfer of Offenders Act, the legal system in the United States, and various American prisons as I've advocated for my brother's transfer home to Canada.

I feel very strongly about the way the International Transfer of Offenders Act has been disrespected and ignored by our current government. I'm appalled that Canadian citizens are being denied access to an act that has been used successfully over the last four decades. This treaty between nations has had a high success rate since its inception, and nothing about that has changed, except that currently Canadian offenders incarcerated abroad are being denied the right to serve their time near their families.

The truth is, when our public safety minister denies transfers, he in fact endangers public safety, tears apart families, denies offenders access to rehabilitation, and turns first-time non-violent offenders into inmates doing hard time. I may never know why they are doing this, but I know it's wrong for all Canadians, and it needs to stop today.

My brother Brent is a Canadian citizen, a young man who made some bad decisions. These decisions led to his arrest by the FBI in October 2007. No amount of explaining on his behalf or mine will be able to justify the crime he committed. Yes, he should be held responsible for his actions, but he's still entitled to his rights as a Canadian citizen.

When Brent pled guilty to the charge of conspiracy to traffic, he stood to face 17 years in jail. After the U.S. federal judge reviewed the FBI's evidence and Brent's character references, his employment and education history, and heard him speak in court, she sentenced him to 57 months in a federal prison, roughly five years. The judge commented during sentencing that she saw Brent as a good person from a good family—not a career criminal, but someone who made a stupid decision to play a minor role in a major crime for quick financial gain.

Because in the U.S.A. the sentences are issued based on quantities, my brother's sentence, while still severe, was nothing short of a miracle for us. Our U.S. lawyer knew of the International Transfer of Offenders Act and assured us that Brent would be close to us while serving his time. We would be able to support him as he coped with incarceration and rehabilitation and we would help him make plans for his future.

Brent's transfer home to Canada was approved by the U.S.A. in December of 2008. It was denied in May 2009 by our then minister of public safety, Peter Van Loan. In a letter sent to Brent by Mr. Van Loan, the minister had determined that if transferred home Brent would commit an act of organized crime, despite the fact that he'd been convicted of only a minor role. It was determined in court that Brent had not been involved in organized crime, but had been hired as a delivery man. Mr. Van Loan ignored all the facts of the case, including recommendations from the U.S., Corrections Canada, and the prosecutor and the sentencing judge in Brent's case.

Brent has currently served over two-thirds of his sentence thousands of miles from home and family. We have visited him at every opportunity we could, at considerable expense. It is common knowledge amongst criminologists, criminal psychologists, and correctional services that optimal outcomes during and after incarceration are dependent on the inmate receiving support from family. By denying transfers, the minister is denying all Canadians the right to optimal outcomes for those apprehended abroad.

Since his arrest, my brother has been offered no rehabilitation, no counselling, and no education. Foreign aliens incarcerated in the U. S. are offered no programs whatsoever, and therefore no access to optimal outcomes.

When Brent was denied a transfer, I submitted an access to information request to all departments and offices of the government. I asked for and received any and all documentation, electronic and otherwise, bearing my brother's name. I did this in an effort to find out why the minister had denied him a transfer home.

In report after report, my brother was considered a prime candidate and recommended for a transfer. Corrections Canada, International Transfers, the prosecutor in his case, the probation officer who did his community assessment, and his sentencing judge all agreed that optimal outcomes were available to Brent if he were transferred home.

● (1535)

Again I stress, the U.S. justice department approved his transfer home in December 2008, nearly two years ago, but his home country, Canada, said no—rather, Mr. Van Loan said no.

It is common knowledge among Canadians incarcerated abroad that as more transfers get denied, more offenders are losing touch with their families and families are being destroyed.

Brent has been apart from his family now for three years. Brent's common-law wife decided to move on when his transfer was denied. At least when incarcerated in Canada, visitation is possible on a regular basis and phone calls home don't cost $1.99 per minute. Families are going broke trying to stay in touch. When transfers are denied, they make the tough decision to do what they have to do until the sentence is served out abroad. When we leave offenders abroad, there is no telling in what condition—physical, mental, or emotional—they will return to Canada.

It is important that Bill C-5 does not pass. More importantly, it is important that this government goes back to honouring a treaty that has served our country well for decades. Amending the act to read "any other factor that the Minister considers relevant" is much too broad and open to the minister's opinion, and not the facts. This endangers public safety in the long-run.

It is a well-known fact that Mr. Harper's Conservative government wants to be seen as being tough on crime. It's quite transparent to even a casual observer that the tough-talking Mr. Van Loan has chosen a path of least resistance. Prisoners across the border are easy marks and the minister can abuse their rights as citizens in the quest to appear tough to the constituents at home.

Should Brent serve his full sentence in the U.S.A., he will come home to Canada with no criminal record whatsoever. Over the last three years, my brother has served time with child molesters, rapists, and murderers. Canada doesn't need to worry about my brother coming home; he has learned his lesson. But we do need to worry about who will be dropped off at the border. After transfers have been denied undetected, there will be no record of their crime in Canada and they will not be registered with a Corrections Canada ID. Again, this is not public safety; this is public endangerment.

Committing a crime abroad does not revoke citizenship. These offenders come home at the end of their sentences regardless of whether their transfers are approved. As Canadians, we need to know who they are, give them an opportunity to rehabilitate, and, most importantly, we need them near their families to help them eventually reintegrate into society.

The attitude that "if you do the crime there, you can do the time there" is not going to help anyone. Forgetting about them and leaving them in dangerous situations when there is a perfectly good treaty between nations in place is inhumane, lacks forethought, and seems to only make sense as a campaign ploy to look tough on crime.

In the case of my brother, the minister ignored American officials, his own officials, made his own decision, and quashed the transfer. In essence, he arrogantly acted as though this bill had already been passed.

The only thing that brings my family comfort is that perhaps, in advocating for prisoner transfers, we can save another family from this hardship. When the people who commit crimes are apprehended and face incarceration, they need support to turn their lives around. Keeping them from their support systems puts us all in danger of them reoffending.

Once again, it is very important that Bill C-5 does not pass and, more importantly, that we as a nation take responsibility for our citizens incarcerated abroad. This will achieve optimal outcomes and ensure the safety of all Canadians.

I hope I have offered you some insight into our experience. I am open to answering any questions that may be of service to the committee. I thank you for your time.

● (1540)

The Chair: Thank you very much, Ms. Williams.

We'll now move to Mr. Conroy, please.

Mr. John Conroy (Lawyer, As an Individual): Thank you.

I have been practising law for some 38 years. I practise in the "Kingston of the west", Abbotsford, surrounded by federal and provincial prisons, so part of my practice is not simply representing people charged with offences; it also involves a considerable amount of post-sentencing work dealing with people in prison, either in relation to prison issues that arise under the auspices of the Correctional Service of Canada or before the National Parole Board in terms of conditional release. So I'm very familiar with how the Corrections and Conditional Release Act operates and what happens to somebody who comes back to Canada, arrives at the reception centres, and is then processed in the same way as somebody who is sent from the courts. I'm happy to answer any questions you might have, because there are provisions in this bill that seem to be inconsistent with that, in the sense of the business about protecting victims or witnesses. Our Correctional Service of Canada is designed to do that, so it's unclear whether the opinion of the minister in some of these provisions is suggesting that the person is going to reoffend when they come into prison in Canada. Or is it after they've gone through the whole process of imprisonment in Canada and have passed through the National Parole Board? Or exactly when? The act doesn't seem to address that.

I have acted and am continuing to act in about 50 cases currently. We have 10 that are filed before the Federal Court. I've acted in all of the cases, I think, except for Grant and DiVito. By the way, I have given the clerk an update of the cases and what has been going on in the law so that you'll have it for your benefit later on in terms of just what has been happening.

The Federal Court has been setting aside the decisions of the minister on a regular basis as being unreasonable. They are, by and large, boilerplate; you can see that they've just plugged in the names and so on in different places. They are, in my submission, inconsistent with the purposes of the act, which is to enable transfers in order to facilitate the rehabilitation and reintegration of the offender by having them come into our system, so that Corrections Canada gets to know who they are and gets to assess who they are, determine their security classification and what programming may be required, and process them through, as I say, a Canadian perspective.

The Corrections and Conditional Release Act requires Corrections Canada to try to place people in close proximity to their families and to their community support in a compatible linguistic and cultural environment, because it has been recognized for many years that having support, having people who can support you and be nearby, is a very important factor in assisting in somebody's reformation and rehabilitation.

The example of Mr. Curtis, who I acted for, is an example that's fairly typical. Mostly, Canadians in the U.S. are there for drug offences, usually as couriers or mules. Usually they've made it to minimum security. As indicated, they're not eligible for a lot of programming in the U.S., so they're simply biding their time, hoping they can come back to Canada and go through the Correctional Service of Canada process and that will assist in their reformation and rehabilitation.

The alternative is that once they reach a certain stage of their sentence in the U.S.—federally, it's at 85%—you get deported back because you're inadmissible in the country in which you've committed the crime. Then you come back, as has been indicated, without a Canadian criminal record. Certainly there's an American criminal record and certainly there are databases now that people can access in order to find foreign criminal records, but it doesn't form part of your Canadian police information computer, which, if the ordinary police officer stops you and is checking his database, is what's going to come up.

The offence has to be an offence in both countries. You have to be a Canadian citizen. The sentence has to be one that can be administered in Canada. We've had some cases where people traffic in certain drugs in the U.S. That's illegal in the U.S., but not in Canada, so those people wouldn't be eligible for extradition or for treaty transfer. You have those two critical factors: citizenship and double criminality are the base.

The situation is such that there are many, many Canadians sitting in this situation, losing their support, losing spouses, and being out of touch with families, and not just in the U.S. I have a number of particularly egregious cases in Japan.

● (1545)

We recently had to file because the minister denied the application of a woman called Ms. Bouseh, who, along with two brothers, was involved in a drug offence going into Japan. Ms. Bouseh was arrested and not sentenced until nine months later. She found out she was pregnant and gave birth to her child while shackled and handcuffed in a prison hospital in Japan. The child was removed from her within a couple of days, and she hasn't seen the child since. The minister took almost three years to decide the question, and he denied her. I have difficulty understanding how that promotes Canadian public safety.

I had a letter just last month from another Canadian in Japan who contests the legality of his conviction and says he was framed. But leaving that aside, he too got nine years. When his wife found out what the current government was doing in relation to treaty transfers, she gave up on him. He has three children—an 11-year-old, a 12-year-old, and a 15-year-old—and he just found out recently, through his mother, that his wife, who had left him, had suddenly died. He has been unable to have any communication to find out what's been happening to the rest of his family. He was sentenced in 2006, so it's been four or five years since he's had any communication with his kids. He was hoping that through this process he'd be able to come back and be reformed and rehabilitated through the Correctional Service of Canada.

I get lots of letters from prisoners throughout the U.S., and throughout the world, in fact, telling me these stories. As I said, I've been to court now on numerous occasions.

This bill seems to be designed to make it easier for the minister to deny transfers, when the purpose of the bill as set out in clause 3 is to assist in the rehabilitation and reintegration of the offender. In the decisions that I see regularly now from various ministers—starting with Stockwell Day, then Peter Van Loan, and now Minister Vic Toews—the bottom line in the reasoning is that they don't believe a transfer would achieve the purpose of the act, which again, even with the amendment to clause 3, is to enhance public safety. These transfers enhance public safety.

If somebody comes back who has been deported in the end and we don't know much about them, that's it. If somebody comes back on a transfer, we get to know them, we get to assess them, we get to find out who they are and what their connections are—all of which the minister's own department, the Correctional Service of Canada, supposedly does. We have case management teams develop correctional plans and present them, if they apply, to the National Parole Board. Most members of the National Parole Board are appointed by this government. You have to convince them you do not pose an undue risk to reoffend before you can then be released.

Many of the treaty transfer prisoners come back past all of their eligibility dates. They still sit—at least in British Columbia—for two to three months in the reception centre before they're classified and placed. Frequently they're first-time offenders with no history of violence, so they qualify for something called accelerated parole. The test for that is whether there are reasonable grounds to believe you're likely to reoffend in a violent manner before warrant expiry.

Many years ago I had the privilege of appearing here at committee when the government decided to make it more difficult for violent offenders and easier for non-violent offenders, because it was recognized—and the research still shows—that the longer you keep a person in prison, usually the worse they get. They don't get better being in prison; they get worse. So accelerated parole was created.

Many of these people are first-time federal offenders and not involved in a violent offence. If they come back to Canada on a transfer, the act recognizes—because of the conversion of the offence and sentence—that they become second-time offenders. So if you're deported back and reoffend, you could still qualify for accelerated parole. If you're transferred back, you would no longer be eligible for accelerated parole if you were to reoffend.

● (1550)

I know the committee has the statistics that were presented to the minister in terms of what happens in relation to people who come back. It would be nice to know what happens to people who are deported. We don't have the statistics of those who come back free and clear. How many of them have reoffended?

We do know that of those who have come back—and have been within two years post their warrant expiry date in Canada—the statistic is 0.6%, which is four people out of some 620 who were transferred back between 1997 and 2007. We also know from the statistics that between 2003 and 2008, with a total of 473 in that period, 16, or 3.4%, reoffended.

So the incidence of recidivism by these people who have come back through the treaty transfer process is very low. That seems to indicate that the existing program has been working quite successfully and ought to be maintained, and fewer people should be denied.

I'm over my time, but I've given in my written solutions—

The Chair: I'll let you go a little bit longer. You're about a minute and a half over already, but if you want to add one concluding comment, please go ahead.

Mr. John Conroy: One last little point then.

You should know that many of these other countries don't take the same approach to imprisonment that we do. In the United States, the Sentencing Reform Act of 1984 abolished rehabilitation as a factor. You don't send people to prison for rehabilitation in the United States.

I've included in the materials I've given you the purposes and principles of sentencing in Canada under the Criminal Code, the purposes and principles of corrections under the Corrections and Conditional Release Act, and the purposes and principles of conditional release, which is part II of the Corrections and Conditional Release Act, to show you what our Canadian system does.

If one looked to Japan, as an example, the conditions of confinement there go back to a Charles Dickens sort of era, in terms of silence and limitations on communications and this sort of a thing. What happens with people if you leave them there and don't bring them back, in trying to affect their rehabilitation, is that they get angry and embittered and you make them more upset and more likely, in my respectful submission, to come back and reoffend.

● (1555)

The Chair: Thank you very much.

We'll move now to Ms. Schellenberg.

Ms. Gaylene Schellenberg (Lawyer, Legislation and Law Reform, Canadian Bar Association): I'm Gaylene Schellenberg, a lawyer with the legislation and law reform department of the Canadian Bar Association.

Thank you for the invitation to present the CBA's views on Bill C-5 today. The CBA is a national association representing over 37,000 lawyers, law students, notaries, and academics.

An important aspect of our mandate is seeking improvement in the law and the administration of justice. It's from that perspective that we appear before you today.

With me is Paul Calarco, member of the CBA's national criminal justice section. The CBA's justice section represents both crown and defence lawyers from every part of the country, and Mr. Calarco practises criminal law in Toronto.

I'll turn it over to him to introduce the substance of our submission and respond to your questions.

Thank you.

The Chair: Mr. Calarco.

Mr. Paul Calarco (Member, National Criminal Justice Section, Canadian Bar Association): Thank you very much.

I certainly would like to thank the committee for allowing the Canadian Bar Association the opportunity to comment on Bill C-5 and the issue of international transfer of offenders.

As Ms. Schellenberg indicated, the CBA section represents the views of both crown and defence lawyers. While I am a practising defence lawyer in Toronto, I have served as a part-time assistant crown attorney and was a standing agent for the Attorney General of Canada for six years. Thus I bring a personal perspective to today's proceedings that encompasses both defence and prosecution experience.

The Bar Association is very supportive of legislation that enhances the safety of Canadians. The object of our criminal law is to ensure a safe and just society through a variety of measures. One of the most important of these is the rehabilitation of the offender. When an offender has been rehabilitated, not only does that person no longer represent a threat to the well-being of our society, but he or she also becomes a contributing member of our country. The national or social interest and the interests of the rehabilitated offender are congruent.

The CBA also recognizes that Canadians travelling abroad are subject to the laws of the country in which they travel. Canada cannot enforce its laws in another state any more than another country could enforce its laws in Canada, but there is more at issue here than simply which laws apply to an individual. What we are dealing with is the fundamental bond between country and individual, and that bond is citizenship. Just as every one of us owes loyalty to Canada, our country owes its loyalty and its protections to its citizens. The legislation being considered fails to recognize this fundamental principle.

In the few minutes I have for this opening statement, I would like to address two important points. First, this legislation is intended to keep Canadians safe. In fact, it would not only fail to do this, but would actually endanger public safety. Second, the bill allows for excessive ministerial discretion, which is contrary to our most basic principles of law.

In dealing with my first point, it is well recognized that the best way to ensure public safety is through the rehabilitation of offenders. This will involve different means in different situations—for example, treatment for an addicted or mentally impaired person or education and training for a disadvantaged person. A person who does not receive rehabilitative assistance during his or her sentence will be in no better position to contribute to our society at the end of sentence than at the beginning of that sentence. The same problems faced initially will be present, if not exacerbated by the period of incarceration in a foreign setting and away from the positive influence of family. The offender will remain more likely, not less likely, to commit offences.

When the offender returns to Canada, as he or she has the right to do as a citizen, nothing will have been done to lessen the likelihood of offending. By contrast, returning a person to Canada during the sentence, when they can be subject to Canadian rehabilitative measures, increases the likelihood of rehabilitation and lessens the possibility of recidivism. It also enhances public safety by allowing Canadian authorities to gradually reintegrate a person into the community, through parole, and allows Canadian authorities to have information about the offender that would not otherwise be available.

Both of these methods contribute to public safety. In the House, when the bill was introduced, it was stated that the government was committed to public safety; however, no explanation as to how this bill contributes to public well-being was given. In our view, this bill would do the opposite and it would fail to protect Canadians.

The second point I wish to make is that the bill allows ministerial opinion to be the determining factor in deciding if a Canadian offender should be returned to Canada. At present, mandatory criteria are set out in the legislation, which the minister must apply. This bill would change that to allow a minister to refuse the transfer of an offender simply based upon his or her own opinion, even if such an opinion was not well founded or was unreasonable.

● (1600)

This is not a standard that can be supported in a country based on the rule of law. This is in reality an attempt to insulate the minister's decisions from review and create a situation of blind submission to ministerial determinations. It is, in our view, quite likely that such a standard would be found to be unconstitutional by our courts. Such a standard will also spawn applications for judicial review using moneys that could be better spent on the rehabilitation of offenders. Rehabilitation will contribute to public safety; endless litigation will not.

If Parliament wishes to address the issue of public safety in a meaningful manner, the Bar Association urges that this bill be reconsidered. It does nothing to enhance public safety; indeed it endangers it.

I would be pleased to answer any questions the members of the committee may have. I thank you for your attention to this opening statement.

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

We will now move to Ms. Des Rosiers.

[*Translation*]

Ms. Nathalie Des Rosiers (General Counsel, Canadian Civil Liberties Association): I want to thank the committee for inviting the Canadian Civil Liberties Association to appear.

I will speak to four main points. The first is the constitutional vulnerability of the bill. The second is that it is not consistent with the international regime currently in effect. The third, which has already been discussed at length, has to do with the fact that the bill conflicts with the very objectives of public safety, because it removes the necessary follow-up provided by the Parole Board of Canada, as well as access to rehabilitation programs, which are equally as necessary. My final point will focus on the dangers of the bill, in its current form.

But first, I want to introduce Lorne Waldman,

[*English*]

who has represented the association in a case where we intervened in the Federal Court.

Mr. Waldman will make the first three points for the association.

Thank you.

The Chair: Thank you, Ms. Des Rosiers.

Mr. Waldman, please.

Mr. Lorne Waldman (Lawyer, Canadian Civil Liberties Association): I'll try to keep my remarks within the time.

I'm surprised, as a lawyer, with a lot of lawyers here, that no one has mentioned section 6 of the charter. I get the honour of being the first, except for my colleague, who mentioned it briefly.

We intervened last month in the Federal Court of Appeal on a case called DiVito. That was one of the cases where a prison transfer had been refused.

There are two different views in the Federal Court right now. In my view, the more cogent view is that section 6 is engaged in the refusal to allow a person to transfer. Simply put, a Canadian has a right to return to Canada, so if he's deported and put at the border, Canada has to take him back. If the Americans say you can go back to Canada to serve your sentence, and there's no longer any impediment to the Canadian citizen returning, except the permission of the minister, the refusal of the minister to allow the Canadian citizen to come back is a prima facie violation of section 6. This point was fully argued in the Federal Court of Appeal last month. I expect there will be a decision quite shortly, and if, as I hope, the court rules that section 6 is prima facie violated by the refusal, then it's my personal opinion that much of this act will be unconstitutional.

If a prisoner has a right, which I believe he does under section 6, to return to Canada, then the only way the minister could properly refuse would be to justify the refusal on exceptional grounds under section 1. The way it is now, the prisoner applies and the prisoner has to satisfy the minister that he is entitled to return to Canada. If section 6 is in fact engaged, and if that's the determination of the Federal Court of Appeal in the decision that I hope comes very soon, then at that point the onus would be on the government, or the minister, presumably, to justify under section 1 that the transfer itself would endanger public safety or the security of Canada—and the minister would have to be able to justify that.

We were in court arguing this with the justices and trying to come up with scenarios. Remember, it doesn't matter how dangerous the person is as a citizen; when he serves his sentence, he comes back, and then we have to use whatever mechanisms we have in the Criminal Code to protect Canadians. The issue is whether he comes back before the sentence is completed to serve his sentence in Canada.

I think it's very hard to conceive of a situation where the actual transfer enhances the risk to public safety or to national security. There may be an exceptional case, so it's possible the court won't strike the provisions down completely, but I'm hopeful that the court will rule that section 6 requires that, except in exceptional cases, the minister would have to allow the Canadian citizen back. If that's the ruling, then I would suggest to you that the bill will have to scrapped and it'll have to go back to the drawing board.

The second point I want to make just very briefly has to do with international law. The transfer of prisoners came about, this whole regime, because there is a recognition internationally that prisoners would be better served if they served their sentences in Canada. It was better for the society of which they're a citizen, because society would have input into their rehabilitation and it was better for the prisoners to be close to their families.

The right of a citizen to return is also recognized under international law. I think there's a very compelling argument that this legislation is not only inconsistent with section 6 of the charter, but it is also inconsistent with our international obligations.

The third point we wanted to make has been made many times much more eloquently by the first speaker, which is that we all want to enhance public safety. I have not heard one argument, in all the times I've been in court and debated this, that convinces me that there's anything in this bill that would enhance public safety.

It seems the bill is designed, as the previous speaker said, to replace a list of mandatory factors that the minister has to consider with a discretion that is inconsistent with the rule of law, and, hopefully, if the Federal Court of Appeal agrees with us, it's inconsistent with section 6 of the charter.

I think Nathalie had one more point she wanted to make.

● (1605)

Ms. Nathalie Des Rosiers: We have been approached by many families who have loved ones not only in the United States but elsewhere. The only point I want to make here is that when you look at some of the provisions that are in the bill.... There are two that I'll mention. One of the criteria is whether the offender has accepted responsibility for the offence for which they have been convicted, and a second is whether the offender has cooperated or undertaken to cooperate with law enforcement.

In the abstract you might say that's great, that we really want to know this. But the danger here is that this provision is going to be used to assess the patriation of people who come not only from the United States, but from all the other countries that are listed. As you know, there are countries all over the world in which at times the vigorous assessment of your presumption of innocence.... I want you to imagine that it's possible out there in the world that there would be some wrongful convictions. If somebody is asserting his or her innocence, then the minister could consider that as being an inappropriate way, for example, of cooperating, of recognizing the harm.

This is dangerous, because we recognize that elsewhere in the world at times this has been used to oblige people to plead guilty, and we have reports of pressure being made in that regard. It is similar with cooperating with law enforcement in cases in which there is torture or bad treatment or in which people are being discriminated against because they are foreigners, or because they are gay, lesbian, and so on. It is a dangerous thing to ask them to cooperate with law enforcement when they can be treated badly and beaten up in prison because they have done so.

So in a way, I think we're concerned that in some of the criteria we may endanger the lives of some people who are incarcerated in a range of countries, and that range of countries will continue to expand and includes countries where I think the rule of law is well observed and other places where people might have concerns about the way it's been applied.

Our concern is that we think it's premature for this bill to be looked at, since it is in front of the court right now. We consider that it does not meet the objective that it sought to enforce and simply that it may indeed be dangerous in some of the criteria it uses.

[*Translation*]

That is the end of our presentation. Thank you very much.

● (1610)

[*English*]

The Chair: Thank you very much, Ms. Des Rosiers.

I will move to the Liberal Party. We'll go to Mr. Holland for seven minutes, please.

Mr. Mark Holland (Ajax—Pickering, Lib.): Thank you, Mr. Chair.

Thank you very much to the witnesses for appearing today.

I started my comments, the first time this bill was discussed by committee, by saying that this is a bad bill. I think I was too kind. What I'd like to do, if I could, with the witnesses is go through this.

I asked the witnesses who came from the department to explain to me how this wasn't a bad bill and how it improved public safety. They couldn't make the case—and I don't think any of you were trying to make the case, but you certainly didn't—that it enhanced public safety. In fact, what we heard was quite the opposite.

Let me start on the issue of recidivism, the rate at which individuals are reoffending. There was an ATIP recently, and I think it was quoted by Mr. Conroy in his comments, stating that over the period of time that was looked at—and I'm just looking at the ATIP now—from 2003 to 2008 the reoffending rate was 3.4% for those who participated in the transfer program. Given the fact that this is a remarkably low rate of recidivism, could you not directly make the argument that for somebody, for example, who is serving their time in the United States, where the rate of recidivism is much higher, we are not only in an anecdotal way but in a concrete way that you can almost definitively prove making a more dangerous situation by not bringing these people home, when you look at comparative rates of recidivism?

I don't know whether somebody wants to respond to that.

Mr. Paul Calarco: I think that point is quite clear. As Mr. Holland mentioned, there are different rates of recidivism in our two countries. As Mr. Conroy mentioned earlier, in the Sentencing Reform Act of 1984 in the United States, rehabilitation was removed as a principle of sentencing there. Also, Canadians would not be eligible for rehabilitative programs if serving time in the United States.

Of course, it varies from country to country, but there is very little impetus for foreign states to spend rehabilitative resources on Canadians, since Canadians will be deported back to Canada when they've served their sentence or are otherwise eligible for release in the other country. Then that person becomes Canada's problem, with no rehabilitation at all. This creates a situation wherein, as I was mentioning in my presentation earlier, all the problems that existed before the offence was committed and before sentencing are even worsened now.

As Mr. Conroy mentioned, prisons are not good at rehabilitating people. People become worse the longer they spend there and the fewer programs they have. So it's very important to have strong rehabilitative programs if we are going to have people return to Canada and become productive members of our society, which is a vital goal.

Mr. Mark Holland: We heard from departmental officials that the bill would scope the reasons by which somebody could reject a claim for a transfer. The concern we raised was that the minister could, for whatever reason he wanted, reject the transfer. The department said, “Oh, no, this isn't the case”, that it would be scoped, and the minister could only act within certain boundaries. Yet as I read the legislation —and I'd be interested in your take on it—there's a section that says “and any other factor” that the minister wants to take into consideration.

Speaking to the panel assembled here, is there anybody who would share the department's belief that the minister would be so constrained, or would you share my concern that in fact no such constraint exists? In fact, even in the absence of this bill, the government is already seeming to reject most claims for transfers.

● (1615)

Mr. Lorne Waldman: As an administrative lawyer, maybe I can try to answer that question.

The minister's exercise of discretion is determined by the legislation. Under the current legislation, he must take into account certain factors; he has to. If he doesn't, then the decision can be set aside.

The purpose of this legislation is to replace the obligation to take into account these factors with a list of factors that he can take into account, as long as he.... It doesn't oblige him to take any of them into account and it allows him to take into account any other factors that he wishes. Obviously, the purpose is to give the minister much broader discretion and to try to avoid a lot of the successful challenges that have been brought—by Mr. Conroy, mostly—to the refusal to transfer prisoners.

Having said that, he would still be subject to judicial review, and if he were capricious.... I mean, the exercise of discretion would have to be based upon factors that were in some way relevant to his overall decision, so if he took into account the fact that the prisoner's eyes were blue or something that was completely irrelevant, the court would still likely intervene. This is all subject to my charter issue, but it's going to dramatically expand the discretions, so it's going to be extremely difficult.

Mr. Mark Holland: I guess my point is that if you have already the government rejecting so many of these transfer agreements, and if you see Bill C-5 pass, given the very broad definition by which the minister could then reject it, could the minister not in any and every single case find some excuse, in that very broad context, to reject an application?

Mr. Lorne Waldman: Absolutely.

Mr. Mark Holland: Okay.

I don't know whether anybody in the panel feels qualified to answer this, but as well as the impact of relations with the United States—we know the United States has approved many of these transfers and that we are now saying no, and we know the state department has reacted very negatively to this—is there anybody on the panel, and I know most of you are coming at this from a legal perspective, who would like to comment on the impact on relations with the United States of pursuing this kind of course and what potential impact it could have?

Mr. John Conroy: I understand that the U.S. has complained about Canada's failure to approve people under this treaty, this agreement that we entered into with them some 30 years ago. If you're going to do this, why don't you just abolish the act? Why don't you repeal the International Transfer of Offenders Act, if that's what your intention really is, and not play these games, hanging this carrot out in front of them and saying, "Well, you can always apply for transfer"? They're told this often at the time of sentencing.

The U.S. approves them now on a regular basis, and most of these people are in minimum security and have kept clear conduct, etc. The U.S. is saying, we made sure they weren't in a gang before we put them in this prison. Now, what is Canada doing? Why isn't Canada accepting them back? That was the whole purpose of our agreement.

We have an act because we have to implement treaties by passing laws to do so. The U.S. doesn't; the treaties are self-executing.

Some people have said this is going to be my retirement bill, because, with this type of amendment, I can see myself in Federal Court on a regular basis on judicial review, both on section 6 and section 7 charter grounds.

The Chair: Thank you, Mr. Conroy.

Madame Mourani.

[*Translation*]

Mrs. Maria Mourani (Ahuntsic, BQ): Thank you, Mr. Chair.

I want to thank you all for being here today to give us insight into this bill.

What I understand, after listening to everyone, especially you, Mr. Conroy, is that the current legislation works. That is what I used to think as well, before this government was elected, of course. Since it has been in power, I have found that there are fewer and fewer transfers. In fact, my office receives requests from prisoners. We call the department, and we get no response, which is another matter.

Instead of calling this bill An Act to amend the International Transfer of Offenders Act, I would have called it the Omar Khadr Act. It is my sense that this bill was drafted in such a way as to make the process so arbitrary that the government would have the discretion to deny applications from people like Omar Khadr. Am I wrong?

Do you think the government is trying to do away with anything involving rehabilitation and make sure that, from the moment someone is arrested for a crime in another country, they have to stay there?

● (1620)

[*English*]

Mr. John Conroy: It's a mystery to me, because in order to override a constitutional right such as the section 6 right to enter, or your section 7 right to have your liberty affected in accordance with the principles of fundamental justice, it usually requires some pressing and substantial government objective. As we've said here, public safety is not really put forward or enhanced by this process.

The act existed long before the Khadr situation. It may be that this is what's behind these amendments. I don't know. Mr. Khadr is a good example. If you take somebody who is accused...well, he has pled guilty to murder, but in the context of terrorism. Paragraph 10 (2)(a) of the act talks about, currently, whether the offender will commit a terrorist or criminal organization offence after transfer. So you take somebody from a terrorist situation and you ask yourself, where's the safest place for him to be? Is it in some foreign country where he may suddenly be deported back, or is it in one of our country's jails, one of our prisons, where we can get to know more about him and control his imprisonment and his release back into the community as a Canadian citizen?

[*Translation*]

Mrs. Maria Mourani: Thank you.

It is clear in reading this bill that it leaves a lot of room for arbitrary decisions. It contains wording such as "the minister may consider" and "in the minister's opinion". Do you think this kind of discretion and this kind of legislation could lead to corruption? That question is for all of you.

The best example of that would be a minister granting the transfer request of an offender who was associated with someone who would then provide campaign funding.

That kind of discretion could lead to corruption and contributions to campaign coffers, could it not?

Ms. Des Rosiers, I saw you nodding your head.

Ms. Nathalie Des Rosiers: Whenever you have a lot of room for arbitrary decisions, there is always the concern that the discretionary power could be used improperly and especially that the public could have that perception.

So a family who has lost hope could think that making a financial contribution to a political party would help an application along. We do not want that to happen.

There is another potential concern with this bill, which is that it could be used as a model in other countries. If Canada passes this kind of bill, in other words, one that affects an international treaty, it could be looked upon as an exportable model abroad.

This is dangerous territory because it will obviously lead to the same kind of unlimited discretionary power being favoured in other contexts, and could very well be dangerous in this one.

Mrs. Maria Mourani: Mr. Calarco, do you think this type of discretion could lead to corruption, quite simply?

When you give someone the discretion to make arbitrary decisions and when campaign funding is at play, people like Vito Rizzuto might make it home faster than, say, Mr. Tremblay, who does not have a dime to his name.

[*English*]

Mr. Paul Calarco: One would hope that any minister of the crown would act honourably, but one has to be aware that excessive ministerial discretion is fundamentally at odds with the rule of law. Every minister requires some discretion in carrying out the functions of his or her office. There is no doubt about that. But this goes far beyond what is necessary to carry out the office. Unfortunately, in Canadian history, we do have cases of ministers acting quite improperly and having to be corrected by the courts. The most extreme examples we see...for example, Roncarelli v. Duplessis, so many years ago, but they remain beacons in Canadian history of what we must guard against.

[*Translation*]

Mrs. Maria Mourani: Thank you.

Yes, Mr. Conroy?

[*English*]

Mr. John Conroy: I'll just add that the minimum requirement under section 7 of the charter is something called "procedural fairness", where you know you have to tell the person the case against them so they have a fair opportunity to respond.

In this section it says whatever "the Minister considers relevant". The person who's going to be affected by that decision will have to be told ahead of time what factors the minister is considering. Otherwise it's going to result in an unfair decision, the Federal Court will set it aside and quash the minister's decision, and we'll have to do it all over again.

● (1625)

[*Translation*]

Mrs. Maria Mourani: My question is for all of you. The discretion to act arbitrarily could lead to biased decisions and value judgments, could it not?

For example, a homosexual person could be in a certain country, or someone might be in a country where abortion is illegal. Those are crimes that go against the values of certain political parties in power.

When you have arbitrary decision making, you can end up with value judgments and biased determinations that are not necessarily based on fact, can you not?

[*English*]

The Chair: Madam Mourani, unfortunately, your time is up. That is a question you may be able to incorporate in some of the other answers.

[*Translation*]

Mrs. Maria Mourani: Can I have an answer?

[*English*]

The Chair: Mr. Davies.

Mr. Don Davies: Thank you, Mr. Chairman.

I'd like to thank all of you for appearing and injecting what I think is some sanity, rationality, and logic into a discussion that until now has been highly politicized. We've beaten to death the arbitrariness that is unmistakable in this act, so I won't belabour it.

But I do want to point out and get your opinion on the following. Opinions can be a little ironic here.

Right now under the act there are four criteria that are mandatory. The proposed act would not only change the mandatory directive to one that is completely directory—"shall" to "may"—but in five of the criteria that are added it injects the words "in the Minister's opinion". This isn't just a question of mandatory directory that he or she may take into account; it actually imports into the act a test of "in the Minister's opinion".

To those of you who have spent time in the appellate courts and doing appeals, particularly in administrative law, I wonder if you could tell us a little bit about what concerns you may have about a test, particularly on appeals, and how you'd appeal a test like that.

Mr. Lorne Waldman: When you introduce the minister's opinion into this it becomes a much more discretionary decision and far more difficult to review. That's the first point.

Second, when we were in the court of appeal last month and looked at the criteria in the current legislation, it was argued—and it's my view—that of the criteria that exist now, most are contrary to section 6. Remember, if the issue is whether you can justify refusing the transfer because in some way it will result in a danger to national security or public safety, the criteria that the minister considers have to be directed to answering that question. Most of these criteria are completely irrelevant to any assessment as to whether the transfer will enhance public safety.

The first one in the current legislation—not the proposed bill—says the transfer will enhance the risk to public safety. Then it goes on to ask a series of other questions that are completely irrelevant, in my view. All of these criteria violate section 6.

Mr. Don Davies: The first is "whether, in the Minister's opinion, the offender's return to Canada will constitute a threat to the security of Canada". The second is "whether, in the Minister's opinion, the offender's return to Canada will endanger public safety". So if the minister says, "In my opinion, that person will endanger", as long as it's not irrational or based on having blue eyes, how would you appeal that?

Mr. Lorne Waldman: It's going to be much more difficult to appeal if section 6 isn't engaged. If it is, the minister will have to prove...and it'll be on the minister to establish that.

Mr. Don Davies: I realize that, if there's a charter right.

I see Mr. Conroy wants to comment, but I want to move to.... One of the reasons I'm concerned about this is not just theory. The Dwayne Grant case was a decision of then Minister Van Loan. The Federal Court said the decision seemed "inconsistent and arbitrary, and therefore it lacks transparency". Mr. Van Loan rejected the unanimous advice of senior officials who recommended transfer.

In the Getkate case—one of yours, Mr. Conroy—then Minister Day, a different minister of this government, found that the applicant represented a threat to national security, even though Canadian prison officials had advised him there was not a shred of evidence of that.

I'm wondering how you feel about there being concrete examples of cases where ministers have already started to try to make decisions based on an absence of evidence or an absence of judicial process.

● (1630)

Mr. John Conroy: I haven't had a case in which the evidence has supported the denial of a transfer. All of the investigations by the Correctional Service of Canada have usually supported the transfer. They have said that the intelligence information determines that this person is not a threat to the security of Canada or is not a terrorist or will not commit a criminal organization offence. Sometimes they say, well, there's some information that there may be a link to a criminal organization, if they're involved in a drug trafficking case, but often they go on to then say there's nothing to indicate that this person was anything more than a courier or a mule.

So usually the evidence doesn't support the minister's opinion, and that has been the basis for the courts finding the decisions to be unreasonable and setting them aside—because many of the courts have decided to duck the section 6 issue, hoping it gets resolved in the court of appeal. So reasonableness is going to be the test, whether these amendments come in or not, and section 1 of the charter, which I have set out in the materials I've handed in, shows the various criteria.

That's going to be the main issue if section 6 is engaged. We do have the Van Vlymen case, in which the Federal Court found that section 6 was engaged and found that the government had wilfully violated his section 6 and section 7 rights in bad faith for a period of nine and a quarter years.

One of the major problems ongoing at the moment is the length of the delay between the time the file reaches the minister's office and a decision is made. We have cases now that are up to three years in the minister's office.

Mr. Don Davies: Thank you.

Madame Des Rosiers, you mentioned I think a very important point, whereby the proposed act would actually enshrine one of the criteria as being whether the offender has accepted responsibility for the offence for which they have been convicted. I'm thinking of Donald Marshall, David Milgaard, Guy Paul Morin, and Steven Truscott, famous Canadian wrongfully convicted people. Under this legislation, had those people been convicted of those offences in a foreign country, they would never have been able to be transferred, simply because they stuck to their claim of being innocent, as they in fact turned out to be. Is that the kind of fear you have?

Ms. Nathalie Des Rosiers: That was the fear. The fear is that when you impose a duty to cooperate with law enforcement where you have to recognize the harm you've caused and so on, it does prejudice people who are wrongfully convicted. They're in a catch-22. If they say they're innocent, which they are, then they are treated worse than if they plead guilty. That's a danger. We shouldn't have that, just because it creates some incentive that we don't want to create. It's not necessary to have it here, and, really, it may have some dangerous consequences for some people in jails, not only in the United States but elsewhere in the world. As you know, the list of countries is quite wide.

The Chair: Thank you very much, Ms. Des Rosiers.

We'll now move to the government side.

Mr. McColeman, please.

Mr. Phil McColeman (Brant, CPC): Thanks to all of you, first of all, for being here and for bringing your expertise. Obviously, it's very appreciated. There's a lot of depth in what you've presented.

Leading into today's session we were provided with an outline from our Library of Parliament. I want to refer to just one section of it, if I might. It's what they prepared in terms of giving us a briefing coming into this. I will quote this for you:

> A total of 1,351 Canadian offenders were transferred to Canada between 1978 and 2007. Of these, 1,069 (79%) were transferred from the United States. The other countries from which the most Canadians were repatriated were Mexico (59 offenders, or 4.4% of transfers), the United Kingdom (33 offenders, or 2.4% of transfers)....

There were 12 from Peru, Thailand had 17, Venezuela had 17, Cuba had 16, and Costa Rica had 14. Then, says the report, “Fewer than 10 offenders were repatriated from any other country.” That's the end of the quote from the report from the Library of Parliament.

So clearly, the vast majority of offenders we're dealing with here offend in the United States. In comparison, a total of 124 offenders were transferred out of Canada between 1978 and 2007. Of these, 106 offenders, or 85.5%, were transferred to the United States.

I think it's important to note that there were 106 sent to the United States and 1,069 brought back from the U.S. over the same period. The International Transfer of Offenders Act, as it currently exists, requires the minister to consider whether the foreign country's prison system poses a threat to “the offender's security” and “human rights”. I guess I would ask each one of you, as lawyers involved—maybe Mr. Conroy can start—if that's correct. Is that taken into consideration?

● (1635)

Mr. John Conroy: No. Usually what I see in the material is that they say, “Oh, it's the U.S. The U.S. is a first world country and therefore its prison system wouldn't threaten the security of people.” That, of course, is completely false. They just closed down California City because of all the violence. We've got a place called Beaumont, in Texas, that they call “Bloody Beaumont” because there's so much violence and gang warfare going on.

The security of Canadians in U.S. prisons is not taken into account; it's assumed that the security is okay. And if you look into some of the things that go on in some of the other prisons, such as in Japan and stuff like that, you'll find it's even worse.

But remember, the purpose of the act is to facilitate reformation and rehabilitation. It doesn't surprise me there are not that many Americans who are going back to the States, because that's not one of the purposes of continued imprisonment in the United States; it wouldn't meet the purposes of the act. Whereas coming back to Canada...coming back from a country that doesn't rehabilitate to a country that does meets the purposes of the act.

Mr. Phil McColeman: My sense of the new proposed act, the one we're studying, is that it would strike a different balance in terms of the determinations. You've obviously presented testimony today to say that's not appropriate.

In fact, I believe Mr. Waldman would suggest that the current act is not appropriate because it violates the charter of human rights. Is that correct?

Mr. Lorne Waldman: That's correct. Most of the criteria in section 10 violates section 6, in my opinion.

Mr. Phil McColeman: What you're saying, just so I can clearly understand it—I'm not a lawyer—is that the current act is not good because it violates the charter rights of people who offend outside of the country.

Mr. Lorne Waldman: Canadian citizens have a right to enter into Canada. If that right is denied to them, that's a prima facie violation of section 6. Any provision in the legislation that takes into account factors that are not connected to whether or not the transfer would endanger public safety or national security, in my view, is unconstitutional. That applies to the current act and to the proposed bill.

Mr. Phil McColeman: So your opinion, sir, if I'm to understand this in a more common person's terms, is that no matter what the offence in the other country, no matter how grievous, how horrific, etc., that person who has been convicted has a right under the charter to return to Canada upon application. Is that correct?

Mr. Lorne Waldman: The first step in every case would be for the foreign state to agree to send the person back. There are instances where states refuse to send people back, and if that's the case, then section 6 is not engaged. It's only engaged at the point where the Canadian citizen has a right to come back to Canada.

Remember, Canada routinely deports people who are convicted of very serious crimes. I've seen people convicted of murder who are deported after four or five years. They get an early parole for deportation purposes and they are sent back to other countries. Those countries have to take back people who are convicted of the most serious crimes in Canada because they are citizens of that country. Under international law, you have to take back a person who is a citizen of your country.

With regard to the Canadian who is convicted of a heinous crime, in whatever other country, once the foreign state decides to send him back, we have to take him. What we're saying is that it's better to take him back while he's still serving his sentence, so we can have some control over him, rather than wait until his sentence is over and have him dropped at our border.

I think that's the point we're making.

● (1640)

Mr. John Conroy: We need to have the act, though, or something, simply to determine, first of all, whether the person is a Canadian citizen, so we don't have non-Canadian citizens trying to come to Canada. Secondly, we have to make sure it's an offence in both countries. Obviously if somebody is given the death penalty in the United States, we can't administer that sentence in Canada.

The sentence and the offence, the double criminality principle, which is in international law—we have to at least meet those, so the person isn't coming to the border saying “I have my right to enter”, but they're asking to come back to serve their sentence. We have to have some control because they're coming into our correctional facilities. There has to be some communication, and so on, in relation to that in order to facilitate the transfer.

The Chair: Thank you, Mr. Conroy.

We'll now move to Mr. Kania.

Mr. Andrew Kania (Brampton West, Lib.): Thank you, Mr. Chair.

Thank you all for coming.

Being the fifth person to ask questions, obviously some of this will be repetitive, because the flaws in the bill are kind of obvious.

Mr. Waldman, I'd like to start with you by saying, as a fellow lawyer, that I would like to mention section 6. It is quite clear that there is a charter right to return to Canada. The way this really applies is that at the conclusion of a sentence, the Canadian citizen has the constitutional right to return to Canada.

I'm looking at the title of this proposed legislation: “Keeping Canadians Safe”. I frankly challenge any of you to think of how this legislation would actually help, as I say, in keeping Canadians safe. I don't know if you'd be able to think of something. This person, the convict, is going to come back to Canada, assuming the person is released from jail. Especially when you have foreign jurisdictions, lack of rehabilitation, or the absence of even criteria for that, how does it make any logical sense to any of you that if a prisoner is going to come back to Canada at the conclusion of a sentence anyway, we shouldn't have some control over the rehabilitation here in Canada, so that when the person is released into the general population, he or she will hopefully have improved and hopefully Canadians will then be safer?

How does this make any sense?

Mrs. Charis Lynn Williams: I can tell you, in the case of my brother, that it is going to happen. John took it to Federal Court. The current minister was given 45 days to reconsider. It was then approved after reconsideration. On December 15, my brother will cross the Canadian border and be brought into Canadian custody. He will be processed. As a first-time, non-violent offender, he'll be in what I understand is a statutory release program. He has received zero rehabilitation, and he will return to Canada and be released into the population without having anything resembling rehabilitation.

Mr. John Conroy: You should know that the statutory release for the transferred offender is different from what it is for a Canadian offender. Generally, if a person is sentenced in Canada—let's take nine years as a sentence—at three years he or she would be eligible for full parole. It would be six months before that for day parole, unless the person is a non-violent offender, which is at one-sixth. The next step is at two-thirds, which is something called statutory release. There is provision to keep you in until warrant expiry.

A transferred offender, though, may be past that two-thirds. The person will still remain in custody, because statutory release for a transferred offender under the act is two-thirds of what is left, so it only kicks in when he or she arrives back. It's delayed statutory release.

The Chair: Thank you.

Mr. Waldman, did I see you trying to get in on this one earlier?

Mr. Lorne Waldman: I'll cede to Mr. Calarco.

Mr. Paul Calarco: I wanted to follow up on one point of your question, Mr. Kania.

One of the reasons this does not protect Canadians is that it specifically does not provide protection for victims of crime. At present, as has been stated a number of times, the offender will come back, and there will be no controls over that person. If a person comes back when there is a sentence still to be served, not only is he or she subject to Canadian programs for rehabilitation, but the Canadian authorities will have much more information about that person and will be able to determine whether there should be post-sentence action taken. For example, they can use subsections 810(1) and 810(2) of the Criminal Code to ensure that there are peace bonds against the person and that appropriate police authorities in whatever jurisdiction the person is going to settle are notified that this person is going to be released so that they can watch him or her. That simply is not provided for in this legislation.

● (1645)

Mr. Andrew Kania: Quickly, on point number one, in terms of a public safety analysis, I'd like to point out that we're talking about persons being taken, for example, from the United States, a foreign jurisdiction, brought back to Canada, and put back in jail. They are not taken from a jail and released into the general population. So when it comes to the public safety issue, frankly, I have a difficult time understanding that.

Second, Mr. Conroy, were you involved in this Getkate case?

Mr. John Conroy: Yes, I was counselling that.

Mr. Andrew Kania: I'm going to look to parts of the reasoning here, but in essence, the minister made a decision, according to the judge, "contrary to the evidence and to the assessment and recommendations by his own department".

I am looking at the amendment here that would change it from "shall" to "may" and would put the discretionary clause for the minister—"any other factors that the Minister considers relevant"—at the end. For me, what I see is the government trying to get around having to follow the law and trying to get around judges who have told them that they are doing the wrong thing. Is that essentially your assessment?

Mr. John Conroy: Yes, and you use—

The Chair: We're out of time on that question, sorry.

We'll move to Mr. Lobb, please.

Mr. Ben Lobb (Huron—Bruce, CPC): Thank you, Mr. Chair.

Thanks to the guests for coming.

Mr. Conroy, I think in your opening remarks you talked about a pile of these files sitting on the minister's desk. Was that what you mentioned or...?

Mr. John Conroy: The delay between the time the file has reached the minister's office and then a decision was made in some cases has taken two to three years. There was a huge backlog. I understand the current minister has tried to catch up on the backlog. The people at International Transfers were muzzled and prevented from telling us when the file left the minister's office, I suspect because the minister was concerned and maybe a bit embarrassed, I hope, about how long it was taking to make essentially a simple decision.

Mr. Ben Lobb: So you'd be well satisfied if it were all caught up, which is the case today?

Mr. John Conroy: Well, it isn't all caught up. I have 50 cases in my office and I have at least 15 that are still in the process.

Mr. Ben Lobb: But they may not be sitting on his desk; they may be somewhere else.

Mr. John Conroy: Yes. If you're telling me the minister is caught up, I'm very pleased to hear that. I have at least 10 new cases filed, and I'm sure some of them came from those decisions.

Mr. Ben Lobb: Okay. Good.

Mr. Calarco, in the document you provided, I could be wrong, but the only part I thought I saw where a victim came up was at the very end, when you were answering some of the proposals that would currently be within the minister's mandate.

From a victim's perspective, do you think it's fair that we're more concerned about the offender's rehabilitation than we are about what a victim may say? I know you may go back to section 6 and use that, but do you think the victim should have a little bit of say in this matter?

Mr. Paul Calarco: Well, sir, if I could refer you, in the English version, to page 5 of our submission, specifically in the middle paragraph, it says, "Where an offender is transferred back to Canada to serve a sentence, authorities will also know whether that person requires continued intervention or monitoring by the state after sentence expiry"; that paragraph deals with victims. Note 14 specifically refers to peace bonds. We also put in the submission that victims will be able to have some input into the situation.

For example, where a person is under the parole authorities or about to be considered by them, the parole authorities can contact the victim of the offence, which would be especially important in a domestic situation, and the victim of the offence could say he wanted reintegration with that person or that he wanted nothing to do with that person, that he felt he was still in danger from that person and required continued protection. That is certainly part of our presentation to you, and it is very much a part of the Bar Association's position.

● (1650)

Mr. John Conroy: What if the victim is in the other country where the offence occurred?

Mr. Ben Lobb: Not necessarily. Theoretically they could be in two countries, right?

Mr. John Conroy: But if these offences are committed in another country, do we have a case in which the victim is in Canada? I don't know of one. The drug offences, I suppose—

Mr. Ben Lobb: I can assure you it's certainly plausible that there could be victims in both countries, and it wouldn't take a whole lot of common sense to see that coming in straightforwardly. Pedophiles would be a great example.

I was talking to a victim of crime today and I asked her what her thoughts were on this bill. I mentioned the fact that the safety of any person in Canada who is a victim would be taken into consideration, the safety of any member of the offender's family, the case of an offender who has been convicted of an offence against the family member, the safety of a child, and she thought those were all great suggestions, and that the minister has the ability to determine whether or not a convicted felon in another country has the ability to come back to this country based on some of these points. She thought that was a great piece to have in there, so the minister could have a chance to stand up to the victims.

Is there anything, Mr. Calarco, that you would have against the minister standing up for the victims?

Mr. Paul Calarco: Obviously I wasn't there in your conversation with the person, but what every victim would have to also know is that the offender has the constitutional right to come back. Would you rather have this person come back to Canada, and whatever they have done to you prior to offending in the other state...would you rather have them monitored by Canadian authorities? Would you rather have police forces know where they are, and would you rather have them subject to parole and court orders, or would you like them to come back and have no restrictions on them? That is the question you have to answer.

The Chair: We will now go to the Bloc.

Madam Mourani, five minutes, please.

[*Translation*]

Mrs. Maria Mourani: Thank you, Mr. Chair. I want to continue with the case of pedophiles and give an example that could very well be real.

Consider a pedophile who has never been caught in Canada and who ends up being caught for the first time in Thailand, the U.S. or some other country. If we do not bring that pedophile back, then he will re-enter Canada and Canadian authorities will not have any information on him. So he could continue assaulting children in Canada. Is that correct?

[*English*]

Mr. John Conroy: We might have a little bit of information, but we have no control over the person. What comes through to me is that the government seems to lack faith in the ability of the Correctional Service of Canada and the National Parole Board to protect victims and to protect other Canadian citizens. That's what their function is, and that's why we say that bringing them back, getting to know who they are, finding out who they are, determining their proclivities, having them get into sex offender treatment programs, which aren't offered if they're busted in Thailand or in the United States, surely that protects victims—not simply dumping somebody back with no restrictions.

[*Translation*]

Mrs. Maria Mourani: Unless I am mistaken, you said earlier that these people would re-enter the country and we would not know anything more about them. We would have very little information.

What kind of information would we have on them if we did not bring them back?

[*English*]

Mr. John Conroy: It would be an initiative on the part of the government, presumably, to get in touch with the other country and find out whatever information they have, but certainly they're not going to show up at the border with all kinds of information. They'll be a Canadian citizen who can come back. And there's an international record, so you could go to the National Crime Intelligence...and see perhaps that there's the foreign record. If a police officer, in his vehicle, pulls up a CPIC check on somebody, it's not going to come up that the person was convicted as a pedophile in Thailand, for example.

[*Translation*]

Mrs. Maria Mourani: That would not come up? Okay. So that means we would lose the opportunity to obtain information on the person by not doing the transfer.

You mentioned the government taking the initiative to obtain information, but I have to say that I do not have much faith in the government's initiative. And that means we would not be very well off in terms of information.

[*English*]

Mr. John Conroy: Well, they should have a bill that maybe requires them to go and gather information or something, but that's not this bill. This bill precludes one from getting the information.

[*Translation*]

Mrs. Maria Mourani: Now this is for all of you. Do you think this bill could be amended? Could it be improved, or should it just be thrown out altogether? Do we have no other choice but to vote against it? Can we salvage anything from it? I have my doubts, but perhaps we can; I want to hear your thoughts on it.

Mr. Waldman?

● (1655)

[*English*]

Mr. Lorne Waldman: I don't think this bill is amendable. I think it's a complete violation of section 6 and it can't be amended. Leaving aside section 6, I think the current bill already gives the minister too much discretion, and all we would do here is give him more.

Mr. Paul Calarco: On Mr. Waldman's constitutional point, simply on legislation drafting principles, I don't see how you can possibly amend this bill sufficiently to make it conform to our international obligations or to the Constitution.

[*Translation*]

Mrs. Maria Mourani: I have a question about the death penalty. As you know, we do not have the death penalty in Canada, but they do in the U.S., not everywhere, but in some states.

From your experience, would you say it is easy to transfer these prisoners? Is it possible? I think something needs to change—the death penalty needs to be commuted to a life sentence or something of that nature.

[*English*]

Mr. John Conroy: They're not eligible.

[*Translation*]

Mrs. Maria Mourani: Not eligible? So if they are not eligible, you are basically saying that Canada contracts out the death penalty.

[*English*]

Mr. John Conroy: I'm assuming that if they're sentenced to death, they're going to remain in that country until that sentence is carried forward. Canada can't administer that sentence, so they're not eligible to come back under this act.

[*Translation*]

Mrs. Maria Mourani: So those people will be executed if they are sentenced to death.

[*English*]

Mr. John Conroy: Unless the other country commutes the sentence, that's right.

[*Translation*]

Mrs. Maria Mourani: So we are contracting out the death penalty to other countries?

[*English*]

Mr. John Conroy: Well, if the citizen commits the offence in the other country, they're subject to the laws of that country. In the death penalty situation, the act simply doesn't apply.

The Chair: Thank you very much.

We'll go to Mr. Rathgeber, please.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Following up on that point, so that I'm certain and Ms. Mourani is certain about this point—and it's a very important point—unless the foreign jurisdiction consents to the transfer, that person is not even eligible to apply. Is that not correct?

Mr. John Conroy: Well, no. They're eligible to apply, but if the consent isn't given, they're not coming. They will not go forward.

Mr. Brent Rathgeber: So a person on death row in any of the U. S. jurisdictions that has capital punishment would not be eligible to transfer.

Mr. John Conroy: Well, they're not eligible because the sentence can't be administered. Remember the dual criminality principle in international law: the offence and sentence have to be an offence and sentence in Canada, because we convert them to Canadian sentences.

Mr. Brent Rathgeber: I'm clear on that. I wasn't quite sure Ms. Mourani was.

Mr. Waldman, you indicated that you believed these proposed amendments would violate section 6 of the charter.

Mr. Lorne Waldman: Yes.

Mr. Brent Rathgeber: But have you not already stated, and have you not argued recently before the Federal Court, that you believe the existing act is contrary to section 6 of the charter?

Mr. Lorne Waldman: That's right. Last month in the Federal Court of Appeal we made the argument that certain parts of the existing act violate section 6 because they require the minister to take into account factors that are irrelevant to whether or not the transfer would endanger public order or national security.

Mr. Brent Rathgeber: So you believe the whole mechanism is unconstitutional.

Mr. Lorne Waldman: No. No, no, no. On the contrary, I believe the mechanism is vital, it's constitutional, but I believe the scope of the minister's discretion to refuse is very limited. In other words, the act is necessary. It provides a mechanism for Canadians to exercise their right to return, but the only ground upon which the minister should be able to refuse a transfer under the act is if the actual transfer endangers public order or national security.

Mr. Brent Rathgeber: Okay.

Mr. Calarco, I want to talk to you about discretion. The first line of part IV of your brief states, “Bill C-5 would give the Minister of Public Safety broad and unconstrained power to deny Canadian offenders return to their home country to serve their sentences.” You believe that to be true, I take it.

Mr. Paul Calarco: Yes, sir.

Mr. Brent Rathgeber: But is it not also true that the proposed amendments also give the minister unfettered discretion to allow offenders to return home when a minister is so disposed?

Mr. Paul Calarco: I hardly think that's the issue.

The situation is that under the present legislation the minister can look at those criteria and bring the offender home. What this does is it permits the minister almost unreviewable discretion, and when we see how this has been applied—Mr. Conroy and Mr. Waldman made some mention of this—you have more and more applications being denied. What is necessary in any legislation, in our view, is certainty as to what criteria are going to be applied.

● (1700)

Mr. Brent Rathgeber: But you'll agree with me that there are criteria in the proposed amendments that actually assist offenders who are trying to repatriate. I'm talking about paragraph (g), “the offender's health”; I'm talking about paragraph (k), “whether the offender has cooperated, or has undertaken to cooperate, with a law enforcement agency”. Would you not agree with me that those factors actually assist an applicant in repatriating back to Canada?

Mr. Paul Calarco: No, sir, I do not.

First of all, the offender's health is not a determining factor. It doesn't matter if you're ill or robust...as to whether or not you should be able to return to your own country to serve sentence.

You mentioned paragraph (i) as well, “accepted responsibility for the offence”. As Ms. Des Rosiers said earlier, and also as we say in our brief, that means that if a person insists on innocence, if a person has been wrongfully convicted, then that is a reason why the minister would say, “No, you can't come back.”

Mr. Brent Rathgeber: I understand what that means. But I want you to agree with me that if a prisoner needs medical treatment that's not available to him or her where he or she is incarcerated, they could use paragraph (g) to assist their application to transfer back to Canada. And if a person has admitted culpability, they could use paragraph (k) to assist their application to transfer back to Canada, and a minister has discretion to consider those factors.

Mr. Paul Calarco: The minister can use those right now. You don't need these amendments to do that, assuming they're everything you wish them to be, sir. Every minister could consider that this is a Canadian, this person is in need of medical care, and the person can be transferred back. You don't need these amendments to do it.

The Chair: Thank you, Mr. Rathgeber.

Mr. Kania.

Mr. Andrew Kania: Expanding on the logic of Mr. Rathgeber, if they have blue eyes they could use that, because paragraph 10(1)(l) says, “any other factor that the Minister considers relevant”.

Mr. Paul Calarco: That's untrammelled discretion, which we of course oppose.

Mr. Andrew Kania: Right. Exactly.

Going back to where I was when I was cut off, Mr. Conroy, to this case of Getkate, going back a little more in time, the court found that the minister had disregarded the evidence, and specifically indicated that since the reasons articulated by the minister were “contrary to the evidence and to the assessment and recommendations by his own Department”, it was thus referred back to the minister.

I'll repeat what I said before. I'm looking at this and I see the change of the requirement from “must” to “may” in terms of the factors. Adding the factor that I noted just now—“any other factor that the Minister considers relevant”—I see as a clear attempt to get around the jurisprudence, which is clearly out there and which has in essence reprimanded the government for not following, and being fair in terms of following, the statute. I see this as their attempt to allow themselves to do whatever they want without getting any form of judicial review. Does that sound about right to you?

Mr. John Conroy: Well, there will still be a lot of judicial review, I'll guarantee you that, both in relation to section 6 and section 1 of the charter and just general judicial review principles. But I generally agree with you.

And you should know that notwithstanding that court decision in Getkate and Mr. Justice Kelen's remarks about the meaning of threat to the security of Canada, the minister still denied people on that same ground, notwithstanding the court's interpretation of the meaning. He simply said, “I have a different opinion to the court.”

Mr. Andrew Kania: I want to be clear. I know there still will be judicial review. But my point was that this statute, in my view, is an attempt to stop successful judicial review. Changing the factors from “must” to “may” and putting this basket clause at the end, saying “any other factor that the Minister considers relevant”, I would say is an attempt to make sure they win judicial reviews and they can get around and do whatever they want. Is that not accurate?

Mr. John Conroy: Absolutely. It's clearly designed to get around what the courts have done so far and to make it easier to deny, as I said in my opening remarks. Section 1 of the charter, though, will hopefully be the section that curtails these unreasonable limits.

● (1705)

Mr. Andrew Kania: And once again, I have a difficult time understanding this, because what we're talking about is moving somebody from a prison in a foreign jurisdiction to a prison in Canada, where they will get rehabilitation.

I want to go to Mr. Lobb's example here, because he was talking about victims. The first point is that logically, if you're incarcerated in a foreign jurisdiction, the victims are in that foreign jurisdiction. We're not talking about Canadian victims. I must say, I don't even understand that. But let's assume for the moment that there are Canadian victims, and I'll give you an example from my constituency office from this past week, where there was a Canadian victim. The male who hurt her was incarcerated for something else in the United States. Her concern was his coming back to Canada. Because he was refused transfer, he was not transferred back; there was no record here, and there would be no record. He would just be brought to the border and released into the general population. There would be no rehabilitation, and because there was no form of sentence being carried out in Canada, there would be no parole, no controls, and we wouldn't know where this person was. There would be nothing.

She was coming to me and saying, “How could this be? How can there be no control over this person?” She was afraid, “What do I do?” The only thing I could say to her...well, actually, I won't say that, but the point is, the concern was that if there had been a transfer back, there would have been better protection for the victim who was in Canada. Does that not make more sense?

Mr. John Conroy: Absolutely.

The Chair: Madam Des Rosiers.

Ms. Nathalie Des Rosiers: The reason these schemes exist, and the reason so many countries agree to these schemes, is because indeed they see it is to their advantage and to the advantage of their own population. Control over offenders indeed enhances the capacity to manage the risk they pose. That's the reason. It's not because they're bleeding heart liberals that so many countries decided to have these transfers of prisoners. The point was that it was a way to enhance public safety within their country. Accepting transfers allows you to control and to know the offender more and to protect the population better. That's the reason.

The problem here is that this may have been lost in the shuffle, this idea that indeed it's important to bring them back so they can control them. You can accept them for whatever reason, but it's important that they are accepted and come back here.

The Chair: Thank you very much, Madam Des Rosiers.

We'll now go to Mr. MacKenzie, please.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair.

Thank you to the panel.

I think everyone on the panel except Ms. Williams is a lawyer? Fair enough. There are no judges?

Mr. Lorne Waldman: Not yet.

Mr. Dave MacKenzie: So when you argue your case before the courts as to whether or not it's a charter case, there are other lawyers on the other side who will argue that it's within the context of the charter. Is that fair? That's our system, right? So if that decision comes down and the court decides that this fits within the Charter of Rights and Freedoms, then we have to find another way to fight it. That's just the way our system operates. Fair enough?

Mr. John Conroy: No.

Mr. Dave MacKenzie: When I use the word “fight”, I mean to challenge the law, to go back to the courts on another challenge of either the charter or in some other manner.

Mr. Lorne Waldman: So you're saying that the court says the law violates or doesn't violate?

Mr. Dave MacKenzie: I'm saying does not violate the charter.

Mr. Lorne Waldman: If the court decides that it doesn't violate section 6, then obviously there still are legal issues.

Mr. Dave MacKenzie: You're not going to run away; that's all I'm saying.

Mr. Lorne Waldman: There's still the Supreme Court of Canada, but ultimately that would be the final....

Mr. Dave MacKenzie: Fair enough.

There are just a couple of other little things. I think everybody has indicated that this government has been just awful and hasn't done what previous governments have done. If I told you that in the last ten years, 709 Canadian offenders had been transferred back to Canada, that would be an average of 71 a year. Fair enough?

If I were to say to you that in the three full years of 2006-07, 2007-08, 2008-09, there were 206 offenders transferred back to Canada, would you agree with me that we're right on the ten-year average?

Ms. Nathalie Des Rosiers: Yes, I think there were only 32 in the first year, but things.... We have not said this. We have come here to talk about the amendment of the bill.

● (1710)

Mr. Dave MacKenzie: Okay, but what we heard was that the government has been all wrong in what it's been doing, so the extrapolation was that it would get even worse.

The other thing is if we have a huge number of offenders in foreign prisons, to fulfill what you're suggesting for the rehabilitation and all those things, would it not be better for Canada just to go and pluck them and bring them all back here? Do you know how many offenders are out there who are never going to apply? When my friend talks about the victim in his riding who wants the individual back, the best way for him to avoid that is to wait his time out, hope he gets transferred back into the country on a deportation, and doesn't get picked up, right?

Mr. John Conroy: I have clients who, one or two years before they would be deported from the U.S., will withdraw their consent because they know they can come back at deportation free and clear.

Mr. Dave MacKenzie: But part of the point of this is that, yes, there may be those who would apply to come back, who would fit into our system and go through some programs, but there may be a larger number who are not interested in coming back. I don't know how justified what you're suggesting is, that we should bring them all back, because they don't all apply to come back.

Mr. Paul Calarco: When you say there may be a larger number, with respect, that is simply speculation. We don't know what the numbers are. What we are suggesting to this committee is that this particular piece of legislation does not meet the goals the minister set out in the House. This is simply not helpful legislation. It doesn't meet its goals, and for that reason, as I was saying earlier, I don't see how this bill could be rewritten to conform to our international obligations or to the charter.

Mr. Dave MacKenzie: I think, Mr. Conroy, you may have indicated—or at least I got the impression, and maybe I got it wrong—that the courts have overturned most or all of the decisions.

Mr. John Conroy: No. I think there are only two or three they haven't overturned out of all the ones I've been involved in, and I'm thinking of two I wasn't involved in—DiVito and Grant were the... and Kosorov. Kosorov was an abandonment of Canada as a permanent residence. Those are the only three that upheld the minister's decision, and it was the second Grant case that was an uphold. In all of the other cases, starting with Van Vlymen and Getkate—and I could list them for you—the court overturned the minister's decision.

Mr. Dave MacKenzie: Thank you. The chair says I'm done.

The Chair: Yes. Thank you very much.

Monsieur Gaudet.

[*Translation*]

Mr. Roger Gaudet (Montcalm, BQ): Thank you, Mr. Chair. I have only one comment.

I have been listening to everything since the beginning. Ethics and justice are not my strong suits, but five lawyers and another witness have just told us where they stand. I think we have just settled this matter. The bill is no good. We should stop talking about it and move on to something else.

Some hon. members: Ha, ha!

[*English*]

The Chair: Thank you very much, Monsieur Gaudet. I wish that going through legislation was always that simple.

We've already heard that there are a number of appeals going on, and there are lawyers on both sides arguing those cases, but thank you for summarizing it for us, Monsieur Gaudet.

I want to thank each one of you for coming today and for presenting your views and opinions on this bill.

We are going to go to committee business, so we are going to suspend for approximately one minute, and then we'll go in camera.

[*Proceedings continue in camera*]

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