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Chair

The Honourable Paul DeVillers

Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (0900)

[*English*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): I'd like to call to order this meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. We're continuing our study of Bill C-2, an act to amend the Criminal Code, for the protection of children and other vulnerable persons, and the Canada Evidence Act.

We have two witnesses to hear from this morning. We have Mr. Nicholas Bala, a professor with the Faculty of Law at Queen's University, and from the Canadian Civil Liberties Association we have Mr. Alan Borovoy, the general counsel.

What I'm proposing this morning, for the benefit of committee members, is that we go until 10:30 a.m., hearing from these two witnesses, and then we reserve the last half hour to go in camera to deal with other committee business.

[*Translation*]

Before we start, I think that Mr. Marceau wanted to raise a point of order to pass some information on to us.

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Mr. Chairman, I have tabled a notice of motion on the closing of RCMP detachments that we will discuss upon our return after the break week. I simply wanted to give as much advance notice as possible. There will of course be a debate, but I hope to have the support of all members of Parliament.

Thank you.

[*English*]

The Chair: Merci.

So now we'll go to our witnesses. I think both witnesses have been here before and know the procedure. We'll ask them for an approximately 10-minute opening statement, and then we'll go to questions.

Professor Bala, perhaps you'd like to start us off.

Prof. Nicholas Bala (Professor of Law, Faculty of Law, Queen's University, As an Individual): Thank you very much. It's an honour to be here.

I am presenting a brief today that I think you have in front of you. I sent it a few weeks ago, on my behalf and on the behalf of my colleagues Dr. Rod Lindsay, Dr. Victoria Talwar, and Dr. Kang Lee, all psychologists at different universities, and Ms. Janet Lee, who works as a victim witness manager in the Ontario courts.

I'm going to be addressing some issues that come up in Bill C-2 based on research work that we've done in a variety of contexts. This research work has been largely funded by the Social Sciences and Humanities Research Council of Canada. We're concerned very much about the position of children in the justice system, but we also very much recognize the need for a fair and balanced justice system. Much of our research in fact deals with issues around the credibility of children, but also such issues as when do children lie, and how can that be detected? So we certainly are not saying that all accused persons are necessarily guilty or don't deserve a fair trial.

The brief that you have in front of you, and my comments, will focus on issues of child witnesses, which has been the main area of our research. I have done teaching and writing on other issues that are in this bill, and if you wish, I'd be willing to address some of those issues if you have specific questions.

I think Bill C-2 is a very important piece of legislation for children. There was an earlier version of this bill, and I was privileged to appear in front of this committee in a previous incarnation, when it was studying Bill C-20. We believe there were very significant amendments, in part as a result of the representations that we and others made in regard to that bill.

This bill is very important for children and other vulnerable persons who are in the courts and for responding more effectively in Canada on child abuse. We would certainly urge the passage of this bill, and while we'll be suggesting certain specific amendments, this is an important piece of legislation.

I know that some parts of the bill are controversial, and I'm sure Mr. Borovoy and others have addressed those. I would urge you, if you feel that some parts are too controversial and you can't come to an agreement or resolution on them, that you pass those parts that have widespread support. I think it was very unfortunate that in the previous incarnation, the passage of this bill was significantly delayed and then ultimately not enacted because some parts that were controversial held up the entire process. I think Canada's children suffered as a result.

A major focus of our research over the last few years has been on issues related to the competency inquiry, what is now section 16 of the Canada Evidence Act. There is a very significant amendment to section 16 as proposed in Bill C-2. Much of our research has dealt with the issue of the present inquiry.

As you probably heard from other witnesses, when a child is called to the witness stand in court, the first thing that happens is an extensive and highly intrusive inquiry about whether the child understands the nature of an oath, understands the meaning of the word “promise”, understands the meaning of the concept of truth and lie.

Our research and the research of others has demonstrated that this inquiry does nothing to promote the search for the truth, but it's often highly intrusive. Children may be asked, for example, “Do you know what an oath is?” It turns out that many adults can't correctly answer that question. Or they're asked questions like, “Do you know what the truth means?” It turns out that there are many people who can't give a very good definition of truth either. Furthermore, and perhaps most significantly, our research establishes that the ability to answer these kinds of essentially cognitive, abstract questions bears no relationship whatsoever to whether one will actually tell the truth.

To give a very famous example, Bill Clinton, perhaps the most famous law professor in the world, I'm sure could give a very good definition of the concepts of truth, lie, and oath. Nevertheless, he told one of the more very famous lies while under oath. So the fact that one can answer those questions doesn't indicate that one will tell the truth.

More seriously and substantively, young children cannot give abstract answers, and do not think cognitively. For example, if one is in a room with a small child and asks them to define a ball, as a spherical object that bounces and is used for play, the child could not give a definition of ball. On the other hand, if you ask a child to point out a ball, the child could probably do that.

Particularly in the context of abuse situations, children can often give very accurate, reliable descriptions of what occurred to them, but they're often excluded from testifying because of the way in which section 16 is presently drafted, and the act contributes to miscarriages of justice as a result.

[*Translation*]

Ladies and gentlemen, it is a pleasure to be here.

● (0905)

[*English*]

Proposed section 16.1 of the Canada Evidence Act is a very substantial improvement on the present law. It recognizes that it's not appropriate to ask children these abstract questions about such concepts as oath, truth, and lie. It recognizes that they can give meaningful, reliable evidence in court processes.

I think it's also very useful that it continues to ask children to promise to tell the truth without asking them to define what that is. Our research has shown that children who are asked to promise to tell the truth are more likely to tell the truth as a result of having made the promise. So the concept of promising is important, even though, if you then turn around and ask the child “What is a promise?”, they can't give a very good definition of promise.

One of my jobs is to teach law students contract law. It turns out that most law students can't give a very good definition of promise either. But we just let people promise without defining what they mean.

We do have some specific drafting concerns around proposed section 16.1 that I think are consistent with the legislation as it's intended. They are set out in our brief.

Briefly, these concerns arise in part because of the way that judges have interpreted the present section 16. This provision was actually substantially amended in 1988, and I think the intent then was much as the intent is now, to make it much easier for children to come and testify, and for their evidence to be assessed on its merits. However, the courts gave it a very narrow, conservative interpretation, I think based on 200 years of legal history. Judges were very much influenced by what happened in the past rather than focusing on the intent of Parliament.

So I would urge you to be as clear as possible in drafting this piece of legislation, particularly with regard to proposed subsection 16.1 (7), which deals with the promise. It sets out that a child should not be asked “questions regarding their understanding of the nature of the promise for the purpose of determining whether their evidence shall be received by the court”. We would urge you to add a few words, making it “promise to tell the truth”. Otherwise, a judge may say he cannot ask about the meaning of the concept of promise, but maybe he can ask about what “truth” means, or what “lie” means. Those kinds of inquiries are similarly not meaningful and often far too intrusive and not helpful to the search for justice.

We would also urge you to clarify that no child under the specified age, which is 14 in the legislation, should be asked to testify under oath or solemn affirmation. All children under a specified age should simply be asked to testify on the basis of a promise to tell the truth. If you have a distinction, it may cause judges to say, “Well, maybe you can still testify under oath, but first I have to ask you if you know what an oath means”, and then one gets into a very intrusive inquiry, which adults are not asked about.

When judges or lawyers are asking children questions about the meaning of an oath, they inevitably ask questions like, “What are your religious beliefs? Is this a meaningful inquiry for you?” Again, children are sometimes asked extremely intrusive questions that we would never ask an adult. Someone might say that an oath is a promise to God to tell the truth, and the judge might say, “Well, you say that; do you know what God is? What is God?” If a child of six or seven years of age is asked this question before they're permitted to testify, that's a very hard question even for an adult to meaningfully answer.

We would also urge you to think about the age. I know that some of you have issues around other age provisions in this piece of legislation. The cut-off age that you have here is 14. Under the age of 14, children will be testifying under the basis of a promise. We would suggest that you base it on a huge body of research about child development and some legal tests: 12 is a preferable age to 14.

In particular, one of the issues here around the issue of promise is the legal significance of making a promise as opposed to testifying under oath. A child under the age of 12 cannot be charged with perjury if he or she tells a lie under oath or under a promise to tell the truth, whereas 14 doesn't have that kind of legal significance. The legally significant age is 12.

Furthermore, and perhaps more significantly, by the age of 12 most children are adolescents in terms of not only their chronological age but also their intellectual and emotional development, and should be treated in the same way. So we suggest 12 is a preferable age.

I could certainly go on and address some of the other provisions—I would just very briefly say that we're certainly in support of those provisions—but I want to say a word about the closed-circuit TV provision and the screen provision, proposed section 486.2 in Bill C-2. This is certainly a significant improvement over the present legislation.

● (0910)

We have done some research around the use of the closed-circuit TV and screen provision in the courts. The present provision is certainly useful, but it is significantly underused. We've looked into some of the reasons why it is underused. One of the concerns certainly is the way the present legislation is drafted. The proposed amendments go significantly towards dealing with this problem.

For example, I know one issue that has arisen—there were a couple of cases, actually, in Canada—is the issue of children witnessing their parents' murder and being called to the stand to testify. The crown asked, “Can we have this young child testify by closed-circuit television?”, and the judge said, “No, you can't, because that is not in the present legislation”. So amendments to broaden the range are very important; however, I think it would greatly help in the use of these provisions if it was clear that an application could be made prior to trial for the use of these provisions.

For example, closed-circuit television is difficult to arrange and use. Often crowns are in court saying, “I'm not going to delay the trial by bringing this application, because it would take a long time to arrange this”. If an application could be made prior to trial, it would greatly facilitate the use of these provisions.

Finally, I would say that while these legislative improvements are very important, and they certainly have a significant role in how children are treated in the court system, there remain many other very important issues around training of lawyers, judges, police, and victim witness workers, and in particular providing adequate resources for children in the justice system. Those are largely matters of provincial responsibility, but there's also an important federal role, and we would urge Parliament to address that as well.

Of course, there's the need for better research and more research into how these provisions are being applied. We would urge you to consider having research follow-up to the implementation of these provisions.

Thank you very much. I'd be happy to answer your questions after.

● (0915)

The Chair: Thank you very much, Professor Bala.

Mr. Borovoy now, for approximately 10 minutes.

Mr. A. Alan Borovoy (General Counsel, Canadian Civil Liberties Association): Thank you very much.

I have with me Alexi Wood, a policy analyst with our organization.

Our remarks will be confined to the child pornography provisions of Bill C-2. The key feature of these amendments is the new defences that it would propose to adopt. In the first place, the new feature is the concept of legitimacy, that material has to have a legitimate purpose related to some of the traditional areas of defence. The problem is that the word “legitimate” is nowhere defined, and it puts people therefore in the impossible position that they simply will not know in advance whether their purposes will be considered legitimate.

But that's only the first hurdle. The second hurdle that they also have to clear is that the material must pose no undue risk of harm to persons under the age of 18. What in the world is an “undue risk”? Indeed, what is a “due” risk? It becomes compounded by the fact that the person is asked to try to establish a negative proposition.

I used to tease my students, when I did some teaching, with the question, “How could you establish that you've never been to China? Tell me what witnesses you're going to call.” That helps to illustrate the kind of impossible quandary that people could be put in.

This is an unfair way to legislate in relation to criminal law. People must have a reasonable way of knowing in advance whether their behaviour violates or comports with the criminal law. If you go out to hold up a bank, you may not know exactly what you're going to be charged with, but you know very well that it's a crime. But if you're dealing with material relating to youthful sexuality, you could well not have a clue whether your material is going to run afoul of the law.

This is rather poignantly illustrated by a dichotomy that has emerged. Some 25 years ago, the children's book *Show Me!* was the subject of a lengthy and controversial trial as to whether it violated the obscenity section of the Criminal Code. It was found that it satisfied the educational purpose, one of the mitigating factors in the law of obscenity. In 2001, that same book was held by a judge to be thinly disguised child pornography. This is after the Sharpe judgment, in which the Supreme Court of Canada said these defences are to be construed liberally. And that is the version of the law before these amendments; without these amendments, that's what happened.

The chief problem from our point of view is not that the defences are excessive, it's that the definitions are excessive. When most people hear the words “child pornography”, it conjures images in their minds of real children being unlawfully abused. If this legislation had been confined to such situations, we likely would not have had a controversy around it. But this goes far beyond. It deals with fictional depictions, imaginary descriptions, imaginary images.

● (0920)

We know that art and literature cannot legitimately be confined to portrayals of virtue. Art and literature are not simply about birds, flowers, and cans of soup. They also have to be able to depict the dark side of human life. Art and literature have to be able to depict and describe evil. That is one of the great functions that art and literature serve in our society.

All of this is being done for the praiseworthy objective of protecting children. But we suggest to you that there is a disconnect between that praiseworthy objective and these proposed amendments, and indeed this legislation in the breadth in which it is drafted.

I invite you to suppose for a moment that all of these fictitious descriptions, imaginary depictions, and images were to disappear overnight. I suggest to you that the children of our society would not be rendered significantly safer as a result. There's one good reason for that: pedophiles are likely to remain pedophiles, and they will be pedophiles with or without the kind of images we're talking about.

Accordingly, the Canadian Civil Liberties Association would propose to you that the definitions of child pornography in the legislation be narrowed so that it applies only to material that involved, or is held out to have involved, the unlawful abuse of real children. If that were done, incidentally, the defences relating to art would no longer be necessary, because you couldn't use that to redeem a situation where a youngster was really being abused, or even held out to have been abused.

We suggest to you that this is one way that the legislation could focus on its legitimate objective, the protection of children, and keep intact a more viable regime for freedom of expression.

All of which, Mr. Chair, is, as always, respectfully submitted.

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

We'll now go to questioning from the members, starting off with, for five minutes, Mr. Toews.

Mr. Vic Toews (Provencher, CPC): Thank you, Mr. Chair.

Thank you for your submissions. Certainly you've left us with a lot to think about.

I want to deal with Mr. Borovoy's comments first about pedophiles remaining pedophiles. That's certainly consistent with a lot of the evidence I've heard in the past, that these individuals are hard-wired: they are pedophiles.

If we went along with your suggestion, and I'm not saying I would, to in fact narrow the scope of what this section would do, given your belief that these individuals are pedophiles and that they're dangerous to our children, wouldn't that be a very persuasive argument for mandatory minimum sentences, that these individuals remain in prison, because they are pedophiles, and they are dangerous to our children? I mean, you can't have it both ways. You can't say narrow the scope, but then those who are truly within that scope are free to wander the streets under conditional sentences, the so-called supervised orders.

What would you say to that, Doctor?

● (0925)

Mr. A. Borovoy: At the risk of losing even your temporary support, Mr. Toews—

Voices: Oh, oh!

Mr. Vic Toews: Consider it very tenuous at best, so....

The Chair: It's conditional, not temporary.

Mr. A. Borovoy: I never doubted that.

Even at that risk, I would urge you to go in the opposite direction when the issue of mandatory minimum sentences is involved. I just want to give you one example of a situation that occurred a number of years ago, before mandatory minimum sentences were involved with this particular offence.

Somebody had his sentence reduced from 12 months to 6 months by the Ontario Court of Appeal. The court said that in the circumstances, the person was acting under extreme distress, and he was a person who had made considerable contributions to the community. The offence was discharging a firearm with intent to wound or whatever. In the circumstances, the person who had his sentence reduced this way was a police officer. This incident arose in the context of an investigation, and the person he slightly grazed was the burglar he was investigating. He got six months. Today, that person would have to get four years. There would be no consideration of extenuating circumstances.

Mr. Vic Toews: Well, Dr. Borovoy, my point is that if it's a criminal act, it's a criminal act. The discharge of a firearm is a very serious offence, and if that needs to be then addressed subsequent to a conviction, then the minister has the opportunity to consider that. But the fact is that the police officer was convicted of a criminal offence. Why should we make exceptions for police officers?

Mr. A. Borovoy: We shouldn't make exceptions for police officers as such. I quite agree with you. But I must say that I'm surprised to hear that you would have favoured a four-year jail penalty for this person. I would suggest to you that's why we have judges, to make these distinctions in these kinds of cases.

If you think a sentence is too lenient, there's always recourse to appeal, but if you have a minimum sentence, and you think a sentence is too harsh, you've got nothing but the rare, unwieldy, arcane process of the royal prerogative of mercy.

Mr. Vic Toews: All right. But the point here is that what you're telling us is to narrow the scope of child pornography, so even those hard-core child pornographers that we all admit are child pornographers... and we're not talking about the exceptional case that you've raised here with this police officer, for example. We're talking about hard-core child pornographers. You're saying, well, even if we reduce the scope, that's not sufficient.

The second point I want to deal with is your distinction about the depiction of real children. Unfortunately, what your testimony ignores is the overwhelming evidence that what this child pornography is used for, even that which does not depict real children, is in fact the grooming of children. Pedophiles use this to groom children. Therefore, simply because it isn't a real child is quite irrelevant. They're using it to groom real children.

For example, I understand that John Robin Sharpe's material, which the court said was for his own personal use, had on it, “This may be illegal in Canada”. That's a very interesting comment from somebody who was using this for himself. I mean, he either knows it's illegal in Canada or not.

We know what pornographers use that kind of information for; they use it to groom other children, whether it depicts real children or not. I think the thrust of your testimony misses that whole aspect of what children pornography is used for in terms of exploiting other children.

Mr. A. Borovoy: You have me at a slight disadvantage, Mr. Toews; when you ask two questions, you're trading on my aging and eroding memory to remember both of them.

● (0930)

Mr. Vic Toews: I'm not that far behind you, Dr. Borovoy.

Mr. A. Borovoy: That you're behind at all is uncomfortable for me.

But I'll take it in reverse order, starting with your point about the grooming of children. I understand that; the thing is that pedophiles who are in that kind of position can use a lot of aids to groom children. I'm sure they use candy to groom children and seduce children as well. In other words, there's no limit when you're dealing with the ingenuity of a pedophile and the naïveté of a youngster. The world is full of things, and you're not going to outlaw them all. That just doesn't make sense.

It doesn't make sense, then, to outlaw legitimate literature or legitimate drawings, and make that criminal, because some pedophile might use that instead of candy. I suggest to you that this simply doesn't make sense.

Let me get to your other point—

Mr. Vic Toews: Doctor, I would suggest that this analogy is not an appropriate one.

To Dr. Bala, I'm not ignoring you. I've read your presentation, and I think there is considerable merit in what you've said. Just because I haven't asked you questions, it doesn't mean I disagree with what you've stated. I just I felt I had to challenge some of Dr. Borovoy's—

Mr. A. Borovoy: He just has more fun with me, that's the only reason.

I'd like to address your first question.

The Chair: The time has expired, but we'll let you address the last point, without interruption this time.

Mr. A. Borovoy: Thanks.

You were talking about the hard-wired, and why a minimum sentence might be acceptable in that situation. We suggested to the Minister of Justice, when we met with him a couple of weeks ago, that there's a way of dealing with it, and that is with what we call the concept of a presumptive minimum sentence. That is, for a number of things—murder would be a good example, and certainly abusing youngsters would be another example—you'd say that presumptively this should carry such-and-such a sentence. That signals to the judge that in the greatest number of circumstances, that should be the sentence, unless there is something that we haven't anticipated.

That is the reason why I keep urging you to at least leave an escape hatch for a judge, in the event of extenuating circumstances.

The Chair: Professor Bala.

Prof. Nicholas Bala: There is a point on which I'd disagree with Mr. Borovoy, who is, as always, very eloquent. It is certainly true that pedophiles are very difficult to treat, and there's a spectrum of pedophilia. Around this, I wouldn't want to hold myself out as an expert compared to some psychologists, but I suspect I know somewhat as much as Mr. Borovoy, or at least enough to raise questions about what he is saying about pedophilia.

While one can argue about the definition... and any definition of pornography is going to be problematic. It is the classic offence, of course, about which someone said, I cannot define it but I know it when I see it. A justice of the United States Supreme Court said that. There are some for whom banning literature that advocates child abuse and depicts child abuse would have no impact at all, but there is a spectrum of pedophiles. Some of them undoubtedly are influenced by what they read, or they view the sexual abuse of children as more normal.

So I think the dissemination of literature that advocates and describes child abuse...and undoubtedly there's a broad scope. I certainly agree, and I think everyone does, that there's a place for art and literature and educational materials and so on. How to define it may be problematic. But to simply say, well, if it's not a depiction of a child, it's not a problem.... I have some difficulty with that broad statement.

[*Translation*]

The Chair: Mr. Marceau, you have five minutes.

Mr. Richard Marceau: Thank you very much, Mr. Chairman. I want to thank witnesses for coming this morning.

My first question is for Mr. Bala. If I understand your brief correctly, you fully agree with the clauses of Bill C-2 that deal with the testimony of children, and you would like them to be adopted as quickly as possible. That is what I understand.

● (0935)

[*English*]

Prof. Nicholas Bala: I'd like to certainly see these parts of the act adopted as soon as possible, although we do have some specific concerns with the drafting of some of the provisions, as I've indicated.

[*Translation*]

Mr. Richard Marceau: If we had to examine one or two aspects in particular about the testimony of these vulnerable people, which aspects would you like us to examine?

[*English*]

Prof. Nicholas Bala: There are two. One is the provision to allow a crown prosecutor to bring a motion for the use of screen or videotapes or closed-circuit television prior to the actual trial process before a judge, who may or may not be the trial judge; in other words, not to have to wait until the hearing actually commences. A number of American jurisdictions have that kind of provision.

Second, we have some proposals around proposed section 16.1, and proposals that are set out in the first couple of pages of the brief and then, in more depth, in the full brief, with the concern that the provisions are not quite detailed enough. I very much support the intent of proposed section 16.1, but as we indicate, there are some provisions that are a little too vague. We'd like to have a little more direction for judges there. For example, in proposed subsection 16.1 (7), it should say "promise to tell the truth", not simply that there should be no inquiry into the child's understanding of the promise, but the promise to tell the truth.

It should also be a broad rule that all children under a specified age will testify in the same way to avoid the possibility of there being an inquiry into whether they should testify under oath. As well, we suggest that the age would be better as 12 than 14.

Those would be the most significant changes we're proposing.

[*Translation*]

Mr. Richard Marceau: Mr. Borovoy, it is always a pleasure to welcome you among us, all the more so because your eloquence and your mastery of the English language make you a pleasure to listen to.

In the examples you gave in your brief, among others the example of Mr. Langer, if I remember correctly, in the end, the people were found innocent. So the system worked; the means of defence worked.

[*English*]

Mr. A. Borovoy: No, no, a thousand times no, the system did not work.

Are you a lawyer?

● (0940)

Mr. Richard Marceau: Twice, in Ontario and in Quebec.

Mr. A. Borovoy: So am I, but I always needle my fellow lawyers that only a lawyer can be consoled by the ultimate outcome of a case. I think the difficulty is that, in the meantime, real people in the real world could suffer plenty by going through a legal process like that.

If you have someone stigmatized as a child pornographer, and ultimately he's cleared, we have to be concerned with what happens to that person in the meantime. My point is that this kind of law, that reeks of subjectivity, simply invites that kind of abuse.

[*Translation*]

Mr. Richard Marceau: As a matter of fact, Professor Bala raised an essential point on subjectivity. Any definition of child pornography will include some subjectivity. To use one of your expressions,

[*English*]

that's what judges are for....

[*Translation*]

They are not there just for sentencing, but also to define points, to clarify matters. You and I would have no work if everything were clear. There would be no courts, and there would be no need for lawyers. In every bill that I have seen or that I have studied, there is always an element of subjectivity somewhere. In that regard, the definition in Bill C-2 reads as follows: "[...] dominant characteristic is the description, for a sexual purpose [...]".

There is the defence that you mentioned earlier: education, art, etc. But there is already an implicit defence, because the Crown must prove that the "dominant characteristic is the description, for a sexual purpose [...]". So for the Crown to successfully find someone guilty of such an action, the requirement is already very high. And in addition to having to prove that beyond a reasonable doubt, there is the defence which, as the colleagues to my right would say, is too broad, whereas the colleagues to my left would probably say it is not broad enough.

It is not all that easy to find someone guilty of child pornography.

[*English*]

Mr. A. Borovoy: Again, I think your remarks are addressed to the prospect of ultimate acquittal, and I'm concerned about the kind of harassment that real people could suffer at the hands of the justice system in the meantime. While I agree that there is some element of subjectivity in a lot of legislation...and I actually had chosen my words advisedly. I don't know how it came across in French, but I had said that this "reeks" of subjectivity. It is much more subjective than most other concepts are, to the point where people could not have a reasonable way to know in advance whether they would run afoul of the law.

While ultimately...and you may be referring to the case I mentioned from the brief, where we're talking about a sexual purpose. Ultimately, the crown dropped the case, because he felt he couldn't prove it, But that man had two months in which he was publicly stigmatized as a child pornographer, and the issue concerned photographs of his naked child at play.

[*Translation*]

Mr. Richard Marceau: I can understand the problem. Besides, as the saying goes: "hard cases make bad law".

That being said, I have one last question. To get back to what professor Bala was saying—he also has a good understanding of the issue—if watching child pornography leads people to consume more of it or even to engage in pedophilia—and you said that a pedophile is a pedophile—then we need to strike a balance, as always, between a definition that is broad enough to crack down on child pornographers, while allowing people who are not child pornographers to be found not guilty in the end, and at the same time we need to protect children. In my opinion, the choice is not a difficult one to make. It seems to me that it is rather easy to choose between inconveniencing a person for two months who, in the end, is found not guilty, and protecting two or three children from the advances of a child predator.

[*English*]

Mr. A. Borovoy: I would urge you to consider a somewhat different model: reduce the likelihood that people dealing in a legitimate way with legitimate material will have to face legal processes.

I know there's no guarantee—there's always some possibility—but reduce it considerably and still focus on the key thing that we're properly concerned about: the protection of children. Eliminate all the references to fictional depictions and confine the legislation to situations where the material is made as a result of the unlawful abuse of a real child, or even if it's held out to be the unlawful abuse of a real child, even that.

If you confined it to that, I think you would have a much better balance. You could still get the hard-core stuff that we are properly worried about and you'd have run much less risk of catching the legitimate material that way.

● (0945)

The Chair: Thank you.

Mr. Comartin, for five minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Professor Bala, to start, I read your material in the paper around the changes you want to proposed subsection 16.1(7), but I don't understand, quite frankly, how you would change it. Proposed subsection 16.1(6) provides, as you're promoting strongly, that no oath be issued, that they simply be required to promise to tell the truth.

So I don't know exactly how you want (7) amended, from its current proposal.

Prof. Nicholas Bala: The concern I have about proposed subsection 16.1(7) is that it says no child shall be asked any questions regarding their understanding of the nature "of the promise" for the purpose of determining whether their evidence shall be received by the court, and I would submit to you that it should be "of the promise to tell the truth".

It's a relatively small change, but again, the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts—I was actually a witness in 1988, when the provisions came into effect—I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this—and we have quite a lot of case law about this—and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"?

Some judges will continue to interpret it that way. In some ways, it's a very small amendment, but I assume it's consistent with your actual intent. My concern, as I say, has been based on how some of these previous provisions have been interpreted.

Mr. Joe Comartin: The second point you raised was about the ability of the crown prosecutor to move in advance of trial to get the necessary orders for special testimony. Any particular suggestions on where that would go in the bill?

Prof. Nicholas Bala: It would clearly go in proposed subsection 486.2(1). I don't have specific wording for how you would do that, but the concern is that those applications are now often brought when the child is actually just testifying, and then the crown is in effect on the horns of dilemma, with the judge saying, "If we grant this, we're now going to have to adjourn it". I think it should be something that would be done after the accused is committed for trial but prior to the commencement of the actual proceeding.

It's common in some American states to have pretrial motions brought. Ideally, of course, it would be by the trial judge, but one may not know who the trial judge is going to be.

So I think there'd have to be some scope in terms of the drafting of that.

Mr. Joe Comartin: Okay.

I recognize I may not get a second round, so to both of you, the voyeurism section of the act has a defence in it. I've been asking a number of witnesses to explain to me why the defence is necessary where you've a situation or scenario where it's a clear, intended act on the part of the perpetrator of the act to do this type of surveillance in a situation where people would have a right to expect privacy.

So there's this general defence, in the public good type of defence. Does either one of you have rationale as to why that defence is necessary?

● (0950)

Prof. Nicholas Bala: I assume it would cover a situation where, for example, there would be security cameras in a particular place, so there is a legitimate purpose. Now, I query.... That might be protected by the fact that it has to be surreptitious observation.

Mr. Joe Comartin: Yes, the surreptitious nature of it doesn't appear to cover that.

Mr. Borovoy, if I understand your position, a good deal of the provisions around child pornography would be taken out, and we would focus in on a specific child victim as opposed to the material, whether it be print or other forms of material.

Is that a fair summary?

Mr. A. Borovoy: I'm not sure what you mean by "specific" child victim. All we'd be concerned about is whether the material resulted from the abuse of a real child or it's being held out as having resulted from the abuse of a real child. That, in our view, should be the test.

Mr. Joe Comartin: Okay. So taking the *Lolita* situation versus the two-year-old child who's being portrayed engaged in sexual activity with an adult, that two-year-old child would be the specific child I'm referring to. The *Lolita* situation, obviously, in your definition, would not be covered. But that specific child, that offence, would be clearly an offence.

Mr. A. Borovoy: Yes. You may not know who the child is. That's why I was wondering about your use of the word "specific". You may not know who the child is, but if you're satisfied that this was made as a result of an unlawful abuse, that could be targeted, but *Lolita* would go free, yes, as it should.

Mr. Joe Comartin: Okay.

Do I still have time for one more quick question?

The Chair: One last one.

Mr. Joe Comartin: Professor Bala, I meant to ask you earlier, on the point about the interim order, in effect the order prior to trial, did you discuss that with the justice department, and did they take any position on it?

Prof. Nicholas Bala: No, I didn't discuss that with representatives of the department.

Mr. Joe Comartin: Thank you.

The Chair: Thank you, Mr. Comartin.

Mr. Macklin, for five minutes.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you, Chair, and thank you to the witnesses for being with us.

Professor Bala, you tweaked my interest when you started talking about ages where we believe children have capacity. Specifically, I think, when we look at one of your comments... because obviously the age of capacity in here to consent to sexual conduct, as well, is one of the areas of considerable concern, and has been addressed by many people.

When I look at your commentary in your draft material, you say that, as you've just repeated here,

> ...twelve would be a better age than fourteen for dividing child from adolescent witnesses, for both legal and developmental reasons. For other criminal law purposes related to sexual offending, fourteen (or older) is an appropriate dividing line.

Now, since you've studied, obviously, the developmental capacity of children to discern right from wrong, looking at the issue of consent to sexual activity, can you help us understand this? We know that historically the age of sexual consent was 12, and then it was moved to 14.

Can you, from your research, give us reasons why that move was a positive move, and yet you're now telling us that you would like us to go back and establish an age of 12 for the purposes of this differential basis in telling the truth? Could you exemplify what you intend and mean, and give us some sense of where we're going with respect to capacity?

Prof. Nicholas Bala: Well, running through the laws are many different purposes for which age lines are drawn—for voting, for drinking, for service in the armed forces, for sexual activity, for criminal capacity, and so on. To some extent, any age is going to be somewhat arbitrary in that someone can say, well, here someone is just over the line, someone is just under the line; are we going to have a single line or not?

For many purposes, I think the administration of justice requires clear lines, and there are other purposes for which one might want to have some individualized discretion. There are issues about individual capacity. There are issues about appreciation of the consequences. In some contexts, I think there are issues about exploitation.

So I'm not sure if your question is going to the issue of capacity to consent to engaging in sexual activity—the issue of 14 as opposed to 16, for example. I'm not sure if that's where you're going. I mean, I think it's very appropriate to say that a child, an adolescent, may well have capacity to give an oath, and indeed has capacity to be found criminally liable under the Youth Criminal Justice Act or the Young Offenders Act, or to say that there are many purposes to which 12 is an appropriate age.

I must say that I am concerned about the fact that many adolescents in Canada are sexually active at the age of 14. The concern to me about the age of 14 around the sexual consent issue is not do they have the capacity to consent, do they understand what's involved; rather, it's the issue of exploitation by significantly older adults.

Canada right now, with 14, has one of the lowest ages in the world. Most jurisdictions in the world, I think appropriately, provide greater protection from exploitation by adults to their children. They say, yes, children who are 14 may be sexually involved—and of course, our definition of "sexual involvement" is very broad, being not only intercourse but also kissing—with other age-appropriate peers. And that is acceptable; or it may not be something that society wants to encourage, but we're not going to criminalize one or both of the partners who are involved.

The concern, of course, is that if you have people, as we are now starting to find, who are in their thirties, forties, and fifties becoming sexually involved with young adolescents, that is inherently an exploitative relationship. I know this legislation as drafted right now intends to deal with that by saying that if this is exploitation, then there can be a prosecution.

My concern in some ways is the opposite of Mr. Borovoy's, in that I'd say that's going to be too hard to prove, and the damage will already be done. It's much better for everyone, including adults, to say that we're going to have some clear lines around this.

A good example, by the way, is with teachers, for whom it's important to have very clear lines to say that you're simply not going to be involved with your students. It's even necessary in a university context to say that we're going to have clear lines here. Just get this very clearly in advance: if you're an adult, you're not going to be sexually involved with someone who is under the age of 16, or appears to be under the age of 16.

So it's not the issue so much of capacity, in that particular context, I think, as exploitation.

● (0955)

Hon. Paul Harold Macklin: Currently our law already covers that, I think, under someone being in a position of trust.

Prof. Nicholas Bala: Well, it does, and it certainly does for teachers and being in a position of trust, but I would say in general there is enough concern about the potential for exploitation between adults who are sexually involved with younger adolescents that one would like to have a clear line.

There is, of course, an argument about, you know, free association, as in why can't 15-year-olds choose to have sex with 45-year-olds if that's what they want. My concern is that there is such a great potential for exploitation, and such little social utility in it, that it's worth drawing a clear line and saying, "That's not acceptable, and we're not going to have it". I think that's a compelling argument for raising the age to 16.

In fact, one can also ask, then what about 14? When we allow 13-year-olds to be sexually involved with other 13-year-olds, why don't we say you can be involved with somebody who is 45, or 19, or...and we say that we're going to have clear lines around that?

I should say that every country in the world has some line. The question is, where do you draw it?

Hon. Paul Harold Macklin: But you're suggesting that at age 12 there is capacity to know the difference between right and wrong, clearly, as you refer it...to telling the truth.

Prof. Nicholas Bala: As to right and wrong, by the way, children at a very young age know the difference between right and wrong, and they actually know the difference between truth and lying. The question is, can they define it? If you ask children in developmentally appropriate ways, they can usually give you a good answer. The problem is that our judges and lawyers don't ask the questions in the right way.

It's not a question of knowing right from wrong. For the issue of capacity to consent to engage in sexual activity, it's the ability to make decisions that are not going to compromise long-term well-being. Consumption of alcohol is another example. You can say that when you're 16, you might know right from wrong, but we're worried that you're going to make a lot of wrong decisions, so we're not going to allow you to make that decision.

● (1000)

The Chair: We'll have to move on to Mr. Thompson, for five minutes.

Mr. Myron Thompson (Wild Rose, CPC): Thank you very much.

Thanks, folks, for being here.

Mr. Bala, I certainly agree with everything you just said in your reactions to Mr. Macklin's questions. Thank you for those comments. I think they are valuable to us.

I'm not a lawyer, praise the Lord—

● (1005)

Mr. Vic Toews: That's not a bad thing.

Mr. A. Borovoy: I was going to say, stop showing off.

Mr. Myron Thompson: —but I am a grandfather and a father. I was in the education field for 30 years, most of the time as an administrator. I got elected to politics, and one of the things I was focusing on when I got into politics was on what can I do, as an individual, when I get down there to make life a little better and more pleasant for some of the kids? With 30 years of experience in an elementary to high school age group, I saw a lot of horrible things.

When I first arrived in Ottawa, I spent the first couple of years, 1993 and 1994, in the penitentiaries going around and visiting—I wasn't in the penitentiary, I was visiting—doing some research work and checking into certain aspects of it. I ended up doing a lot of work reporting on sexual offences, particularly those pertaining to children. I was just amazed at the amount of people who were in the penitentiaries because of that crime, of harm to a child.

In my interviews with the inmates, in my interviews with the psychologists, in my interviews with all the caseworkers—and I went to many, many penitentiaries over those two years—almost to the person I was told, by both the perpetrators and the caseworkers, that the problem that led to this person being here, being incarcerated, was child pornography. Over and over and over again, that was mentioned to me.

It was then I decided to do a little checking into how serious this child pornography was in the police world. I was shocked at the number of things taking place, at the material that's been confiscated, with so little people trying to police it. And it wasn't art, and sculpture, and good fancy stories. I mean, this was filth, evil—just the worst you could imagine.

Many of the members of this committee know what I'm talking about. As the years have progressed, we've had presentations from various police departments, indicating to us the kind of material, and that this is going on. What we have out there is hundreds of people, victims, suffering because their children have been affected by what's been brought on by child pornography, obviously playing a major role in that.

Now, I realize that the museums have some art, and there's sculpture, as was mentioned, depicting nude bodies. You probably could find some nude pictures that belong to my wife and me of our baby boys when they were taking their first bath. Those things exist. We know that. But in all the material I've ever seen, and there's been a lot, and I've talked with police, I've never seen any of that material as being that which would exploit...or being used in a charge of exploitation of children.

So I don't understand why we give them that focus. I feel sorry for the fellow who went to get some negatives of his four-year-old boy playing. It's too bad that happened, because there was no intent to.... Those kinds of things lead to some tragic things. But I'm telling you about what I've seen, that the tragedies going on are to such an enormous extent that this is the area we need to concentrate on.

I'm sorry about that one case. Hopefully we can learn from it and do some things about that. But for the life of me, I cannot understand why anybody, for a moment, would try to explain that there is some value and legitimate purpose to maintaining the kind of child pornography that we're dealing with in this country, where it has become a billion-dollar industry, people are getting filthy rich on it, and it's widespread. It's not even in the major cities any more. I have now discovered that it's even in the small towns, in the small communities. It's spreading.

We need to have some input from you people as to why we should allow this kind of thing to grow, and why we don't seriously, in this place, take some action that's going to combat it the best way we can.

The Chair: We have about 30 seconds left in the time allotted for a response.

Mr. Myron Thompson: He went eight minutes. I timed it.

The Chair: I know. And the first round all went eight minutes because of that. In the second round, we're trying to stick to five minutes.

Any response to Mr. Thompson's statements?

Mr. A. Borovoy: Yes, I would like to respond.

I was interested to hear, in the course of your remarks, that you're not insensitive to some of the critical distinctions. You did note that there are the families who want to take pictures of their naked kids, that there is legitimate art and literature. There is that, on the one hand, and there's the evil stuff, where kids are being abused to produce material, on the other hand. We simply ask that the law reflect that distinction, simply saying in the law that this is confined only to those cases where the material involved the unlawful abuse of a real child, or it's held out to have involved that.

There you could much more readily—no guarantees, of course—draw the distinction between the legitimate and the illegitimate.

The Chair: Professor Bala.

Prof. Nicholas Bala: I think it's important to distinguish between issues of enforcement, which are enormously problematic, and the resources given to police to enforce legislation as opposed to the drafting of the legislation. While I do have some differences with Mr. Borovoy and others about exactly how to define this, I think it's important not to let a very important, legitimate concern that you're raising—about the very damaging influence of child pornography, and then child sexual abuse—lead one to have a very broad definition.

On the other hand, I thought Mr. Marceau was very articulate in pointing out that, in drawing that balance, I would, personally, place greater emphasis on the protection of children than other kinds of concerns. It's a very important concern. You're always going to have a difficult balancing there, in the definition.

The Chair: Thank you.

Madame Bourgeois, cinq minutes.

[*Translation*]

Ms. Diane Bourgeois (Terrebonne—Blainville, BQ): Thank you, Mr. Chairman.

Gentlemen, welcome. I have to start by saying that I am not a lawyer either, rather, I am a teacher who is very concerned about the welfare of children, of course.

My first question is for Mr. Bala. In the brief you sent to us, on page 3, there is a paragraph entitled “Resources, Training and Research“. You say the following “[...] there remain very significant issues, especially in regard to implementation of the law, which will require better training and more adequately resources.” I would like to hear what you have to say on this.

When you speak of better training, who are you referring to? What do you mean to say by “more adequate resources”? What type of investment are you suggesting? Would it be monetary or more human resource-based? I think you elaborate on this further on in your document, but I would like you to specify what you mean.

My second question is for Mr. Borovoy. Mr. Borovoy, you urge us to be cautious. According to you, a clear distinction is to be made between acceptable and unacceptable material, be it pornographic or not. I will admit that my first concern, when I read the bill, was to think of my life as a teacher, because there is indeed a problem there.

How, as a teacher, can one be protected from parents who could inadvertently spread the idea that a teacher's attitude or a photo that was shown or material used was pornographic? I taught history and I think back to some photos. I know that you mentioned it earlier on, but I would like you to go further and to suggest to us specific ways to protect all of the people who work in the field of teaching or health care who could face prosecution.

● (1010)

[*English*]

Prof. Nicholas Bala: I am not an expert on the amount of resources that would be taken, the financial kinds of questions. I have been involved in the training of police officers, social workers, judges, lawyers, so I have a sense of what is required in terms of the training. As to how much money would be required, I know it's primarily a provincial and territorial responsibility, but of course there's been federal cost-sharing in some of those situations.

There is no doubt in my mind, having done some professional education, that there's a need for a great deal more for all the professionals who are involved in the justice system, starting, if you want, with the judiciary, but certainly going to police, prosecutors, social workers, and others, so they better understand issues of child development, better understand the law as it now is, better understand the resources available and how to better use the resources. I mean, sometimes they're just technical problems, in the sense that police don't know how to use some of the equipment they may have. They don't have access to it. That speaks to resources.

There are many places in this country where we don't have adequate access to, for example, closed-circuit television for children who might be testifying. In major cities we do have that, much less so in rural areas. This has been an issue in this country for many years. We're now doing a better job, but there's a great deal more to be done.

[*Translation*]

Ms. Diane Bourgeois: Seeing that this could be a major problem, have you raised it with the minister or those that introduced the bill?

[*English*]

Prof. Nicholas Bala: I believe people from the Department of Justice have seen my brief. I don't know that the minister himself has seen it. It's certainly worth raising this issue with the minister if he's a witness here. I think it is, however, important to appreciate that there's both a federal responsibility here and a very significant provincial-territorial responsibility for the administration of justice.

The Chair: I think Madam Bourgeois had also posed a question to Mr. Borovoy.

Mr. A. Borovoy: Whenever anybody asks me for legal advice, I'm tempted to say to them, the advice I give you will be worth what you're paying for it.

I think the difficulty is that I am not in a position to tell the teacher or anyone else how best to protect themselves. I think what's important is that in your role as legislators you enact legislation that's more workable in the community than the existing legislation is.

Partly in response to you and partly in response to Monsieur Marceau, my colleague Ms. Wood was good enough to remind me of something that's rather important in this respect, that you not, even mentally, leave it to the courts to work it out ultimately; that's not good enough. I cite again to you the distinction that we already have had with respect to the book *Show Me!* A court 25 years ago clears it and a court in 2001 says it's child pornography. They're both purporting to use a defence of educational purpose, and they differ on it.

That's one of the reasons we say it's helpful to have a definition that's more workable immediately, so that police can get it a little clearer, because it's an impossible one for them to interpret, and people in ordinary life will have a much better idea of what they can deal with and what they can't.

The Chair: Thank you, Mr. Borovoy.

[*Translation*]

Thank you, Ms. Bourgeois.

[*English*]

Ms. Neville, for five minutes.

● (1015)

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you, Mr. Chair.

Madam Bourgeois at some level pre-empted me, but I'm going to come back at it a little bit. It seems to be necessary this morning for us to qualify ourselves: I too am not a lawyer.

As I listened to the two of you, from very different perspectives, I was struck by Mr. Borovoy's comments that the bill reeks of subjectivity—that resonates with me substantially—and to not leave it to the courts to work it out ultimately. Professor Bala spoke about the importance of training judges.

Recently I was part of some discussions in my own community on the area in the bill of sexual exploitation and the age of consent. I don't share your opinion, Mr. Bala, because I do think that the sexual exploitation...will do what is required. But the criticism of that part of the bill ties in with what the two of you are saying here today.

I listened to many people say, in their criticism, well, what we're going to is leave it to the judges, and that's dangerous in terms of the sexual exploitation. So my concern is the education of judges, the values of judges, the values we all bring to whatever.

Professor Borovoy, I know the book *Show Me!* It was current when my children were little. Pornographic was certainly not how we viewed that book.

I'm concerned about how you reconcile the subjectivity of the law as you see it, the subjectivity of the judges in interpreting it, the lack of education or understanding of child development, and the individual values we bring to it, with this whole issue.

I'm not sure whether I'm being clear, but I'm concerned here.

Perhaps you each could comment.

Prof. Nicholas Bala: You've raised some very profound questions that go to the entire nature of the justice system, about who gets to make what kinds of decisions, about how much clarity we want as opposed to discretion for everybody involved.

I would say that inevitably, in many of these laws, there is going to be a significant degree of discretion given first to police and then to prosecutors and judges, and ultimately, in some of these cases, to juries, or you're going to have a very narrow legal regime that may exclude certain situations that I think are inappropriate.

The issue of an exploitative relationship is a good example. You can either say let's have a relatively narrow situation or let's have more protection for children. Inevitably, as you're moving in this area, you're going to some extent to be buying the protection for children at the expense of some rights of adults, essentially. I would tend to err on the side of giving more protection to children, recognizing that there always has to be some kind of balancing.

By and large in this country, I think we have judges who do a good job of dealing with many very difficult cases, but there is also unquestionably a need for more judicial education. We now have the National Judicial Institute, which does training of judges. Understandably and appropriately, the question of education of judges is not one that's given over directly to, for example, the police and crowns. It's done independently. I think that's very appropriate. They are a lot more aware of the need to give judges social context education.

You're certainly raising questions about the process of appointment of judges. Frankly, my own view is that some of our provinces are doing a better job than the federal government in regard to that, but that's a matter that's beyond the scope of today's discussion.

Indeed, many of the questions you're raising really go to the nature of the kind of justice system we want, but they also do have specific application in the legislation you're drafting today as well.

The Chair: Mr. Borovoy, do you have a response to Ms. Neville's question?

Mr. A. Borovoy: When I made the remarks I did about the dichotomy between the two decisions on *Show Me!*, I was not intending to criticize the judges. It is not a criticism of the judges. The problem is in the legislation.

I agree with what Professor Bala says, that of course it's not possible to eliminate all discretion and all subjectivity. We should just be trying, as best our ingenuity equips us, to narrow the amount of discretion and decision-making as much as you can, so that people will know whether they're committing a crime or not, so that people handling the book *Show Me!* will be able to make a reasonable judgment on whether they're going to be in trouble or not going to be in trouble.

So when I appeal to you to narrow the definition the way I have suggested to you, I know that it's not going to eliminate all discretion, but it's going to help considerably, at every level, to understand exactly what it is we're worried about.

● (1020)

The Chair: Thank you, Ms. Neville.

Mr. Comartin.

Mr. Joe Comartin: I'm feeling maybe just overly defensive, Mr. Chair, but I'm going to make a statement rather than ask questions because of the comments we've had from Madam Bourgeois and Mr. Thompson in terms of their educational background.

I just want to say that lawyers aren't here just to protect the accused. I spent the first 10 years of my professional career, a great deal of my time, and a great deal of it pro bono, working on protecting children in my community and across the province of Ontario. I did that as a lawyer. I used my professional expertise. And I'm doing that again, as I work on this legislation.

I want to say to the rest of the committee that all of that experience I had...and I did train police officers, social workers, psychologists, and judges in that process. What we were really focusing on, and I think rightfully so, was the enforcement of the legislation that we had at the time—the code and other provisions in our child welfare legislation.

I just want to say to the committee, don't overemphasize what we're doing here. In a very small number of cases we're going to protect children with this legislation, because of the problem we have with pedophilia and the hard-wiring. And that's really quite accurate. There are gradations, but that's the reality.

The abuse of children, the sexual exploitation of children, is going to continue to a great degree in spite of this legislation. We would be much better to spend our effort in enforcement, having more police officers investigating, having more social workers in our child welfare area dealing with incest within the family. That would actually be much more productive than what we're going to do here.

So I just say to the committee, with as much passion as I can, don't overplay our role with this legislation. It's not going to have that great an impact.

Thank you.

The Chair: Reaction, Professor Bala?

Prof. Nicholas Bala: I think Mr. Comartin was very eloquent, and in significant measure correct, but I also would say, on the other side of it, don't underestimate what you're doing. There's no doubt that resources, training, the human support provided to children victims are the most important part of it. However, legislation has also played a role.

For example, there are the specific issues that I've been raising around facilitating children coming to court and testifying to tell their stories. The amendments made in 1988 have been significant, and further amendments I think would be helpful and appropriate. They're ones that professionals in the field, some of whom...and the brief we wrote in part was written with people who work in the field, particularly colleagues in Kingston, but elsewhere as well. They are saying, we want to see these kinds of changes.

You're probably right that the procedural and evidentiary changes may be more significant, in some ways, than the substantive changes. Certainly many of the issues—for example, the ones Mr. Thompson was raising—are much more issues of enforcement than anything else.

I think it's important to recognize that as difficult, as tragic, and as enormous as the social burden now is, we're probably doing a better job of dealing with child sexual abuse and child abuse now than was the case 20 or 30 years ago. We can see a gradual trending down in rates. There are a number of different measures for this, looking at not only victimization studies but also offending rates.

We're slowly doing a better job, but many things have to be done, which is your point, I take it. One can't imagine that this is going to solve the problem. This is part of working towards a better response, though.

● (1025)

Mr. Joe Comartin: Professor Bala's point is extremely well taken. I actually wanted to make it, and I forgot as I got wound up on my other point.

The greatest amount of protection we're going to provide the children is in those sections where we protect them when they're going in to testify. I can't tell you how many cases I did where we were dealing with children who were being revictimized under the current system we have, and under the systems we had even earlier, from the abuse they suffered in the first round from their parents, their custodial guardians, or complete strangers. That's where we're going to do the greatest amount of help.

The Chair: Thank you.

To conclude this section of the meeting before we go in camera for other business, Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chairman.

I'd like to thank the witnesses for being here today. This has been very informative. The focus of my questions will be going to Mr. Borovoy.

My wife and I were blessed with five children, and one grandchild now. We have a deep love and are very thankful for the experience of having had children. They're all grown now, except for our grandchild. But yes, we have taken pictures of them in the bath. At no time, whether it's myself or others, where you've had a picture taken of a child in a bath...or I even think of the ad that we've all seen, from my generation, of the Coppertone girl with the bathing suit being pulled so that you can see the tan line. But none of those pictures were for sexual gratification. They were about the innocence of a child.

I think the will of all of us, and the responsibility of all of us, is to provide legislation that provides protection for those vulnerable citizens, our children, with that innocence. They deserve to be protected.

From the criminology courses I've taken, even 20 years ago there was no evidence of success in dealing with pedophiles, no success in treatment for pedophiles. As recently as a month ago, I was on a plane where the person sitting beside me had a daughter who'd just finished her doctorate. Her thesis was on whether or not there was evidence of success in the treatment of pedophilia. It tweaked my interest.

Is there anything new, any new evidence that there's success in treatment? Again, another report, another study, another thesis, and no evidence of success in treatment.

So in terms of your comments that a pedophile is a pedophile is a pedophile, I would agree. There's no evidence that it's treatable.

Turning to your submission, first, thank you for it. On page 2, you share this:

> As indicated, the controversies around child pornography engage one of the fundamental freedoms of the democratic system—freedom of expression.... this freedom is a source and vehicle of self-fulfillment.

There's a balance in democracy. Again, getting back to the protection of our children, I believe child pornography is a vehicle, a fuel, as my honoured colleague shared in his experience in dealing with pedophiles in prison, such that even though someone has been wired in a different way, wired as a pedophile, if they have child pornography available to them it will hurt those in our society who need our protection. So I think there's this balance, and our desire is to....

Art is art, but pornography is pornography. I cannot define adequately a definition to satisfy everyone, but still, I think the average person, the average Canadian, will know the difference between art and pornography, and our desire is to protect our children.

Any comments?

● (1030)

Mr. A. Borovoy: I would suggest to you that if you were to do a poll, or to just talk to the average Canadian, as you say, I'll bet you, although I shouldn't be wagering in front of a parliamentary committee, that the greatest number of them, when they hear the words “child pornography”, will believe you're talking about situations where children were hurt in the production of the material, where the pictures were taken of children being abused. I'll bet you that's what goes through their minds.

They won't think of the classic painting of Cupid fondling the nipple of the goddess Venus. They won't think of the sculpture of the biblical Lot being straddled by his underaged daughter. That won't go through their minds. What will go through their minds is the abuse of real children. That's why we suggest to you that this is the way....

I agree that a balance has to be struck. I am the first to acknowledge that freedom of expression is not, and cannot be, an absolute. But I'm suggesting that the way to strike the balance is to focus on what people think when they hear the words “child pornography”: material involved, or held out to have involved, the abuse of a real child. I think you'll be much closer than you ever could get to striking a reasonable balance.

The Chair: Thank you.

Professor Bala, did you have something to add before we conclude?

Prof. Nicholas Bala: I just wanted to say that while one has to be very cautious about the treatment of pedophiles, it's also possible to be too pessimistic and say that nothing can be done, that these people are hard-wired and out there running around, and we just have to accept that, or lock them up for their entire lives. Far from it. If you have a system that provides effective enforcement, there are people who are deterred. They may have a preference for pedophilia, but they will not reoffend if they think there's a high likelihood of being caught and prosecuted and sent back to jail. So I think we do get some deterrent value from our justice system.

Also, I don't think we can completely write off treatment. There are some programs that have some success. The greatest difficulty is that we don't know who we've succeeded in treating until they reoffend. But we shouldn't imagine that nothing can be done at all, that we should have castration for everybody or whatever.

Mr. Mark Warawa: I wasn't saying that.

Prof. Nicholas Bala: No, I know you weren't, but that might have followed from that.

The Chair: Thank you very much. We'll have to move on now, but I thank the witnesses for their very enlightened assistance, as usual.

[*Translation*]

We will suspend the meeting for a minute before moving on to future business.

Proceedings continue in camera.

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