



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 040 • 1st SESSION • 41st PARLIAMENT

EVIDENCE

Thursday, May 31, 2012

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Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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• (1110)

[English]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): I call to order meeting number 40 of the Standing Committee on Justice and Human Rights. Pursuant to the order of reference of Wednesday, February 29, 2012, today we are considering Bill C-299, An Act to amend the Criminal Code (kidnapping of young person), clause by clause.

It is quite a large bill—there's one clause.

I think, Mr. Cotler, you have an amendment, LIB-1.

Hon. Irwin Cotler (Mount Royal, Lib.): Yes, Mr. Chairman.

The amendment is that Bill C-299, in clause 1, be amended by replacing lines 10 to 12 on page 1 with the following:

imprisonment for life; and

Mr. Chairman, if I may, let me just provide an explanatory context for this. This amendment effectively removes a mandatory minimum penalty from the proposed legislation. I don't want to use the occasion to repeat all that I've said before and will say prospectively on other occasions about my critiques of mandatory minimums—they're well known. Much of what I've been saying was also echoed in witness testimony before this committee, including succinctly by our witness in the last meeting.

I just want to address two points in relation to this amendment. The first is the following—which I want to state for the record as a result of exchanges that sometimes take place in the House. Like all members here, we are all concerned about the kidnapping of young persons. Indeed, when I was Minister of Justice, the first piece of legislation I introduced on behalf of the government at the time was Bill C-2, An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, which became law in July 2005, and which, among other things, enhanced the Criminal Code with respect to sexual offences against children, failure to provide the necessities of life, and abandonment of children. It also made child abuse in the commission of an offence an aggravating factor for sentencing purposes.

I make reference to this because I accept and promote the overarching objective with respect to this legislation, the protection of young children from criminal offences. My objection is only on the issue of the mandatory minimum. If I may state for the record why the issue of children is so important to me, as I've stated before, when my daughter was 15 years of age, she came to me one day and said, "Daddy, if you want to know what the real test of human rights is, then always ask yourself, at any time, in any situation, in any part

of the world, is it good for children? Is what is happening good for children?"

So the question of protecting children was a priority for me as a minister, and that legislation to which I just referred became known among us in the government as "Gila's Law", because at the time it was very much inspired by my daughter Gila. This is an issue that I take very seriously, as do all members of this committee.

I want to draw the attention of colleagues to the language of my second amendment, LIB-2, because it should be read in concert with the first.

The Chair: Mr. Cotler, I think we can only deal with LIB-1.

Hon. Irwin Cotler: It's only by way of background.

The Chair: But I don't think we should deal with that.

Hon. Irwin Cotler: Okay.

The Chair: Thank you.

Mr. Cotler, Bill C-299 amends the Criminal Code to impose a mandatory minimum sentence on anyone convicted of kidnapping a person under 16 years of age. This amendment proposes to delete the mandatory minimum sentence. As *House of Commons Procedure and Practice*, second edition, states on page 766: An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill.

In the opinion of the chair, the deletion of the key element is contrary to the principle of Bill C-299 and is therefore inadmissible.

Ms. Françoise Boivin (Gatineau, NDP): Can we challenge you on that one?

The Chair: You can challenge the chair.

Ms. Françoise Boivin: We'll challenge the chair.

The Chair: Shall the ruling of the chair be sustained?

(Ruling of the chair sustained: yeas 6; nays 5)

The Chair: Therefore, the amendment will not be considered. Here I should say that I erred in allowing the debate to carry on about LIB-1.

Madam Findlay, are you introducing G-1?

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Yes, I am.

We move that Bill C-299, in clause 1, be amended by replacing line 10 on page 1 with the following:

imprisonment for life and, unless the person who commits the offence is a parent, guardian or person having the lawful care or charge of the person referred to in that paragraph, to a minimum

Can I speak to it?

• (1115)

The Chair: Yes, you can.

Ms. Kerry-Lynne D. Findlay: In our view, the bill rightly seeks to ensure that cases involving kidnapping of children by strangers are treated with the severity they deserve. This goal is laudable and merits support. We know that although stranger child abduction happens fairly rarely—thank goodness—the consequences are dire, as abducted children are often sexually assaulted or murdered.

Offenders must be punished severely for such crimes, in our view. However, there is a concern that the way it's presently worded the proposed mandatory minimum penalty could apply to a parent or someone *in loco parentis*. With respect to that person, there might be an issue of preventing that child from seeing the other parent in the context of a custody or access dispute. We know that parents involved in such disputes have been charged with kidnapping of their own child.

Of course, parental child abduction is a serious issue, as well, for all involved, but we don't believe this bill's intention is to impose severe penalties in these types of situations. The Criminal Code currently criminalizes kidnapping of children through a number of different offences: subsections 279(1), kidnapping, and 279(2), forcible confinement; and sections 280 to 283, which contain four child-specific abduction offences.

Maximum penalties for these offences range from five years to life imprisonment, but only the kidnapping offence, in subsection 279 (1), imposes mandatory minimum penalties in certain circumstances, for example, where a firearm is used or where organized crime is involved. Although sections 282 and 283 deal exclusively with parental child abduction, sections 279 and 280 can apply to cases involving both stranger and parental child abductions.

Therefore, Bill C-299's proposed mandatory minimum penalty could, as presently written, apply to parents. To prevent this unintended result, the proposed friendly amendment—which Mr. Wilks has also stated he would accept—would exempt parents and persons standing in place of parents from the application of the proposed mandatory minimum penalty.

Whether or not this amendment is supported, I certainly hope the bill will receive the support it deserves and that we all move together to seek sanctions on those who would seek to harm our children.

The Chair: Thank you.

Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: Thank you, Mr. Chair.

We have heard about this through the grapevine now and again and we have seen it in the briefing notes prepared by the Library of Parliament. It seemed that Mr. Wilks, the sponsor of this bill, might be bringing forward an amendment, because there could be some confusion.

First, I assume that you have Mr. Wilks' written consent for this. I will take your word for it, but I just want to be sure that we have his consent. My problem is not about that at all. What concerns me a little is that the crux of the analysis, the study that has just been done on Bill C-299, dealt with the offence specifically and the minimum sentence to such an extent that Mr. Cotler tried to have the minimum sentence removed. The very goal of this bill was to add a minimum sentence to section 279 of the Criminal Code.

As a parliamentarian called upon to create a new piece of legislation, I am concerned about the problems I see in some clauses that seem to be contradictory. I wonder if we are getting involved in an amendment that has not been fully discussed or analyzed.

I think we should have a representative from the department here. Will someone be here at some stage?

[*English*]

Is she there? Can she come to the table, please?

The Chair: Would you come to the table, please?

• (1120)

[*Translation*]

Ms. Françoise Boivin: When I read it, it does not seem clear to me. It reads:

That Bill C-299, in clause 1, be amended by replacing line 10 on page 1 with the following:

imprisonment for life and, unless the person who commits the offence is a parent, guardian or person having the lawful care or charge of the person referred to in that paragraph, to a minimum

You may tell me that the questions going through my mind are stupid, but, how can a person kidnap someone for whom they have the lawful care or charge?

A whole bunch of questions occur to me. They are questions that I would have loved to ask various people with expertise in the area, and perhaps others too, with no disrespect to the people from the Department of Justice who work with the government on projects like this. It just seems that we are moving a little quickly.

If this was the intention, and if the sponsor of the bill, or the government, had a question about what is in Bill C-299, it seems to me that it would have been better to ask it beforehand, so that all the members of this committee, who have to vote on Bill C-299, can do so with full knowledge of the matter. This is not like a store changing an advertising flyer; we are getting ready to amend an important section of the Criminal Code.

Why are we making this distinction? If we are saying that such a person can commit the offence under section 279, why would that person not receive the same minimum sentence? Why is the government singling out a person who is a parent, guardian or person having the lawful care or charge of the person referred to in one of these paragraphs? Why should a person like that have the right to avoid the minimum sentence when others do not? In the case law, we have seen, for example, a mother who has just lost a child being completely distraught and taking off with another small child. If she is deemed to be able to tell the difference between right and wrong, to the extent that she is not considered not criminally responsible, she could therefore be subject to the minimum sentence.

These are the kinds of questions that occur to us. I am sure that this proposed amendment is well intentioned, but I am not sure that we have really weighed the advantages and disadvantages to see if it stands up, if it is robust.

I do not know if the people from the Department of Justice have analyzed this amendment. Perhaps they could give us some guidance; perhaps they could explain what it means and how it fits into the bill and into the provision that section 279 would then become. Perhaps they could tell us why the distinction is being made between these categories of people. Couldn't brothers, sisters, uncles, aunts be included too, in a way?

All these questions occur to me not only because this is new legislation compared to the second reading in Parliament, but also because of the way the committee has spent the time allotted to us for the study of this bill.

[English]

The Chair: Ms. Levman, I wonder if you could try to respond.

Ms. Nathalie Levman (Counsel, Criminal Law Policy Section, Department of Justice): Maybe what I'll do is just take a little step back and explain the broader framework in which this amendment is taking place. I know there have been some questions about the kidnapping offence, forceable confinement, the abduction offences, etc. What we have in the Criminal Code is a broader framework that deals with abduction, and child abduction types of cases.

The kidnapping offence is an offence of general application. It can be applied in cases involving abductions of children, of course, but really it is there to deal not just with abductions of children but also with any kind of movement, the taking of one person from one place to another against their will, which is a violation of fundamental human rights enshrined in our charter. This can take place in the context of a child. It can take place in the context of an adult victim as well.

The origins of these offences are in fact quite ancient British law. We can't exactly pinpoint the exact year but we know they came about hundreds of years ago, and, in fact, the kidnapping offence in Britain is still a common law offence. It's not in the statute.

We know they were developed for different purposes. We also know that the elements of the offences are different. So kidnapping is really an offence against the person and therefore we are concerned with consent in kidnapping. So whether or not the person agreed to go with the alleged kidnapper really is the critical issue that we look at when we deal with kidnapping.

The difficulty with using the kidnapping offence in relation to children is to what extent and how does the court evaluate whether or not a child consented. The court has given some guidance on that and we know now that where a child is very young, the consent issue is not going to be a terribly live one when it's, for example, Kienan Hebert who was only three. That issue might become a live one where the child is older—12, 13, 14. I'm not exactly sure, but there are issues about mature minors, etc.

Given the concern that sometimes it might be difficult to apply kidnapping in the cases of child abductions, the child abduction specific offences were developed, and they are truly offences against the custodial rights of parents. The court will not look at or find relevant the consent of the child. What the court is looking at is the consent of the parent or person who has lawful authority over the child.

What happens when we impose a mandatory minimum penalty in the context of the kidnapping offence is that we are potentially applying it to a broad range of cases, because of the breadth of the offence, because the offence is an offence of general application. So we're concerned that a mandatory minimum might be applicable in a case where we might prefer to have one of the parental child abduction offences used. However, because it's such a broad offence, it could in fact be used and we do know there have been charges against parents in these types of cases.

We unfortunately don't have any reported case law where the kidnapping offence was charged and the court actually looked at how the kidnapping offence could be applicable in a parental child abduction type of scenario. But we do know that it is applicable, and that is a cause for concern, where we might want a judge to factor in the particular circumstances of the case involving a parent. As you pointed out, custody and access disputes often involve the taking of children, but not to the child's detriment—or at least, that's not the intent of the parent.

• (1125)

My understanding is that the government was concerned about that, which is the birth, if you will, of this particular amendment, so that it will not apply in the context of parental child abduction cases. We do have those offences—there are sections 282 and 283, which are intended to deal with those types of scenarios—but the bottom line is that kidnapping, being an offence of general application, can be and has been used in these types of cases, hence the exclusion of parents from the application of the mandatory minimum penalty.

I hope that gives you some background on the offences and the nature of the amendment.

Ms. Françoise Boivin: But just on my question, why reduce the scope of the family link to the mother, the father, and the legal guardian? Grandparents would be scared, maybe wrongfully, but would think that something... I don't know; so many ideas come to my mind that I—

•(1130)

Ms. Nathalie Levman: I understand what you're saying.

These are policy issues and policy calls. The concern in the framework of the offences is that we have offences that deal specifically with parents, and in those cases the government does not want mandatory minimums to apply.

As to the possibility of other people being included in this exemption, it's not really my place to discuss that.

The Chair: Madam Findlay.

Ms. Kerry-Lynne D. Findlay: I have a few points.

First of all, I wanted to point out that the wording of the amendment we're proposing is "a parent, guardian or persons having the lawful care of charge of the person". It is not limited to parents and legal guardians. That's why I used the term *loco parentis*. It includes someone in lawful care or charge. That is not necessarily always someone who is actually a legal guardian.

Secondly—

Ms. Françoise Boivin: That is not said in the French. That's why I'm saying that, in reading the French.... If you read the English, I agree with you. In English it's a bit wider in scope; in French, not at all. There's a very specific definition for

[Translation]

"une personne ayant la garde ou la charge légale". In French, the term "charge légale" means that...

[English]

you either have a court order or are definitely the legal guardian. It's almost the same thing.

So I would verify that. That's why I say that before we introduce something that is brand new and has not been reviewed by any witnesses, we still have time—it's not as if time is of the essence here—to be....

[Translation]

We have the time to take a deep breath and make sure that we are not making a mistake. I want my colleague to understand that we are not opposed to the idea of making the exception. We are opposed to the minimum sentence, so if it is being removed for some groups of people...But we do not want to create a situation whereby another injustice is committed.

[English]

The Chair: Maybe we could have another comment from the Justice official here.

Ms. Nathalie Levman: We do, in fact, know what that phrase means from a legal perspective in the English. I believe it would cover anyone with legal or de facto custody of a child. Wherever somebody with legal custody, for example, transfers that custody—even by saying, you take care of my child for this period of time—then the exemption would apply to that person. Cases in which it wouldn't apply are those in which that custody hasn't been transferred.

The Chair: Madam Findlay, go ahead.

Ms. Kerry-Lynne D. Findlay: Thank you.

I do not pretend to be an expert in the French language, but we certainly can make sure and verify that the French has the same meaning as the English. I can only go on the English version.

Just as the official has said, when you're talking about "lawful care or charge", you're talking about someone who may have de facto custody, who may be in that position, that *loco parentis*, that parental-type position with the child, but not necessarily a legal guardian.

You mentioned Mr. Wilks as the proposer of the bill. I think it's important here to note that what we're trying to do is actually narrow the application of the mandatory minimum, not expand it. We want a narrower scope to be applied.

As someone who for many years dealt with family law cases and the volatility of those situations with children, we don't want a criminal process superimposed on a family or divorce situation unnecessarily, or where it doesn't fit and wouldn't be suitable. Of course there are many people in the best interests of a child who along the way can end up *in loco parentis*. It may in fact be an aunt, uncle, godparent, or grandparent, but those are also people who may overstep their bounds, who are not in lawful care or custody; then that's a different situation.

I would suggest that the sponsor's intention has been clear from the beginning of this parliamentary process, and our amendment is in line with those intentions.

Mr. Wilks testified before this committee with regard to the abduction of Kienan Hebert. The abduction, which happened to be, unfortunately, in his riding, was by a stranger last year. It instigated his efforts to ensure the imposition of a severe penalty in cases involving stranger child abduction.

Also, at second reading debate in the House, he clearly stated that his intention in introducing the bill was to have the mandatory prison sentence apply only in cases where a stranger commits the crime of kidnapping a child under 16.

I have the transcript from Monday, November 28, 2011, when Mr. Wilks spoke to his bill. He said:

In closing, I have received questions regarding the intention of the bill and whether it focuses on the kidnapping of children by strangers. My intention is to have the mandatory prison sentence apply only in cases where a stranger commits the crime of kidnapping a child under the age of 16. I am open to considering an amendment to my bill that would clarify that intention.

In response to whether this is in keeping with his intention, I say that it is and that he's been very clear about that. Our amendment is intended, as I said, to narrow the scope and to make it clear that we are talking about a young person being kidnapped by someone where there is no relationship. It is a stranger to the child.

Thanks.

•(1135)

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Chair.

I would confirm for Madam Boivin that I just talked to Mr. Wilks, and he is 100% in favour of the government's amendment.

I do have an issue and a question. Madam Findlay has spoken about *loco parentis*, which of course is a decision by the court to find a person standing in the place of a parent.

For the record, I just want to make sure that this is not something that the court can find out later. In my mind, it could be a stepfather or stepmother who takes the child, and afterwards the court could determine that the person actually stood in the place of a parent during a period of time and was trying to protect that child. I don't think the idea of this exemption is to allow that person to be exempted from the finding of guilt and be exempted from that as a result of them being in the place of a parent.

I do have one question for you, Ms. Levman. I'm just wondering about something relating to the offence itself. For instance, we've had some number of cases where somebody will kidnap a child, raise that child to be their own, and then, later on, when the child is 14 or 15, we'll find out where that child is and that person will be charged.

Under these circumstances, and with this exemption, I just want to make it clear on the record that at the time of the offence, if that person were not in place as a parent or guardian, and later became a guardian—obviously a court could do that at a later date, in another jurisdiction, without full knowledge—would that person still be found guilty of the offence and not be exempted if they were later found to be a parent or guardian?

Ms. Nathalie Levman: Just to be clear, this isn't about guilt; this is about application of the MMP.

Mr. Brian Jean: An exemption, yes; I understand that.

Ms. Nathalie Levman: Yes.

That sounds like a complicated fact scenario. I think the issue is that at the time the offence was committed, was the person a parent or a person standing in place of the parent? That can be determined on the basis of law—as your colleague has pointed out, by a legal paper—or it can be on the basis of having just de facto custody.

Mr. Brian Jean: At the time of the offence.

Ms. Nathalie Levman: At the time of the offence.

Mr. Brian Jean: That's the question. I just wanted to clarify it for the record.

Finally, there was a case by the House of Lords that I was involved with, of a Canadian child who was abducted—Anne Steinhouse out of Fort McMurray. I can get that reference for you. It was back in 1997, I believe. The House of Lords went over it specifically and over the problems with abductions and kidnappings, even in other jurisdictions, with the rule of law and democracy. They went through a full acknowledgement of the *loco parentis*, etc.

Ms. Nathalie Levman: That may be helpful in these cases, yes.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): I have just a couple of very quick questions.

I generally share the concerns of Madam Boivin that we are underinformed about this amendment, even if it instinctively feels like it's going to narrow things in a good way. There is a lot of emphasis on the “parent, guardian or person having the lawful care or charge” or custodial rights, but do we want, for example, a parent who has no custodial rights—and would this person be included? According to the current language, that person would be included.

Would you say this is correct?

• (1140)

Ms. Nathalie Levman: If you're a parent, you are excluded from the mandatory minimum penalty, or if you are a person *in loco parentis*.

Mr. Craig Scott: Right. So there can be a tension within the three exceptions here in the sense that you can....

In a custody dispute, where the custody hasn't been decided, or after the dispute, where there is joint custody...but there are situations where parents have no custodial rights, correct?

Ms. Nathalie Levman: There are a few, but there is some dispute in the case law about when custodial rights are extinguished, so I can't give you a clear answer.

I suppose there could be some rare cases where custodial rights are extinguished. I would imagine that a family court would have very good reason for doing that, meaning there was some risk of harm that the parent posed.

Mr. Craig Scott: Exactly. But by this wording, that person whose custodial rights have been extinguished would not be caught by the minimum mandatory penalty because they're still a parent.

Ms. Nathalie Levman: Correct; by the way it's drafted, yes.

Mr. Craig Scott: Right.

So this is not a matter of going after a really narrow, remote situation. It's a matter of saying that I'm just worried that we haven't fully thought through what the exceptions could be.

For example, grandparents are not strangers, right? From the beginning, Mr. Wilks was using the words “not a stranger”. His word was “stranger”. The list we have here, of “parent, guardian or person having the lawful care or charge”, is not the inverse of “stranger”. It's an under-inclusive list with respect to what he said he didn't want to have happen.

I'm just a bit worried that we're maybe doing this a bit too quickly and that we could benefit from another session where we either talk it through a bit more, after having reflected a bit, including with expert assistance, or think through whether we need a little bit more expertise.

I'm not trying to be obstructionist. I'm just a bit worried that I personally have not thought this through enough, having seen it just so recently. It doesn't seem to map onto the stranger idea.

The Chair: Thank you.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay: In the scenario you're talking about—in the rare scenario, but it does happen—where a parent's custody rights are extinguished, we do have section 282 of the code, “Abduction in contravention of custody order”.

It is, again, rare, but it certainly has happened where a parent who either has had their custody extinguished or who is restricted to, say, only visitation or access has gone contrary to that custody order and taken a child and refused to return them.

There are sections that will deal with that already in the code. If it's not something that can be dealt with at a family court or at a similar level, the code can deal with that, in my view. In our scenario here, when we talk about “lawful care or charge”, that is fairly broad language, and as I said....

Actually, I would like the official's opinion on this. Do you feel you can make a comment as to whether the wording in the French version has the same intent as the wording in the English version? Are you able to speak to that? Does it have the same legal effect, in other words?

Ms. Nathalie Levman: Only generally.... I do speak some French, but I'm not a francophone, nor am I a civil lawyer. All I can say is that when we sit in a drafting room we try to ensure that the English and the French mean the same thing.

Now, we have case law that has elucidated points where the intention has not come to pass and there have been differences. That requires rectification. My understanding in this particular case was that the French meant the same as the English. I would have to consult with an expert on civil law to confirm that.

Ms. Kerry-Lynne D. Findlay: All right. In any event, with respect to our amendment, and because I believe there are other areas of the code and civil law that deal with the scenarios we're talking about, we're moving forward with our proposed amendment.

Thank you.

• (1145)

The Chair: Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): Actually, our fearless leader, Ms. Findlay, raised all the points I wanted to raise, so I'm fine.

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler: Mr. Scott raised the concerns I had about the custody issue, and whether we've been able to think these things through to the point where we can properly rule on them today. This brings up the question I was going to ask on the issue of the parent. If a person gives up a child for adoption, would they be covered by this or not?

Ms. Nathalie Levman: I would have to verify that. My instinct tells me that all parental rights would be extinguished and they would no longer be a parent of that child. But I'm a criminal lawyer, not a family lawyer, so before I make any kind of definitive statement I would prefer to consult with my colleagues who are experts in family law.

Hon. Irwin Cotler: That precisely confirms the point Mr. Scott made, to bring up another example. I could even bring another example of a person who abandons their child at birth and leaves...no longer the effective parent, etc.

I just wonder if we have thought these things through, Mr. Chairman. I'm wondering if it's premature in the manner in which we're approaching it today.

The Chair: Thank you.

Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: I would like to follow up on what Mr. Cotler and Mr. Scott have said.

Given the answer that Ms. Levman just gave us, I think we should perhaps ask someone with a specialty in family law. We have two interrelated concepts. We have the criminal offence under section 279 and we have the impact. This amendment introduces another area: the lawful care or charge.

I do not want to vote having told myself that the meaning is probably the same, that it should cover...this is not any old ad hoc committee; this is the committee on justice. We have to submit a bill to Parliament. Whether we agree on some points or not is not what this is about; since the Department of Justice representative cannot assure us...That is no criticism. We all have our specialty. I am certainly no expert in family law, so I ask questions. If I do not get an answer, I do not feel comfortable voting. From the outset, I have been saying that we are not really opposed to reducing...

[*English*]

the scope of the thing. We appreciate that. But are we creating a monster with a lot of heads, and we have no idea what is going to come out of it? I think we should suspend this—albeit not for long—and get somebody to come to answer those questions that we have before we decide what to do with the amendment.

The Chair: On Madam Boivin's suggestion, it would take the unanimous consent of the committee to stand down, and attempt to fulfill her request.

Ms. Kerry-Lynne D. Findlay: No, we don't have that consent. We've already said that we would have officials ensure that the French version has the same legal effect as the English. We're being told that it does.

The Chair: Okay. Just as long as—

Ms. Françoise Boivin: It's more than about just the French and the English; it's what it represents. I mean, it's at the core of the definitions of who's “*la garde ou la charge légale*” or “parent, guardian, or person having the lawful care”. Wouldn't it be more prudent, if we have questions and we don't have the answers, to just take a step back?

The Chair: But there is no consent.

Mr. Cotler.

Hon. Irwin Cotler: There's no urgency that this thing be adopted today. Once adopted, it's going to be there in the Criminal Code, and hopefully in an enduring fashion. Would we not want to put the best possible legislation in the Criminal Code rather than say that we have to do it at this meeting and put it through without the proper appreciation?

I don't see how doing it next week rather than this week would prejudice this process. But I do see how putting it in without properly thinking it through could prejudice the process.

• (1150)

The Chair: Thank you.

Mr. Seeback.

Mr. Kyle Seeback: I think we have thought it through. People have come up with one or two examples that would be extremely rare in application. Every time we've brought witnesses here to this committee, members on the other side have said that they have so much faith in our judges and that we have the best judicial system in the world. Quite frankly, I think a judge is going to be in a position to be smart enough to figure out whether this section applies to somebody who abandoned their child, and 30 years later, kidnapped them. I think a judge can figure that out.

I don't think we need to spend another week having witnesses come and try to mince this down into even smaller parcels. This is very clearly defined, as far as I'm concerned. Any sort of ambiguity that may exist, which I don't agree does, a judge is going to be able to figure out.

I see no need for us to spend more committee time looking at this.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott: I won't respond exactly to Mr. Seeback's view that the exceptions are marginal. I think that some of what we have been discussing and our concerns might be more than marginal, especially, for example, the grandparents issue.

I was wondering if Ms. Findlay could help me with respect to one comment she made, to make sure I understood. You talked about "lawful care or charge" being quite expensive or broad. I'm not sure what word you used.

Ms. Kerry-Lynne D. Findlay: It was "broad".

Mr. Craig Scott: Thank you.

So I'm wondering whether, from your point of view, that therefore means that it's different from what we would call *in loco parentis*. Or does *in loco parentis* map onto that same broad meaning?

The Chair: Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I'm using both terms, because both are recognized in the case law. *In loco parentis* means, in effect, lawful care or charge. *In loco parentis*, as you know, doesn't necessarily mean that there has been a court order saying that this person has custody. It means a situation where it is lawful for that person to be with that child, because that person has the care or charge, the day-to-day care, whatever it may happen to be.

There is a lot of case law out there on this. I guess what I'm struggling with, with respect to some of the examples you and your colleagues have been giving, is that, as I said, our amendment seeks to narrow the application or the scope of the mandatory minimum.

If you had a situation, as Mr. Cotler mentioned, of someone who abandoned a child 30 years ago but is still a biological parent, for instance, that's exactly the situation where the judge would have discretion.

I think it was the opposition members, and I don't know who exactly, who said earlier that many of the sentences we've seen actually exceed the mandatory minimum we're contemplating. The judge has the discretion to do that in those situations.

In terms of a mandatory minimum and when it is going to apply, should the case be proven against that person, we feel that it is consistent with our civil law. It is consistent with the normal course of human events and family connections that someone, at least on the face of it, who is a parent, or who has lawful care and charge, or who is a legal guardian would not be subject to the mandatory minimum.

I don't see the lack of clarity you're concerned about.

The Chair: Mr. Cotler.

Hon. Irwin Cotler: Mr. Chairman, I think we brought up enough examples—and there are more—saying that these are not just some sundry exceptions, and one can go on. It wasn't just the 30 years of abandonment; it was also the question of adoption and so on. They're different issues. Apart from the fact that we may have different provincial definitions of the term "parent", just as we have different definitions. It's *mère ou père* in French, and "parent" in English. All these things bring up complicating factors. Again, I say that it's somewhat premature.

My colleagues opposite say we can trust the judges to be able to make the appropriate judgments and understanding. Precisely. That's why I wonder why we have this mandatory minimum to begin with. If we can trust the judges, and they can make those kinds of judgments, then we don't need the mandatory. They can make that kind of judgment and tailor the situation to the particular circumstance with regard to the offence and the offender at hand. The more they speak, I think the more they're making my point as to why we shouldn't have a mandatory minimum.

I might add, Mr. Chairman, that you ruled my particular amendment out of order. I understand that. But then, again, this legislation prescribes, as it says in this summary, "...a minimum punishment of five years when a kidnap victim is under sixteen years of age". It doesn't speak of any amendments. In this sense, their amendment is also a way of going contrary to the initial principle of the legislation. I would like to have a ruling as to whether that's out of order, given that the same principle is involved.

• (1155)

The Chair: I think we're passed that stage.

Hon. Irwin Cotler: I wonder if that has been considered and a ruling made. In my case, allegedly, it had been considered and a ruling made. I'm saying that had this been considered and a ruling made.... Because, again, if you look at the legislation it's a prescription of a mandatory minimum without exception, and now there's an amendment that says there is an exception. So I'm saying that is as contrary as what I was trying to do, in a certain sense, and mine was ruled out of order.

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: *In loco parentis* is Latin for “in the place of the parent”, and it gives legal obligations as well as legal rights to a person if a court finds that person *in loco parentis*. This does not talk about *in loco parentis*, but it talks about a person having lawful care or charge of the person referred to in that paragraph, if they're not a parent or guardian. I think it's very clear what it says.

I'm not sure of the French, Madame Boivin, but I think with our instructions to Justice to ensure that it is identical, as Ms. Kerry-Lynne Findlay said, I think will be fine, and I think it should go ahead on that basis.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott: I have nothing much more to say, as I don't think we're going to get very far on this, other than to say that Mr. Jean's comment may well be correct. I think it probably is, but I'm not convinced that it maps onto the language of “lawful care or charge”, and Ms. Findlay's answer didn't convince me that there's no space between those two concepts. So I think we're unclear even on what those words mean, but we're not going to get very far if I say anything else.

Ms. Françoise Boivin: Would you mind terribly if we took five minutes so I can talk to my people before we vote on your amendment?

The Chair: I need consent, if you wish to suspend for five minutes.

Okay, let's suspend for five minutes.

• (1155)

_____ (Pause) _____

• (1200)

The Chair: We'll resume the meeting.

Ms. Levman.

Ms. Nathalie Levman: Thank you very much.

During the break I had a little time to reflect and I just want to bring to the committee's attention a particular issue that I'm hoping will be helpful.

Of course, I will be verifying that the English and French do, in fact, mean the same thing. But my initial view that it does mean the same thing is based on the fact that this language already exists in the Criminal Code and has been judicially interpreted.

I'd like to draw the committee's attention to the child abduction provisions where that phrase is used throughout. That is why that

particular phrase was chosen, because it does have meaning in both languages and has been interpreted in the context of the criminal law, which is why I have some understanding as to what it means despite the fact that I'm not a family lawyer.

I just wanted to point that out, that this isn't a phrase that was plucked out of nowhere. It exists and has been interpreted in a helpful manner right up to the highest court of Canada.

Thank you.

• (1205)

The Chair: Thank you.

I think that illustrates why it was a good idea to take a break. Thank you.

Madam Boivin.

[Translation]

Ms. Françoise Boivin: That was one of the points raised about the wording. The wording is actually the same as in subsection 283 (1). But the last paragraph does not provide for a minimum sentence whereas subsection 279(1.1) does. The intent is to reduce the scope and a lot of questions arise again. According to the logic behind the government's amendment, a lot of cases could apply in the same context, but they do not match the definition of those in those categories, a definition that has already been interpreted.

I will stop there, but I think we would be wise to dig a little deeper into the matter to see if all those cases really are covered by the wording. After all, we are talking about a new offence with a mandatory minimum sentence. If the government's argument is to reduce the scope of the mandatory minimum sentence, it must make sure to include those whom it wants to be part of the exceptions. We will never be able to tell because we will have not studied those concepts. That is the only thing I find regrettable in all this.

[English]

The Chair: Thank you, Madam Boivin.

Seeing no further intervenors, I will call the vote on amendment G-1.

Those in favour?

(Amendment agreed to: yeas 6; nays 5)

The Chair: We now go to LIB-2.

Mr. Cotler, would you like to introduce it?

Hon. Irwin Cotler: Yes, Mr. Chairman. This amendment seeks to address what we in effect are here to denounce, the kidnapping of young persons, but by dealing with it in a more principled form in the sentencing and not by way of a mandatory minimum—in other words, by making age and vulnerability the sentencing factors.

This takes into account the concerns that have been raised about whether 14 or 16 is the appropriate age marker for the offence, as well as the issue of those captured by the offence perhaps unnecessarily—for which examples have been given before. It also acknowledges that age is not the only issue here, but that vulnerability could also cover attributes such as a physical or mental disability, which may make a kidnapping particularly heinous.

My main point here, Mr. Chairman, is that we should be able to trust the judges. We should have sentencing factors that allow for the appropriate exercise of discretion for principled sentencing purposes, factors that do not detract from the objective of denunciation—which the mandatory minimum seeks to do—but ones that not only reaffirm the approach to denunciation but allow for the proper exercise of judicial discretion in a more effective and principled fashion.

The Chair: Thank you, Mr. Cotler.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay: We have some concerns as to whether this amendment is within the scope of the bill, in the sense that it seeks to amend subsection 279(1.2), whereas the bill is only dealing with subsection (1.1). But if it is found to be in order, I have a comment.

The Chair: I don't believe there is any problem with it in respect to the scope of the bill.

Ms. Kerry-Lynne D. Findlay: In that case, having seen the government amendment pass, we are prepared to agree with this amendment, in that it gives further indication to the judiciary in sentencing.

As Mr. Cotler has aptly put it, perhaps the age and vulnerability of the victim would be factors in sentencing. Therefore, we're prepared to support it.

The Chair: Thank you.

Madam Boivin.

• (1210)

[*Translation*]

Ms. Françoise Boivin: We also thought that it was beyond the scope. We learn more about it all the time. As I understand it, clauses that have nothing to do with the bill can be added, and that is fine. They will have to explain themselves at some stage.

That said, I do agree with the concept introduced by my colleague Mr. Cotler. But, for me, it brings up the same question that the Conservative amendment brings up. It seems that concepts are being introduced with no analysis. The committee is making a mistake in doing that. If we work that way, this committee will not be seen as serious any more. We are supposed to be justice's last line of defence.

I see no problem with a court considering the age and the vulnerability of a victim, but I wonder what vulnerability means, and so on. I always have some difficulty expressing an opinion on a bill without having had my questions answered. Even if it is sometimes an answer I do not like, at least I have an answer. Then it is up to me to decide whether I vote for a bill or against it.

Section 718 already contains all the concepts needed for sentencing, all the factors that the court has to consider. Concepts are being introduced a little lightly, but basically, I have no objection. It is just that I feel that no in-depth study of the concepts has been done. That is the only criticism I have of this amendment.

[*English*]

The Chair: Madam Findlay.

Ms. Kerry-Lynne D. Findlay: Just as when we dealt with citizen's arrest and self-defence, when the NDP members only brought forward suggestions on sentencing at the time we sat and deliberated on them, this is what's happening here today.

Sometimes the plain language of something means exactly what it's meant to mean. What we're saying to the judiciary is to take into account the age. I could imagine, if I were in that place, perhaps looking at a kidnapping differently if we were talking about a 15-year-old, or a 3-year-old.

I think we all know what "vulnerability" means. There may be, as Mr. Cotler has pointed out, a diminished capacity. One can think of many things that would make the victim more vulnerable in the eyes of the judiciary. That is why we're prepared to support this amendment. It's just another way of giving the judiciary a little more guidance when it comes to sentencing.

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: I'm curious about this particular section. Does this mean that the court will take into consideration the range between the minimum and the maximum? Or does it mean that the court can ignore the minimum mandatory penalty?

Ms. Nathalie Levman: I would have to look at it more carefully. I heard you read it out, and I know you're placing it in subsection 279 (1.2). Is that right? I would imagine that if both the mandatory minimum and the aggravating factor applied, then the judge would be asked by Parliament to start at the mandatory minimum and then factor in the aggravating factors after that.

That's the way that mandatory minimum penalties work. They are meant to be a floor, the starting point at which a judge calculates the appropriate sentence.

Mr. Brian Jean: I understand and agree with that. I agree with this amendment, if that's the case. But it reads: "In imposing a sentence under paragraph (1.1)(a.2), the court shall take into account the age and vulnerability of the victim." As a legislator, I want to make sure the mandatory minimum applies and that judges do not use that section to avoid applying it.

Ms. Nathalie Levman: Your concern is that it might exclude the mandatory minimum penalty.

Mr. Brian Jean: Yes. In your reading, does it do that?

Ms. Nathalie Levman: May I take a minute to read through it?

•(1215)

Mr. Brian Jean: Please do.

Ms. Nathalie Levman: Upon first reading, it doesn't look as if it excludes the application of the proposed mandatory minimum penalty. However, if the committee would feel more comfortable if I consulted colleagues who are experts in sentencing, I could make sure that it doesn't defeat the purpose of this private member's bill.

Mr. Brian Jean: I'd certainly like to hear from the mover of the amendment whether or not it was his intention to exclude it.

Hon. Irwin Cotler: No, my intention is to take into account the factors of age and vulnerability.

Mr. Brian Jean: So you did not want to exclude the application of the minimum sentence.

Hon. Irwin Cotler: Well, I'm not happy with the minimum sentence.

Mr. Brian Jean: I understand that.

The Chair: Since there are no further intervenors, we'll have a vote.

(Amendment agreed to)

The Chair: Now we have LIB-3.

Mr. Cotler.

Hon. Irwin Cotler: This amendment addresses the concern I raised with respect to the government amendment, namely that while the wording of "parent, guardian or person having the lawful care or charge" is seemingly encompassing, it may not be so. I want to ensure that there's some flexibility and that we acknowledge a relationship such as a teacher, clergyman, or extended family member that may, depending on the age, either aggravate or mitigate the gravity of the offence. It's intended to provide more flexibility within the framework of the government's own amendment.

The Chair: Thank you, Mr. Cotler.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay: We would be opposed to this amendment. We think that the government amendment, which has passed, speaks to relationships and has narrowed the scope of the application of the mandatory minimum penalty in a way that makes sense. We believe that this amendment is unnecessary and doesn't achieve what I'm hearing the intent to be. We're opposed to it.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott: Just to make sure nobody else is as confused as I am, this is the same as the last amendment, correct? It doesn't have anything to do with affecting the mandatory minimum we've adopted, right?

I was worried that this was part of your concern.

The Chair: Thank you.

(Amendment negated)

Shall clause 1 as amended carry?

Ms. Françoise Boivin: May we have a recorded vote?

(Clause 1 as amended agreed to: yeas 6; nays 5)

The Chair: Shall the title carry?

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Shall the bill as amended carry?

(Bill as amended agreed to [See *Minutes of Proceedings*])

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

Some hon. members: Agreed.

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

Some hon. members: Agreed.

The Chair: I shall report the bill to the House on Monday.

It's fair to say, as someone else at the table just mentioned, that sometimes one-clause bills take longer to get through than some others.

I appreciate the help we've received from Ms. Levman from the justice department, who has clarified a number of the issues.

There being no further business, the meeting is adjourned.

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