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Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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• (1530)

[English]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): Seeing that the time is 3:30, we'll begin the meeting. This is meeting number 49 of the Standing Committee on Justice and Human Rights. Pursuant to the order of reference of Tuesday, October 16, 2012, we are examining Bill C-37, An Act to amend the Criminal Code.

We have two witnesses before us today. We have Kim Pate, the executive director of the Canadian Association of Elizabeth Fry Societies, and Sharon Rosenfeldt, from Victims of Violence. I know both of these witnesses have appeared before committees before, and I think you know how we operate.

If you have an opening address, Ms. Pate, and if you would like to go first, you're first on our list.

Ms. Kim Pate (Executive Director, Canadian Association of Elizabeth Fry Societies): It would be my pleasure. Thank you.

Thank you very much for inviting the Canadian Association of Elizabeth Fry Societies to present to you. I'm happy to be here with a long-time colleague and friend, Sharon. We've known each other since Alberta days.

I also want to say that I come, as you know, representing an organization that works with marginalized, victimized, criminalized, and institutionalized women and girls.

I will cut right to the chase on this. We have two concerns with Bill C-37.

One is that we know women form the fastest-growing prison population. The majority of them are in prison for poverty-related offences: they have tried to negotiate poverty. Our significant concern is that Bill C-37 will only exacerbate that issue, particularly when you're talking about women who are single moms. The majority of the women in prison are single moms, and most were the sole supports for their children before they went to prison, women trying to support themselves and their children living in poverty.

The reality of having a mandatory surcharge also flies in the face of the Wu decision of the Supreme Court of Canada in 2003, which clearly said that it is certainly appropriate, in a situation in which a default of payment of a fine—and by extension a victim surcharge—occurs because someone chooses not to pay, to be looking then at the potential for a far more serious penalty, but that a genuine inability to pay a fine should not be a proper basis for imprisonment. By extension, the same argument would apply similarly to a victim surcharge.

So we would encourage you to reconsider this and to allow there to be judicial discretion to examine the ability to pay, rather than see us end up defaulting to a situation we have been in, and to which arguably we're heading with many women in the prison system, such that we end up with prison essentially being debtors' prison, where people are put because they cannot afford to pay the penalty, and not because of an unwillingness to pay the penalty or to pay a victim surcharge.

When we know that the majority of the women—91% of the indigenous women in prison, 82% of women overall—have histories of physical and/or sexual abuse, talking about a victim surcharge to assist victims, when these women end up in custody largely because of the lack of resources in such other parts of the community as social services and health care, particularly mental health care, seems highly.... I would suggest there will be some section 15 and some human rights challenges.

But also, it seems morally problematic to be talking about more individuals being in prison, largely because they can't pay, at a huge cost to the Canadian government. The Parliamentary Budget Officer has estimated that it costs \$343,000 per year to keep one woman in federal custody, and provinces range, depending on the range of services and what is costed in, from a minimum of \$30,000 of cost up to in excess of \$200,000. When we're talking about those kinds of costs, to jail someone for non-payment of either a fine or a victim surcharge seems counterproductive at best.

We would respectfully urge you to look at either not passing the legislation or, in the alternative, amending it to ensure that the provision of failure to pay....

We would also urge that you seek an accounting from the provinces and territories as to how they're spending their victim surcharge moneys now. My understanding is, and the background legislative summary for this prepared by the Library of Parliament indicates, that it seems unclear which provinces and territories actually are requesting the money. It's certain that some are requesting increases in victim surcharges, but what is very unclear is how that money is currently being spent. It strikes me that it behooves all members to know where that money is going and how it's being spent before we start imposing more fines that will likely cost taxpayers even more money and arguably will not assist victims, if in fact these resources are not going to the sorts of supports that will prevent people from being victimized in the first place and not necessarily to providing direct services in the second place.

Thank you very much.

•(1535)

The Chair: Thank you.

Ms. Rosenfeldt, if you have an opening address, go ahead.

Ms. Sharon Rosenfeldt (President, Victims of Violence): Thank you very much. Thank you for inviting our organization, Victims of Violence, to appear today on Bill C-37, An Act to amend the Criminal Code, on victim fine surcharges.

I will briefly tell you about our organization—only half of it.

Our mission is to promote a more balanced justice system through legislative action and public awareness. Victims of Violence was founded in 1984 to provide support and assistance to victims of violent crime, to advance the rights of crime victims, and to enhance the safety of all law-abiding Canadians by addressing problems in Canada's criminal justice system.

We are appearing here today in support of Bill C-37. We agree that doubling of the victim fine surcharge and making it mandatory is crucial to the provision of victim services across Canada. Twenty-five years ago the concept of rights for crime victims was not widely recognized by either the justice system or the general public. Within a growing movement consisting of a group of determined individuals made up of victims of crime and associated professionals, the movement began advancing the vision of a system that would acknowledge and protect not only the rights of the accused but also those of the victim.

Great progress has been made since then. But progress does not come without challenges. While it is clear that there is an increased need for victim services across Canada, allocations from the victim fine surcharge have steadily decreased over the past number of years. Today the government recognizes this dilemma, and steps are being taken with the proposed amendments in Bill C-37 to restore allocation levels.

It is our opinion that the need for victim services has increased because the past 25 years have seen such a growth in understanding of crime victims' rights and services and of the network of crime victim advocates, service providers, and associated professionals who work to restore a sense of normalcy to victims' lives that crime victims are today more aware of services and seek to use them. Unfortunately, violent crime is a fact of life, and there continues to be a need for increased public awareness of the dynamics of crime. Attention must be paid to the fact that crime is not just a violation of a criminal code, but it also causes harm to victims, including economic loss, emotional suffering, and physical and mental injury.

I wish to bring the committee's attention to an issue that does not seem to get enough attention when we are discussing issues affecting crime victims. The cost of violent and serious crime consists not only of taxpayers' dollars but of the loss of human life, loss of family, loss of law and order, and loss of faith in the criminal justice system.

In 2008 the Department of Justice released a report that estimated the costs of crime. The report stated that the tangible costs of crime—including police, court, corrections, health care, victim costs, etc.—were approximately \$31.4 billion, while the intangible costs of pain and suffering, loss of life, etc., were more than double that, at a whopping \$68.2 billion.

We would therefore like to ask the committee to take into consideration the costs that crime has had on victims, primarily in three areas: one, in drawing comparisons about whether convicted offenders can afford to pay the fine surcharge or not; two, in deciding whether or not the new amendments to Bill C-37 should be made mandatory; and three, in determining why some question that the new amendments will take away a judge's discretion.

Further, we would submit to the committee that you should consider recognizing that the victim fine surcharge is a major source of funding for victim services throughout Canada. The surcharge is unique in that it is composed primarily of fines from convicted offenders, making it a self-sufficient source of support that does not rely on Canadian tax dollars to carry out its work. We feel that by way of the victim fine surcharge, those who cause victims suffering contribute to alleviating their pain and helping them rebuild their lives.

That said, we wish to touch on a few challenges that we see. The victim fine surcharge legislation has now been in place for 24 years, and we find that there is very much disparity across the provinces as to how the provinces use the victim fine surcharge funds. It is our humble opinion that there is seemingly no transparency. To date, and to our knowledge, there has never been adequate research study done on the use of the victim fine surcharge funds in all provinces, with the exception of four—New Brunswick, B.C., Ontario, and Saskatchewan.

•(1540)

We would therefore suggest a review of provincial practices by the federal government, possibly done by the Office of the Federal Ombudsman. A result of this study could potentially lead to a legislative requirement for something akin to the Victims' Justice Fund, which is generated by the victim fine surcharge in Ontario and which compels the money to be used only for victim assistance use, with maybe a requirement of an annual report on the use of those funds.

We understand that this suggestion would be considered somewhat controversial, if not impossible, since the victim fund surcharge is federal legislation and it is left to the discretion of the provinces to deliver victim services in the manner that they deem appropriate.

In closing, I wish to thank the government for the proposed amendments to the victim fine surcharge as stated in Bill C-37, which we support. I also thank the committee on behalf of Victims of Violence for the opportunity to not only voice our support, but to listen to our concerns as well.

Thank you.

The Chair: Thank you very much, both ladies.

We'll begin the round of questions with Madame Boivin.

[Translation]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chair.

I want to thank our two witnesses for being here during our final hour of analysis and study of Bill C-37.

There are a few facts I would like to check. You may not be aware of certain comments that were made about you at our last hearing, this past Tuesday. I want to come back to them, because I really don't like it when the discussion focuses on people who aren't there.

Ms. Pate, I would like to know if you have ever been the chair or director of the John Howard Society.

[English]

Ms. Kim Pate: No. I worked for the John Howard Society once.

[Translation]

Ms. Françoise Boivin: I am just trying to get a few things straight, further to some comments made by my colleague Robert Goguen. He mentioned that you had testified on other bills, including Bill C-59 and

[English]

Bill C-475. You were quoted as saying:

I want to be clear that, as we stated before the house committee, we do not support this bill. We do [not] support issues to protect the rights of victims and to protect victims generally. We feel that...many more initiatives could be undertaken rather than, that after the fact, undertaking a bill of this sort.

I went into the answers—well, not me but our brilliant researcher here. I'd like you to remove the impression—maybe it was Mr. Goguen who was right and not Hansard, but according to Hansard, what you did say was:

I want to be clear that, as we stated before the house committee, we do not support this bill. We do support issues to protect the rights of victims and to protect victims generally. We feel that if that was the objective, many more initiatives could be undertaken rather than, after the fact, undertaking a bill of this sort.

Do you not support victims, Madam Pate?

Ms. Kim Pate: Many of our organizations do work with victims, so yes, and many of the women we work with.... I was just at the inquest into the death of Ashley Smith yesterday, so yes, we do.

Ms. Françoise Boivin: I just wanted to clear that up because it must have been a mistake, a "not". When you remove one little word of three letters, the impact can be so much more devastating.

[Translation]

Does the fact that section 736 can be used—in other words, that provincial and territorial programs can be accessed—somewhat diminish the potentially negative impact on individuals who are unable to pay because of extreme poverty, mental health issues or other reasons? Does that aspect not give you some reassurance, Ms. Pate?

[English]

Ms. Kim Pate: Sorry, I missed part of the question.

Ms. Françoise Boivin: The way the section in the Criminal Code was construed before, there was the discretion of the judge to charge or not charge the—I can never say that word in English.

● (1545)

Ms. Kim Pate: Surcharge.

Ms. Françoise Boivin: Excellent. Thank you.

There was no access to the provincial and territorial programs to work instead or to make some type of compensation so that jail was not necessarily compulsory.

The bill now, as it is written by the government, states that it is at the discretion of the judge because it was proven that 80% of the time it was never applied, but with no explanation, reasoning, or justification by the courts. Now the access to the program has been added to the *suramende*. Would that remove a deterrent, in your view, toward that bill?

Ms. Kim Pate: Do you mean the fine option program, the being able to work it off? I'm not certain what you mean.

Ms. Françoise Boivin: Yes, exactly.

Ms. Kim Pate: Okay. Not every province has a fine option program. Even where fines are imposed, if someone can't pay, they may still end up in custody. They're not supposed to, and certainly the Supreme Court of Canada has addressed that issue, but they sometimes still do. That's true.

Where there would be an opportunity to work off the surcharge, it would be beneficial, because then the issue does not come up of basically jailing someone because they're poor. They could pay the fine surcharge and pay the fine through the fine option program. But not every province and territory has that option, so that's the concern we have.

Ms. Françoise Boivin: Ms. Rosenfeldt, are you satisfied with the fact that the programs can be used? It won't give more money to the victims, because we know the cost to victims—we heard it loud and clear in this committee—\$80-some billion, and probably not even close. There's no money that really compensates a victim of a crime or her or his family for what they've gone through.

And it's not only that. It's fine to double the fines and sub-fines, but at the same time, if the money is not going to victims, what good does the bill do?

Ms. Sharon Rosenfeldt: I think that's the crux of the whole issue. Under the four studies that were done, this has been brought to the attention of governments for a while now. I believe the intent of this bill is to reallocate the funds. The only way it seems possible is to make it mandatory and double the fine surcharge.

In response to your first question, it would be totally fine with our organization if the offender could not pay but was able to possibly do community service or whatever. You're quite right. There isn't any amount of money that can repair the pain and damage that we've gone through. However, what the money is used for is not specifically to hand victims money; it is for victim services, so that victims do have a place to go.

Does that answer your question?

Ms. Françoise Boivin: Yes, it does. Thank you very much.

The Chair: Thank you.

Go ahead, Madame Findlay.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Ms. Rosenfeldt and Ms. Pate, thank you both for being here.

Ms. Rosenfeldt, during your appearance before this committee on Bill C-10, the Safe Streets and Communities Act, you said the following, and I will quote:

Although I can't speak on behalf of all victims of crime, I can speak on behalf of myself, our organization, and the victims we represent. I can tell you of the strong support that exists across Canada for the government's crime agenda....

As you know, the bill before us, Bill C-37, will increase the victim surcharge to 30% of any imposed fine, \$100 for summary conviction, and \$200 for an indictable offence. That money, collected through the increased and mandatory victim surcharges, will go to the provinces in order to fund victim services on the ground.

Can I take it from your remarks that you would agree with me that these are relatively small but important steps towards bringing some accountability by criminals towards their victims, and that's part of why you support Bill C-37?

• (1550)

Ms. Sharon Rosenfeldt: By all means. That is a very important component to victims, as has been stressed.

There isn't anything monetary that would ever compensate us. However, the ability to be able to seek out services when they're needed is crucial for victims. We truly believe in accountability as part of this bill, whether or not the offenders recognize it or say, "Damn, another surcharge". We still feel good about that in principle.

Ms. Kerry-Lynne D. Findlay: I'm interested as well in what you, as a victims advocate, have heard on the ground regarding the current application of the victim surcharge. We're told that 80% to 90% of the time it's simply not enforced. We're also told—and given some of the other testimony here—that the surcharges are used in the provinces in many ways for information on the criminal justice system and court processes for counselling, court preparation, court support for vulnerable persons, and assisting with victim impact statements. All of these kinds of things are part of their victims services.

Are you hearing from the victims you work with that they're in favour of a mandatory application?

Ms. Sharon Rosenfeldt: Yes, by all means.

Another thing I'd like to point out.... I'm sorry, that thought went.

Ms. Kerry-Lynne D. Findlay: That's all right. I was just asking about whether you had heard from victims you work with that they're in favour of it being made mandatory, in that it hasn't been applied 90% of the time and it goes to all these kinds of services I've been talking about.

Ms. Sharon Rosenfeldt: Yes, by all means.

Right from the start, when this bill started, when it came into force in 1988 it was combined. It was in Bill C-89, and there were two bills: one was the victim fine surcharge and one was victim impact

statements. They were considered at that time and throughout the years to be very.... Judges really didn't like to be told that they should be levying the fine surcharge and/or allowing the victim impact statements. In fact, a lot of the time the judges would just not do it, in relation to victim impact statements, until it was actually legislated in the Criminal Code.

That has been fixed. It has come along quite fine and is now quite well recognized, as I believe this will as well, to make it mandatory that judges do in fact levy the victim fine surcharge. I believe it has to be in legislation, and I believe it has to be totally adhered to right across the board. That's the only way victims are able to access, really, any services.

I know what I was going to say. We really feel the taxpayer should not be burdened with the provision of victim services for crime victims when the offender has actually committed the crimes. We feel more comfortable that the money comes from the levy of the fine surcharge and/or the surcharge on summary indictable offences. As small as it may be, it's definitely fine.

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

The Chair: Mr. Cotler.

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

Let me begin with Ms. Pate. You mention that the cost of incarceration at the federal level was approximately \$350,000 per year. There's a variation at the provincial level, between \$30,000 and \$200,000 per year.

My question is this. Why is there such a difference? Why the variation? More importantly, what are the cost impacts of Bill C-37 in terms of incarceration of those imprisoned for failure to pay?

Ms. Kim Pate: Part of the reason for the discrepancy depends on whether provinces, territories...and in the federal government context, the Parliamentary Budget Officer looked at capital expenditures as well as operating costs, which most correctional services don't when they categorize.

The lowest that I'm aware of has been Alberta, and at a time when there were human rights complaints about inadequate nutrition and that sort of thing in the institutions a few years back. That is the lowest of which I am aware.

So partly it's dependent upon what's available to a prisoner and what's not available, upon the volume of prisoners.... If you have a large number of prisoners housed in a very large complex with very minimal staff and mostly static security, it can cost less and certainly can lead to more inhumane conditions and all the rest of it—hence some of the things we've seen in the United States. The provinces are probably in a better position to identify how they cost out what the costs are.

The Parliamentary Budget Officer's estimates were based on Corrections Canada's own estimates—and on including their operating costs and capital expenditures, as I understand it—when his investigators came to that figure in their review of Bill C-26, actually, as it then was.

In terms of the impact, I absolutely support Sharon's and Victims of Violence's desire to have victim services. I don't believe this bill will achieve that, in large part because we're talking mostly about people who are impecunious, who don't have resources. The reason, with respect, that 80% to 90% of the surcharges are not being imposed is that we're dealing with that level of poverty. When you see who is in prison, who ends up in the system, it tends not to be people who have money.

You're shaking your head. If you have different information, I'd be happy to hear it. I go into the youth and adult men's prisons, and in the last 20 years into women's prisons, and while there may be some individuals who have some resources—and I certainly would not be adverse to their contributing—the majority of the people I know, particularly the indigenous women or women with mental health issues or single moms, certainly don't have those resources and will be the ones who end up in prison at, I would argue, far greater taxpayer cost than if we had other sentencing options, or more important, victim support services—universal services—that avoid people becoming victimized.

The work we have done with our indigenous sisters around the missing and murdered aboriginal women points exactly to that. When you don't have the resources—which would have been part of the comments that may have been taken out of context at another time—our view, and part of the reason our Elizabeth Fry Societies work with marginalized women as well, is that we're trying to work with individuals before they end up victimized and criminalized. So we have shelters, we have women's centres, rape crisis centres, homeless shelters, homeless beds—all things that are aimed at trying to prevent people from being victimized.

Government tax dollars are going into this, necessarily to set up these initiatives, and we would rather have the resources—

• (1555)

Hon. Irwin Cotler: For reasons of time, let me lead into the next question, which may flow from your response, because you mentioned a section 15 charter concern.

I wonder whether you could elaborate on it. I suspect I might know what it is, but I'd rather hear it from you, and it flows from what you've been saying at this point.

Ms. Kim Pate: The fact that we're seeing people right now being provided in some provinces with the opportunity to work off fines.... This has been set up largely to offset the section 15 inequality that would exist if equal access to those programs were not available, something we haven't had, which the Supreme Court of Canada has already said is discriminatory; it struck down the sentence in the Wu case, in which a jail sentence had been imposed when someone was unable to pay a fine.

We would argue both that section 15 concerns arise in terms of the inequality of application and that we would end up seeing disproportionately women, aboriginal people, and people with disabilities—particularly mental health issues—in prison largely because of these sorts of provisions.

I think there is also a section in the Canadian Bill of Rights saying that the Minister of Justice shall, in accordance with the regulations, examine every regulation and determine whether it would be

inconsistent with the purposes and provisions and the role of human rights protections in the bill of rights. This is another reason that it likely will be challenged.

And then there will be the cost—I'm sorry to say it, but as we've just experienced yet again—of the Department of Justice being a bottomless pit of money to fight these sorts of provisions. The government should be defending the Charter of Rights and Freedoms for all people, those who might potentially be victimized or who have been victimized, as well as those who end up in the system victimized.

Hon. Irwin Cotler: Here is a short question, Ms. Rosenfeldt. Do you share Ms. Pate's view regarding the Supreme Court's decision in the *R. v Wu* case?

• (1600)

Ms. Sharon Rosenfeldt: I know there is a Supreme Court decision, but I'm not a lawyer, Mr. Cotler; I'm a victim advocate. However, I believe the government would definitely have taken that case into consideration. I would trust that the government has done its homework on that.

The Chair: Thank you.

Mr. Rathgeber.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair, and thank you to both witnesses. It's good to see you both again. Thank you for your interest in Bill C-37.

Ms. Pate, in your opening comment, you indicated that the Elizabeth Fry Society works with marginalized, victimized, institutionalized, and criminalized women. We might quibble over the definition of victim. When you were using the word “victim”, you were talking about women who have been treated poorly by the economy or by their family circumstance; you were not talking about victims of crime, necessarily, when you spoke about women who have been victimized. Or did I misunderstand you?

Ms. Kim Pate: Unfortunately you may have misunderstood, because we certainly are. We have shelters for battered women who are fleeing violence for which their partners may very well have been charged with violence; we work with residential school survivors who have been victims of abuse—

Mr. Brent Rathgeber: Would you agree with me that there is a tremendous overlap in client groups between your mandate—which is primarily with respect to dealing with offenders and people who have been institutionalized—and victims of crime? A woman could be a victim of crime one day and be charged with a criminal offence another day, if she's a marginalized person, for example.

Ms. Kim Pate: It's certainly true across the board. We know that the majority of people, by the time they reach adulthood, have done things for which, if these had been detected and pursued, they could have been criminalized.

Mr. Brent Rathgeber: I take no issue with the fact that you support the concept of victim services, that you support those programs, because certainly women who avail themselves of Elizabeth Fry services on occasion will require those services. You'll agree with that?

Ms. Kim Pate: We certainly support services for victims. We don't necessarily support their being merely set up as victim services.

When I was working with the John Howard Society many years ago, one thing the police victim services used to do, in the province we both worked in, was to routinely send victims for us to deal with—because I was setting up one of the first victim offender programs in that area—because they felt they couldn't deal with them through victim services, particularly in cases of sexual assault and violence against women.

Mr. Brent Rathgeber: So you take issue with the mechanics of how victim services are delivered in some cases, but generally you are supportive of services for victims.

Ms. Kim Pate: As a fundamental, we're supportive of the universal application of services so that we don't have victims, and when we do have victims, yes, of course we support them.

Mr. Brent Rathgeber: And would you agree with this statement, that making compensation assists in the rehabilitation of people who have been convicted of criminal offences?

Ms. Kim Pate: There are very few people I know who are in the system who would rather have been in the position of committing a criminal offence to start with.

Mr. Brent Rathgeber: I didn't ask that.

Ms. Kim Pate: I know you didn't ask that, but it's necessary for me to be able to fully answer your question, and I don't want to shortcut my answer.

The reality is that it would. It's part of the reason that historically I was involved in setting up those sorts of programs, because many of them feel the need to be accountable, and the system—including the victim surcharge approach—doesn't necessarily provide an opportunity for them to be accountable directly to the individuals whom they may have harmed. We know that in situations where it is possible, in which they can compensate.... When I ran programs for young people who could actually go back and work for the victims, it was certainly a far preferable situation to—

Mr. Brent Rathgeber: If you support generically the concept of services for victims and if you agree with me that paying compensation after a finding of guilt helps the rehabilitation of the offender, then conceptually you have therefore no problem with a victim fine surcharge.

Ms. Kim Pate: I think my logic professor would not have liked that slipping through of a few of the suppositions first, before you get to that conclusion.

I'd like to be clear: of course, accountability, where there needs to be accountability, is important, and sometimes that accountability can be financial. There is no doubt that the more serious and violent a crime, the more difficult it is to compensate for it, and certainly when a life is lost—as we both know in our families—you can't compensate for it with money; you can't compensate for it with all kinds of things. But you can ensure, as a principled position, that you provide the fewest opportunities for people to be victimized in the first place and, where there are opportunities, for that to be recompensed.

I don't then go the next leap to say that a victim surcharge means that it's the way to do it. In some cases, there may be excellent victim services provided; in some cases, there may not be. I would suggest to you—and I think both of us agree—that you may want to look at

how those victim surcharge moneys are being spent right now by the provinces and territories.

● (1605)

The Chair: Thank you, Mr. Rathgeber.

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): I'd like to give my time to Pierre Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): I want to start by saying that the NDP supports victims of crime and respects the recommendations of the ombudsman for victims. However, as you said, Ms. Rosenfeldt, nothing could ever truly compensate victims of crime. First and foremost, victims need services.

Ms. Pate, what can we do to enhance services available to victims—whether we're dealing with victims of crime or criminals, who themselves are victims—and make offenders more accountable?

[*English*]

Ms. Kim Pate: One of the challenges—and it's painfully clear to me, in the process I've been going through and in being in Toronto yesterday at the inquest into Ashley Smith—is that the false dichotomy of people being victims or offenders is just that; that when we have prisons filled with people who have survived residential school abuses or violence generally or mental health issues, and when we see the evisceration of social programs and health care, we see a creation of the climate for increased victimization of many people and the abandonment of those people by the state. I think that is the fundamental...whereby you can start preventing victimization if you provide supports.

The campaign by our aboriginal sisters for the missing and murdered women is a perfect example. Many of those women were also criminalized. It didn't mean they deserved to be taken and murdered—and I don't suggest that anybody is saying that. It's very much linked also to the challenge that our friend Cindy Blackstock is bringing on behalf of aboriginal children who have inadequate education, and the challenges that are being brought by the Native Women's Association of Canada with a number of young people and women who don't have access to adequate nutrition and health care on reserves.

I think we need to start much earlier than this. But to answer your question, once they are in the system, I think the greatest way to show accountability is to be accountable ourselves and to demonstrate the sorts of behaviours we want to see.

When we worked with young men and young women in the juvenile system, and when I worked with men in the adult system, one of the things we tried to do was identify with them who they had victimized, how they had victimized—sometimes these weren't people they had ever been charged for, maybe a family member, or it might be somebody else—and how they were also victimized. This was not to excuse their behaviour, but to help them get in touch empathically with...because many of them have been desensitized, by that stage, to their own victimization and therefore to the victimization of the people they've harmed.

I'm going now from people who have been in the system, including people who were victims who were part of the process or who were identified as victims by the system and those who were identified as perpetrators. The ones who have gone on and done very well in the community talk about understanding this—having opportunities to be contributing members of the community and being able to pay back in all kinds of ways.

Lisa Neve, who was once declared a dangerous offender, helps by trying to mentor young people. She had a horrendous history of victimization before she went on to be in the youth justice system herself and to be labeled one of the most serious young women in the system. Now, almost everybody would agree—she has been thirteen years out of the system—she contributes to the community and does everything she can to prevent anybody else from both being victimized in the way she was or victimizing in the way she did.

Those are some of the limited...you know, in the 30 years I've been doing this work, that's what I've been able to see. But very much I think modelling the behaviour we want to see is key at every level: for our teachers, for our educators, for our government, for those of us who do the work—it's key.

The Chair: You have half a minute.

[*Translation*]

Mr. Pierre Jacob: Thank you, Ms. Pate.

So minimizing the number of victims means strengthening the social fabric through investments in education, health and social services. The way to achieve accountability is not necessarily by imposing a sum of \$100 or \$200, but rather by applying remedies and ensuring better rehabilitation.

In your opening statement, you said—and your words stayed with me—that a judge's discretion should not be taken away as regards the surcharge. You said it would do more harm than good and would be overly punitive in cases where extreme poverty and mental illness are present. In fact, you said that 91% of aboriginal women in prison and some 80% of women in prison overall had themselves been victims and were not able to access adequate health care or mental health services.

• (1610)

[*English*]

The Chair: You're way over time.

Mr. Albas, go ahead.

Mr. Dan Albas (Okanagan—Coquihalla, CPC): Thank you, Mr. Chair, and I want to thank both of our witnesses for their testimony here today.

I'd like to direct some of my questions to Mrs. Rosenfeldt. Thank you very much for being here today. In a previous appearance before this committee, you said the following:

It is worrisome that so many people have focused on the cost of crime, particularly as it relates to offenders and prisons, without considering the cost that crime has on victims. The cost of violent and serious crime not only consists of taxpayers' dollars but the loss of human life, of family, loss of law and order, and loss of faith in the criminal justice system.

Especially on that last note, I could not agree with you more. It seems that many people, including those who oppose the bill, have

forgotten or have chosen to ignore the fact that crime has significant costs to victims. For this reason, it is our belief on the government side that victim services are extremely important and need to ensure the well-being of law-abiding Canadians who, unfortunately, have been victimized as the result of the unlawful behaviour of another individual.

By increasing the victim surcharges and making them mandatory in all cases, this legislation will ensure that more money will be sent to the provinces to increase the important services to victims across the country. Do you think this increase of funding through victim services will be well received by the provinces and the organizations on the ground?

Ms. Sharon Rosenfeldt: By all means, I do.

I'd like to make one comment on the questions given to my colleague, Ms. Pate, and her response. She talked about the incarcerated individuals, a lot of whom have been victims of crime themselves. She talked about prevention.

My response is, isn't this what this bill is trying to do? To put more money into the system, into the provinces, so that we can begin to provide better and enhanced victim services so that maybe the victims that Ms. Pate is speaking about will get the help prior to their having to go out and commit crimes?

Mr. Dan Albas: I think that's a very intriguing point: by making sure those services are there, people who have been victimized can deal with their victimization and hopefully find a way through it so that they can return to normalcy.

Last day, we talked about what counselling services are available, making sure they're not paying fully out of pocket to attend and to give victim impact statements, etc.

Oftentimes, I've heard reports of people who have suffered these kinds of issues who didn't even know there were victim services. Maybe that's something that could be looked at.

Your organization is nationwide. Do you have any sister organizations at the provincial or regional level?

Ms. Sharon Rosenfeldt: No, we don't. We're just on the national level.

Mr. Dan Albas: The reason why I ask is that I'm a big supporter of letting people close to the issue identify the problems and possible solutions. Last day, I read into the record a number of these victim services that are offered.

I want your opinion on what people might suggest as being a good use of this surcharge money. I think provinces would appreciate the fact that it would be consistently addressed across the country, but also that this money is highlighted for services that are needed and wanted.

What kinds of services do you think your organization would support it going to?

•(1615)

Ms. Sharon Rosenfeldt: There is definitely a huge gap and has been for years. Historically, ever since I've been around, the provinces have been responsive to victims of domestic violence, mainly women, by providing funding for shelters; child victims of sexual abuse, historical child victims of sexual abuse, which came to light in 1993, I believe; and to provide services for female sexual assault victims, but not males. It has been across the board, I guess, in all provinces, where the provinces have responded.

It was 24 years ago when this victim fine surcharge came into force. Our organization and others were part of advocating for this, with the hopes that there might be some money for another set of victims, in particular for victims of homicide.

The gap is huge. For instance, in Ontario, with the Criminal Injuries Compensation Board, there is pain and suffering for all kinds of victimization other than for homicide, mainly because your loved one is deceased, has been murdered, but there is no pain and suffering.... There is no compensation for victims in our case, and in some cases we have had a very difficult time.

I was a board member on the Criminal Injuries Compensation Board for the Province of Ontario, and I chaired that board for a while. One of the difficult issues we struggled with was providing compensation for funeral expenses for a family to bury their loved one. They were denied because their loved one had maybe been trafficking in drugs. So the family was actually—

Mr. Dan Albas: I think we're getting a little bit outside of it.

Ms. Sharon Rosenfeldt: Oh, I'm sorry.

Mr. Dan Albas: Thank you very much. Thank you for your compelling testimony.

The Chair: Thank you.

Mr. Côté.

[*Translation*]

Mr. Raymond Côté (Beauport—Limoilou, NDP): Thank you very much, Mr. Chair.

Thank you, ladies, for being here today.

Ms. Pate, I want to congratulate you on the two awards you received from the Calgary police for your contribution to the community. I must say I was quite pleased when I heard about it.

Ms. Rosenfeldt, it was sad to find out how you and your husband were treated in the wake of Darren's abduction and disappearance, particularly the lack of consideration and empathy you experienced. You were already struggling with not knowing where he was; you did not need the RCMP giving you the answers it did. I very much appreciate the position you presented to the committee. I think it is quite balanced.

Beyond the payment of the victim surcharge, one of the most important considerations is the use of that money. During our study this week, we found out that the majority of the money was unfortunately not being used by the provinces; it was getting lost.

Could you comment on that?

[*English*]

Ms. Sharon Rosenfeldt: In my presentation, I think I made the suggestion, but I don't know how far that would go. It is very difficult, this being a federal piece of legislation, to have all provinces on side in relation to the possibility of providing an annual report on where this money is going.

I believe one of the witnesses mentioned that \$2 million from this fund that is set up for victims is going to the Rick Hansen fund, which has nothing to do with crime victims. It's very difficult for us, as a victim organization, to try to downplay whatever services there are. However, I feel very, very strongly, and protective, as a long-time victims' advocate who was involved in this legislation from the get-go, that there is no transparency in how this money is being spent. I think the bill is a good step in the right direction to being able to continue providing victim services; however, I believe there has to be more transparency by the provinces.

•(1620)

[*Translation*]

Mr. Raymond Côté: To my mind, increasing the surcharge is a positive measure. The only problem, as I said, lies in how the money is used.

In the course of our work, we learned that judges and crown prosecutors were refusing to impose the victim surcharge because they had no assurance that the money was really going to victims because it was actually ending up in the province's consolidated revenue fund. That information came from an Ontario study done in 1994. That's a pretty big problem.

The other consideration is people's ability to pay. I want to thank my colleague Mr. Seeback for pointing out the fact that certain people subject to the fine would not be able to pay.

Do you not think the bill's intent to limit or remove judges' discretion could cause a lot more problems than it solves?

[*English*]

Ms. Sharon Rosenfeldt: I don't think so. I don't think it should be up to the crown attorneys or the judges to make an assessment on how this money is going to be spent. I think that is going beyond their discretion.

There is a large portion of the funds going to victim services today. That's why I think there has to be a mandatory piece of legislation in the Criminal Code that in fact tells them that this is what they have to do. It could really get abused as well by the perception of the crown or judges. Not everybody feels the same. When this bill first came about, it was really a shock to the Canadian criminal justice system that, "My gosh, victims are going to be allowed to make victim impact statements, and now we're going to have to levy a fine surcharge?"

You have to remember, that was 24 years ago. Today, it is much different, and there has been a lot more education done for judges as well as crown attorneys in having a better concept of what crime victimization does and the importance of having victims' representations, and seeking a balance between the services for offenders, for instance, the rehabilitation of offenders.... I have no idea for sure how much money goes into that. There is no rehabilitation money for victims of crime. I don't know if I'll ever see that in my day, but this is a step in the right direction.

The Chair: Thank you.

Mr. Jean, go ahead.

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

I thank you both for coming today.

I'm curious, Ms. Pate, about some statements you made earlier. I had an opportunity to practise law in northern Alberta for about 11 years, back in the 1990s. I have to tell you, I never did Legal Aid for more than six months. People who hired me could afford to pay, and they could afford a lot of money to pay for what they did, but very seldom was a victim surcharge put in place. I was always curious why, but I didn't understand what those funds went to.

If 100% of the money collected went to support victims, for counselling and other necessary services to help them get through their ordeal, would you support this legislation?

Ms. Kim Pate: I think you need to back up a bit, because part of the concern we have is that there are people who—and it's great that you had people who could pay—

• (1625)

Mr. Brian Jean: I understand that, but that's not my question. I do understand that some people can't pay. I do understand that. I saw enough of the system to understand that, but my question is if 100% of the money collected, in this case for victim surcharges, went to the victims and to support mechanisms for the victims, would your organization support the legislation?

That is my question. It's just a simple question.

Ms. Kim Pate: We always support resources going to victims, but that wouldn't mean we'd support this legislation, because even if that

Mr. Brian Jean: That was my question, so if 100% of this money did go toward victims—

Ms. Kim Pate: It can't. We're back to a logical inconsistency: if people can't pay, they'll go to prison, and the result will be longer jail sentences—more expensive than the surcharge would have been in the first place—and people will end up in custody.

Mr. Brian Jean: Okay, so you're looking at a macroeconomic policy based upon the criminal justice system and overall what it does.

Ms. Kim Pate: I don't know how you can't look at the legislation that way.

Mr. Brian Jean: But you would agree with me that some people who are criminals have never been victimized. Clearly we've seen

case after case of people who are criminals who haven't been victimized.

Ms. Kim Pate: There may very well be, yes. There are some who haven't been—

Mr. Brian Jean: You would agree with me on that, that there are some criminals who have not been victimized. They're just criminals.

Ms. Kim Pate: There are lots of people who do things for which they are criminalized, not because they're victimized. Yes, I would agree with that. But that doesn't mean that's all they are.

Mr. Brian Jean: I understand that.

I would like to pass the rest of my time over to Mr. Rathgeber, please.

Mr. Brent Rathgeber: Thank you.

Ms. Pate, I'm following up on what my friend Mr. Jean asked.

I read somewhere or maybe it was one of the witnesses who indicated that currently judges routinely waive the victim fine surcharge in the majority of cases, except for impaired operation of a motor vehicle. Do you know if that's true?

Ms. Kim Pate: I don't know if that's true.

Mr. Brent Rathgeber: But assuming that it is true...or at least we can probably agree that people charged and convicted of that type of an offence are, generally speaking, not as impecunious as people charged with what I might colloquially refer to as a street crime. Would that be fair?

Ms. Kim Pate: I don't believe that to be true—depending on the type of vehicle they have. But there are a lot of people who don't necessarily have a lot of resources, who have vehicles and rely on them to work and that sort of thing. We know from all of the work done on drunk driving that if someone is still driving, with the amount of public education that's been done about it, it's often because of other issues, including not being able to—

Mr. Brent Rathgeber: I understand the people convicted of impaired operation actually do pay victim fine surcharges because they're not impecunious. Now if that's the case, doubling the victim fine surcharge, all other things being equal, would double the funds available. Would you—

Ms. Kim Pate: If they're not impecunious and they can afford to pay, then the judge already has a discretion to impose a higher surcharge.

Mr. Brent Rathgeber: Just generally speaking, philosophically, who would you suggest bears more of an onus to fund programs to help victims: individuals who have been convicted of crimes or taxpayers?

Ms. Kim Pate: It's not a real question, because taxpayers pay in the end anyway to fund the criminal justice system, to fund the creation of these laws, to provide victim services ultimately because

Mr. Brent Rathgeber: I absolutely agree that both are going to have to pay, but who bears the bigger responsibility in society? Those who caused crime or the taxpayer generally?

Ms. Kim Pate: The challenge I have, and especially this week, quite frankly, is when we have a situation of who is responsible for the years of sexual abuse in institutions, of males and females, whether it's residential schools, orphanages—

Mr. Brent Rathgeber: I think you're getting off topic, so thank you, Ms. Pate.

Ms. Kim Pate: Well, I don't think we are actually. We're talking about victimization created by the state.

The Chair: Sorry, but time is up.

I want to thank the panellists for being here. You've brought a different perspective to the committee and I think we appreciate that. Thank you again. It's always a pleasure to see both of you.

We'll take a short break so we can switch over to the clause-by-clause part of this meeting.

• (1625) _____ (Pause) _____

• (1630)

The Chair: We'll call the meeting back to order.

Before we begin the clause-by-clause, I think everybody has seen the project budget circulated for Bill C-37, and I need somebody to move the adoption.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): I will move it.

The Chair: Thank you, Mr. Goguen.

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

The Chair: Thank you very much.

Now we move to the clause-by-clause section.

Pursuant to Standing Order 75(1), consideration of clause 1 is postponed.

(Clause 2 agreed to)

(On clause 3)

The Chair: I believe, Mr. Cotler, you have an amendment that you're proposing?

• (1635)

Hon. Irwin Cotler: Yes, Mr. Chairman.

I will be brief with regard to the explanation of the amendment.

The government has expressed its concern that the undue hardship defence is being improperly applied; that is, judges were waiving the surcharge for no reason—something that was critiqued in numerous reports—and I certainly understand the government's concern in that regard.

I might add that all my amendments intend to, in effect, dovetail with the intention of the government and seek only to bring about a better achievement of the government's own intention. This amendment proposes to address the problem, correctly identified by the government, by allowing the undue hardship requirement but requiring judges to record their reasons in writing. This would improve the enforcement rate for the application of the surcharge,

and it would address the concern of the improper granting of the waiver that has taken place.

The Chair: Thank you, Mr. Cotler.

Bill C-37 amends the Criminal Code by, among other things, repealing subsections 737(5) and 737(6). This amendment proposes to replace subsection 737(6) with a text that is similar to the current Criminal Code text. The effect of the replacement would be to negate the repeal of the subsection. 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 my opinion, the reinstatement of a key element being repealed is contrary to the principle of Bill C-37 and is therefore inadmissible.

Hon. Irwin Cotler: Mr. Chairman, I won't challenge your reasoning. That was the reason for my prefacing my remarks. While I share the government's intention, I was seeking only to bring about a different refinement of it.

The Chair: Thank you, Mr. Cotler.

I believe you have another amendment.

Hon. Irwin Cotler: Yes.

This one I think is not as directly opposite in scope. This amendment would agree with the collection of the surcharge and would suspend it only "if the court is satisfied that undue hardship to the offender or dependents of the offender would result from the payment of the victim surcharge" in provinces where a fine option or similar program is unavailable.

Simply put, Mr. Chairman—again, I'll be very brief—Bill C-37 seeks the mandatory application for the victim surcharge, which we are supporting, while removing an undue hardship defence. The amendment maintains the government's intent to impose the surcharge, but suspends its collection when undue hardship would result. We're not seeking to replace the undue hardship defence here. As such, it is supportive of the government's objective of recognizing the need for a surcharge and the related goal of denunciation, while at the same time allowing a court to consider the resulting financial hardship and ordering the immediate payment of the fine.

In other words, while much has been made of fine option programs, Mr. Chairman—and with this, I will conclude—we know that not every province has one. For example, we discussed Newfoundland and Labrador, B.C., Ontario, and the equivalent programs available may not be adequate in certain circumstances. The purpose of this amendment, simply put, allows offenders to make an application that they're in such a situation, and therefore in that situation the surcharge would be suspended.

The Chair: Thank you.

Again, Bill C-37 amends the Criminal Code by, among other things, repealing subsections 737(5) and 737(6). This amendment proposes to replace subsections 737(5) and 737(6) with a text similar to the current Criminal Code text. The effect of the replacement would be to negate the repeal of the subsection. 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 my opinion, the reinstatement of a key element being repealed is contrary to the principle of Bill C-37 and is therefore inadmissible.

• (1640)

Hon. Irwin Cotler: Again, I will not challenge your reasoning. I'm only saying that this was an attempt to simply suspend collection under very narrow and specific circumstances where there is clear proof that immediate payment would result in undue hardship and no fine option program is available. That's all.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Cotler.

I believe you have another amendment. Is it Liberal-3?

Hon. Irwin Cotler: Yes.

This amendment, Mr. Chairman, would suspend the collection of the surcharge if the court is satisfied that requiring the offender to immediately pay the surcharge might have a negative effect on his or her rehabilitation, again, in provinces where a fine option or a similar program is unavailable. We know the difficulties in that regard.

Mr. Chairman, I'll conclude by saying, again being very brief, that we all share the objective and know the importance of rehabilitation. As courts have found, the imposition of a financial obligation may in certain circumstances impede such rehabilitation. As such, this amendment, once again, seeks to impose the fine. It does not eliminate the requirement to pay the fine; it only suspends its collection in cases where it is demonstrated that the immediate imposition of the surcharge will have a negative impact on an offender's rehabilitation, which we all seek, Mr. Chairman.

The Chair: Thank you, Mr. Cotler.

Bill C-37 amends the Criminal Code by, among other changes, repealing subsections 737(5) and 737(6). This amendment proposes to replace subsections 737(5) and 737(6) with text similar to the current Criminal Code text. The effect of the replacement would be to negate the repeal of the subsection.

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In my opinion, the reinstatement of a key element being repealed is contrary to the principle of Bill C-37 and is therefore inadmissible.

Hon. Irwin Cotler: Again, Mr. Chairman, I won't challenge the opinion as you've expressed it. As I say, I think we are along the lines of the intention and purpose of the bill and do not oppose it. At the end of the day, even if I did object to the reasoning and question it, I know what the outcome of a vote would be, so I'll leave it at that.

The Chair: Thank you, Mr. Cotler.

I should have indicated that we have two officials with us: Ms. Morency and Ms. Arnott. I should have done that before. My apologies.

Do you have another amendment, Mr. Cotler?

Hon. Irwin Cotler: Yes, I have one last one, Mr. Chairman.

It simply adds the language "that for greater certainty, an offender who fails to pay the victim surcharge because he or she is unable to do so is not subject to imprisonment as a result of that failure."

Again I'll be brief in my explanation, Mr. Chairman.

Basically, the amendment seeks to codify the principle in *R. v. and Wu*, to which I've referred before, as have other colleagues, in which the Supreme Court affirmed that it is irrational to imprison an offender who does not have the capacity to pay a fine in order to compel the payment. This would add clarity to the statute while addressing the concerns that have been expressed that this bill would have the effect of putting people in jail longer simply because they aren't able to pay or because they are in a province that does not have a fine option or a similar program to offset their debt obligation.

Basically, we are seeking to codify the Supreme Court reasoning by way of an amendment to preserve the government's objectives, but not allow for unreasonable incarceration or prolonged incarceration where it wouldn't otherwise take place.

The Chair: Thank you.

Go ahead, Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: Are we discussing the amendment now?

• (1645)

The Chair: Yes.

Ms. Kerry-Lynne D. Findlay: The proposed amendment would specify that an offender who is unable to pay the victim surcharge is not subject to imprisonment for that failure to pay. We understand that is the idea; however, in our view, the proposed amendment goes beyond current paragraph 734.7(1)(b) of the Criminal Code, which reflects the Supreme Court of Canada's 2003 decision in *Regina v. Wu*.

Under this paragraph, a court cannot issue a warrant of committal in default of payment of a victim surcharge unless the offender has refused to pay the surcharge without a reasonable excuse. This would prevent, for example, an offender who was unable to pay the surcharge due to poverty from being sent to prison. The wording of this proposed amendment could mean that an offender who doesn't pay for any reason will not be subject to the ultimate consequence of imprisonment. The Criminal Code currently prohibits the imprisonment of offenders who default on the victim surcharge due to an inability to pay.

Bill C-37, as introduced, seeks to ensure that offenders who have the ability to pay are absolutely required to do so. Those who are unable to pay the victim surcharge will be able to discharge the amount owing by participating in a fine option program. These programs exist in seven jurisdictions. Alternative measures are available in the provinces that do not offer such programs, such as my own jurisdiction of British Columbia, where there are many mechanisms used to collect fines of this type.

Mr. Chair, I would like to ask the officials to comment on this as well.

The Chair: Do the officials have any comments?

Ms. Carole Morency (Acting Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice): As just noted, the provision referred to paragraph 734.7(1)(b), where the court cannot issue a warrant of committal to commit an offender who cannot pay...or an offender who refuses to pay without a reasonable excuse cannot be committed to jail. I know the Wu decision has received a lot of consideration around this table, and rightfully so, because it directly impacts on the issues addressed by this bill.

In Wu, the facts of that case were whether a conditional sentence was appropriate. The court held it was not, but then the court went on to consider what is appropriate when dealing with an offender who has been fined and has a true inability to pay. The court went through the listing of the considerations. If there are administrative actions that can be taken, then that would be the next recourse. It could be that a civil judgment enforcement isn't going to be effective in those circumstances. If the real reason that the individual offender is unable to pay, or refuses to pay, is due to their impecunious state, then Wu does very much stand for that proposition; it would be inappropriate to incarcerate that person.

Wu stands for that proposition, and the Criminal Code reflects a similar interpretation: that the court wouldn't have the authority to do it in those circumstances.

The Chair: Thank you.

Hon. Irwin Cotler: Mr. Chair, this amendment is for greater certainty.

It would leave intact a court's judicial discretion to sentence an offender to whatever punishment the particular offence would deserve, pursuant to the law at issue and the relevant sentencing guidelines. An offender would be subject to incarceration, when warranted, by his specific offence, but as I think this committee is aware, not all offences in the Criminal Code call for this extreme punishment.

To conclude, the amendment would ensure—and that's what the reasoning is—that where incarceration is not otherwise an option, and where an offender is simply not able to pay the surcharge because of financial hardship, he or she will not thereby find themselves facing such incarceration. I would note that even one day in jail could have adverse consequences, particularly when it's unnecessary, and could even lead to a loss of employment in a certain situation, exacerbating the difficulties in the situation.

This is not, in my view, the objective being sought by Bill C-37. If the committee is going to pass this bill with the undue hardship defence removed, which is I suspect what we will be doing, we should at least ensure that the Supreme Court's decision in this regard can be appropriately respected and codified. That's all I'm saying.

The Chair: Thank you.

Go ahead, Ms. Morency.

Ms. Carole Morency: I should have added that Wu does speak to the fact that the court also has the power to structure how the payments could be made and over what period of time. Wu does speak to the fact that if the offender does not have the ability to pay at the time that the offender is before the court, it doesn't mean that the offender may not have a future ability to pay, and that too is a factor that can be taken into consideration.

• (1650)

The Chair: Thank you.

Go ahead, Mr. Scott.

Mr. Craig Scott: Sorry, Mr. Chair, just a quick clarification. Ms. Findlay mentioned paragraph 734.7(1)(b).

I'm not sure if the language reflects or codifies Wu.

Ms. Kerry-Lynne D. Findlay: It reflects it.

Mr. Craig Scott: I'm just wondering. I should know this. I should have read it more closely myself. Is Wu in fact an interpretation of paragraph 734.7(1)(b) or is it an extraneous interpretation to that paragraph? Is it giving meat to that provision, or did this provision follow from Wu?

Ms. Carole Morency: No, the provision was in the Criminal Code before Wu. Wu was a 2003 decision. The provision was there before. I believe it was part of the overhaul of the sentencing provisions.

Mr. Craig Scott: Right, so I guess my question is again for clarification. If I'd had more time, I could answer it myself.

The Chair: How much time did you need?

Voices: Oh, oh!

Mr. Craig Scott: I need more time to read the judgment. This is unfortunately the case. I'm not used to not knowing the cases I should know.

The question is, was Wu about this provision?

Ms. Carole Morency: No. I believe Wu was an appeal from the Ontario Court of Appeal. He was charged under the act of trafficking in contraband tobacco, so there was a minimum fine that was imposed. The court—the trial judge—found that, in the circumstances of the accused before him, Mr. Wu, imprisonment was inappropriate, and he imposed the mandatory fine. Then, because of the inability to pay, he said, "You're going to be sentenced to a conditional sentence of imprisonment at home because you have no ability to pay." The court was really dealing—

Mr. Craig Scott: Was this provision on the basis of common law or another provision in the code?

Ms. Carole Morency: The Supreme Court would say it's an inappropriate interpretation of the availability of a conditional sentence.

Mr. Craig Scott: Oh, okay.

Ms. Carole Morency: That was really the starting point. In the course of its decision and proceeding on, it went through...you know, this was an accused in Ontario with no fine option program, so what are the proper steps to be taken and gone through?

Mr. Craig Scott: All right. Thank you.

The Chair: Thank you.

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

The Chair: Now we have NDP-1, if you would like to introduce it, Madame Boivin.

[*Translation*]

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

The days we've spent studying Bill C-37 have been extremely informative. Some concerns were raised at second reading. After hearing from various witnesses, we can see that there is some basis for those concerns. Ms. Morency's answers about the application of the decision in *R. v. Wu* may alleviate those concerns in part. Be that as it may, we see that, despite being set out in the Criminal Code already, the surcharge is not imposed in a large enough number of cases—I wouldn't say 80% or 85%, or even 75% of cases—and the court is not even required to state its reasons in the record, in accordance with the facts presented.

Some groups have also raised concerns about certain prison populations who would have difficulty paying or who suffer from mental health problems. We've all heard about the Ashley Smith case, which is very much a hot topic. Even the government admitted there was a problem. The answers we heard during our question and answer period today call attention to the matter. So we won't bury our heads in the sand: in many cases, those who are in prison should probably not be there.

The surcharge is extremely well-intended. We wholeheartedly stand behind the objective, which is to increase funding for victims, as the Office of the Federal Ombudsman for Victims of Crime has called for I don't know how many times over the years. There is absolutely nothing wrong with that aspect. I believe everyone in this room supports the measure. But this isn't the only way to compensate victims. We heard Mr. Waller talk about the possibility of imposing bigger fines. It's one of the current provisions in Bill C-37. We didn't discuss it much because it didn't involve any amendments.

A little while ago, Mr. Jean mentioned clients that were able to pay the legal bill for their defence counsel. And we're glad of it. That said, they may be able to afford a higher fine. It will be useful to see how many times the courts impose a higher surcharge. That may be the way to shore up funding for victims programs.

Nevertheless, a problem remains. I am referring to borderline cases that are likely to fall through the cracks of the system. For example, in cases where a minimum sentence is imposed in the form of a fine, the surcharge will automatically be imposed. So that eliminates the possibility of rendering the right decision.

Indeed, the decision in *R. v. Wu* is an important consideration. My background is in civil law. Quebec's system is based on codes: the Civil Code, the Code of Civil Procedure, the Criminal Code and so on. Something that is clear and understood by everyone is our preference to codify rather than interpret the jurisprudence, as is often the case under the common law system. That is the beauty of our *bijural* tradition in Canada. Regardless, there are times when I prefer to write down what the law of the land should be, to put all questions to rest.

When we prepared our amendment, we tried to fully adhere to the government's objective of doubling the surcharge and making it

mandatory, while maintaining the onus of proof on the accused, the conditions of which would be similar to those described in *R. v. Wu*. They are extremely specific cases. There are two conditions: the issue is not only whether the accused is unable to pay as a result of extreme poverty, which must be proven, but also whether it is impossible for the accused to access a fine option program under section 736.

● (1655)

I believe—and I think I speak on behalf of the NDP as well—that we genuinely need to strengthen this bill to the point of removing all weaknesses. As they say, the stronger the better. That would be ideal. That would reconcile almost all the logical points of view heard throughout our consideration of Bill C-37. That is what we're trying to do and it should not be considered unacceptable. It would truly improve the bill tremendously.

[*English*]

The Chair: Thank you for your explanation, Madame Boivin.

Ms. Françoise Boivin: I didn't convince you.

The Chair: Bill C-37 amends the Criminal Code by, among other changes, repealing subsections 737(5), 737(6), and 737(10). This amendment proposes to replace subsection 37(10) with a text similar to the current Criminal Code text, where the effect of the replacement would be to negate the repeal of the subsections. As *House of Commons Procedure and Practice* second edition, states on page 766:

An amendment to a bill that was referred to committee *after* second reading is out of order if it is beyond the scope and principle of the bill.

In my opinion, the reinstatement of a key element being repealed is contrary to the principle of Bill C-37 and is therefore inadmissible.

● (1700)

Ms. Françoise Boivin: Not because I want to challenge you necessarily, Mr. Chair, but since I know my colleagues on the government side are really reasonable people and would love to debate that amendment—I'm pretty sure, because it is absolutely smart—I do challenge your decision, because I'm sure they will agree with me that we should definitely....

The Chair: Do you want a recorded vote?

Ms. Françoise Boivin: Please.

The Chair: Should the chair's ruling be sustained?

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

(Clauses 3 to 5 inclusive agreed to)

The Chair: Shall the alternative title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

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

Some hon. members: Agreed.

The Chair: I want to thank the officials and the legal analyst, the counsel, for being here today. I will report this bill to the House on Monday.

Just before we leave, Tuesday's meeting will be at 9 o'clock over on Queen Street. That will be the only meeting.

Ms. Françoise Boivin: Am I to understand there is only the minister and some officials of his department? Is there no way we can have the commission itself come?

Ms. Kerry-Lynne D. Findlay: I don't believe so. That's all we had contemplated, the minister and officials. We tried for 9:30, but the availability wasn't there.

Ms. Françoise Boivin: So it's really a meeting where we can't propose anybody or anything.

Perfect.

The Chair: The other thing, before you run away, is that the clerk still reminds you that if you have witnesses for these upcoming bills, get the witnesses' names to him so that he can do some work while we're gone next week.

The meeting is adjourned.

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