37th PARLIAMENT, 2nd SESSION

Standing Committee on Justice and Human Rights

EVIDENCE

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CANADA

Standing Committee on Justice and Human Rights

NUMBER 077 • 2nd SESSION • 37th PARLIAMENT

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[Recorded by Electronic Apparatus]

(1535)

[*English*]

The Chair (Hon. Andy Scott (Fredericton, Lib.)): Good afternoon. *Bienvenue à tout le monde.*

I call to order the 77th meeting of the Standing Committee on Justice and Human Rights. Today, pursuant to the order of reference of Tuesday, May 13, 2003, we are looking at Bill C-33, an act to implement treaties and administrative arrangements on the international transfer of persons found guilty of criminal offences. As we agreed, we are now going to clause-by-clause consideration.

Are there any questions of detail that members would like to put to Mr. Payette or Mr. Laprade? If not, I will go directly to clause-by-clause.

(Clause 2 agreed to)

(On clause 3—*Purpose*)

The Chair: For clause 3, there is an amendment identified as CA-1. Would anyone like to speak to amendment CA-1?

Mr. Kevin Sorenson (Crowfoot, Canadian Alliance): Yes, I would, Mr. Chairman.

Thank you, Mr. Chairman.

When we come to clause 3, I want to make it abundantly clear that the Canadian Alliance is not opposed to the transfer of offenders in general, as outlined in the bill we have here, but we are opposed to Bill C-33. The reason we are opposed to Bill C-33 is that we are against concurrent sentencing; we're against section 745; and we don't agree with statutory release, with accelerated parole, and the leniency of the Youth Criminal Justice Act. This bill extends these provisions to the offenders who are transferred to this country; therefore, we oppose it.

If this bill were to state as its purpose, which is what clause 3 is, that "The purpose of this act is to...". If it were to take out the three lines and state clearly what the primary purpose of the bill would be, I think we could support it. The amendment we've brought forward here basically states what this bill should have in it.

What this bill is stating is not just that we want to transfer offenders but, in its purpose, that we believe our correction or penal system is the best, and we don't sign on to that.

So that's why we have this amendment before you today.

The Chair: Thank you very much.

Ms. Jennings.

Mrs. Marlene Jennings (Parliamentary Secretary to the Solicitor General of Canada): I would hope that my colleagues would not support this Canadian Alliance amendment, CA-1, because it would completely change the philosophical basis on which our correctional and sentencing system is based. Mr. Sorenson has made it very clear that Canadian Alliance is completely opposed to the underlying philosophical tenets and values upon which our correctional and sentencing system are based. Clause 3, as it is now worded, is clear that our system is based on the administration of justice and the rehabilitation of offenders and their reintegration into the community in order to ensure the public safety of Canadians.

Therefore, I would ask my colleagues not to support CA-1.

The Chair: Do you have a final comment, Mr. Sorenson?

Mr. Kevin Sorenson: I would ask the parliamentary secretary, if the purpose of this bill is to contribute to the administration of justice, will it also contribute to the administration of justice for those offenders we transfer to other countries?

Mrs. Marlene Jennings: As for the offenders who ask to be transferred, another underlying principle of this bill is that foreign nationals and citizens who have been convicted of crimes under our system of justice have the right to ask to serve their sentence in another country. I'm sure Mr. Sorenson has carefully read Bill C-33 and sees that Canada can undertake to sign treaties and agreements with other states and, if this passes, with administrative authorities in order to ensure that our sentences are.... If a foreign national wishes to serve their sentence in their country of origin or citizenship, a country other than Canada, they will be able to do so, and will do so according to the agreement that has been signed.

(1540)

The Chair: Thank you very much. We'll go to the question.

I remind the witnesses to get my attention if they feel the need to interject, and I invite members of the committee to take advantage of their stroll over on a very damp day.

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

(Clauses 3 to 9 inclusive agreed to on division)

(On clause 10--*Factors--Canadian offenders*)

The Chair: I see amendment NDP-1. Mr. Comartin wants to speak to amendment NDP-1, I'm sure.

Mr. Joe Comartin (Windsor—St. Clair, NDP): Yes, thank you, Mr. Chair.

Mr. Chair, we have no problems with the existing provisions of paragraphs (a) through (c) in clause 10, but we feel that the provision we're providing in the new paragraph (d) that we're proposing addresses an issue, a criterion, that the minister should take into account when assessing whether the minister is going to support the transfer of an accused person, or a convicted person, from a foreign prison to the Canadian system.

Given the most current history we've had, when you look at the Sampson case and the Arar case, obviously it's a situation where the minister should in fact be directed to take this particular issue of a threat to the offender's security or human rights into account as opposed to doing that. I think it was suggested during the course of some of the hearings, certainly from the department, that this would happen in any event. And if that's the case, there's nothing wrong with adding it so that the minister in fact is compelled to take this into account as one of the criteria he or she would have to look at before making a final decision on a transfer of a prisoner in a foreign prison.

The Chair: Thank you very much.

Ms. Jennings.

Mrs. Marlene Jennings: I would ask my colleagues not to support this. First of all, this is not for people who have been arrested and detained in foreign countries. It deals specifically with people who have actually been arrested, prosecuted, and found guilty and sentenced to incarceration in another country or here in Canada. Therefore, the example of Mr. Arar does not hold at all. Even Mr. Arar does not claim that he was convicted of anything either in the United States or in Syria.

So I would bring it back to those to whom it actually applies: convicted offenders who wish, if they've been convicted in Canada and are not Canadian citizens, to serve their sentence in their country of citizenship, or Canadians who have been convicted in foreign countries and who wish to serve their sentence in Canada. So that's the first reason why this should not be supported.

The second reason is that there are a multitude of factors that the minister has to take into account when he consents to a transfer. Obviously the issue of the possibility of lack of offender security or a violation of that offender's human rights is one of those factors that the minister has to take into consideration. So I think the NDP amendment is actually limiting the grounds on which the minister could and should render a decision as to whether to agree to a transfer of an offender.

I would ask my colleagues not to support amendment NDP-1.

The Chair: Thank you very much.

Mr. Maloney, were you trying to get my attention?

Mr. John Maloney (Erie—Lincoln, Lib.): Yes, I was looking for an explanation as to why the government may not support this.

The Chair: And I think you've had it.

Mr. John Maloney: I've heard the parliamentary secretary. Do the officials have any other comment?

The Chair: They seem satisfied with Ms. Jennings' response.

I want to go the question on NDP amendment 1.

(1545)

Mr. Joe Comartin: May I respond?

The Chair: Certainly, Mr. Comartin.

Mr. Joe Comartin: The parliamentary secretary's response, of course, does not address the Sampson case. And we probably could go through a long list of cases. She's right, the Arar situation was one where he hadn't yet been convicted before he was released from that country. But that begs the question, what if he had been convicted? Would the argument still be the same? And the parliamentary secretary is wrong when she says that the minister has to take this into account. There's nothing in this bill that requires the minister to take this type of situation into account. He or she may very well do that, and should in fact. But if we're going to ensure that the minister is going to do it, you're going to have to put it into the bill.

The Chair: Ms. Jennings.

Mrs. Marlene Jennings: The minister, as I said, has a variety of factors. The underlying principle of this bill is that all offenders should have the right to serve their sentence, if they so wish, in their country of citizenship. That obviously includes Canadian citizens who have been convicted in other countries and sentenced in other countries. That's the underlying principle.

Then once we have that underlying principle, the minister will need to look case by case. There are a multitude of facts, and the issues of human rights and security are part of those factors.

The Chair: We have all kinds of attention here.

Mr. Payette.

Mr. Normand Payette (Acting Director, Corrections Policy, Department of the Solicitor General): If I may add, Mr. Chair, not only do we want to repatriate or transfer offenders who are often housed in difficult situations, we also want to transfer everyone, and that includes offenders who are detained in the conditions whose standards are similar to Canada's. What we really want to do at the end of the day is contribute to the public protection service. As I said, the minister, in deciding whether to consent to a transfer, will consider that factor. It is an underlying factor. But as I said, he will also consider, above and beyond this, public protection and the fact that we want to repatriate all Canadian offenders.

The Chair: Thank you very much.

Monsieur Laprade, you had your hand up, but that's that.

Mr. Sorenson, then Mr. McKay.

Mr. Kevin Sorenson: I would like to add our support for this amendment. I think that indeed this amendment should be the purpose of the bill. Whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights is not spelled out here in this bill. We would support that amendment.

The Chair: Mr. McKay.

Mr. John McKay (Scarborough East, Lib.): The minister is supposed to concern himself or herself with whether the offender's return to Canada would constitute a threat to Canada's security. So we're worried about whether that affects Canada's security.

Then he or she is supposed to concern himself or herself with whether they still have any connection to Canada, i.e., whether they've abandoned Canada or whatever, and then consider whether there is some social or family connection here, all of which seems to be perfectly legitimate.

I can't imagine why it's not also perfectly legitimate and why it shouldn't be said that this prison system is a serious threat to this person's human rights. To say that it automatically gets considered is nice, but maybe it doesn't always get automatically considered. In light of some of the recent cases where the rights of Canadian citizens have been abused and they may actually come up for transfer, I don't really know what the minister's argument is. Why not just say it?

The Chair: Thank you, Mr. McKay.

I think we've discussed this pretty much. We'll see what happens. We'll now vote on amendment NDP-1.

Did you want to speak, Mr. Marceau?

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Jacques-Cartier, BQ): My vote will speak for me.

[*English*]

The Chair: Go ahead.

Mr. Joe Comartin: Mr. Chair, maybe we should have a recorded vote.

The Chair: We'll have a recorded vote. Thank you very much, Mr. Comartin.

There is a tie? It is carried.

(Amendment agreed to: yeas 7; nays 6 [See *Minutes of Proceedings*])

(Clause 10 as amended agreed to)

(Clauses 11 and 12 agreed to)

(On clause 13--*Continued enforcement)*

(1550)

The Chair: I see an amendment to clause 13, identified as amendment CA-2. Who would like to speak to that amendment?

Mr. Kevin Sorenson: The enforcement of the Canadian offender sentence is to be continued in accordance “with the laws of the country in which the conviction occurred”. This would have some consequential amendments down the road. This basically is stating that there is a recognition of the laws of the country the individual was in when the offence was committed. It would take away the sentencing and the time served in this country and would recognize the country where the offence occurred.

The Chair: Ms. Jennings.

Mrs. Marlene Jennings: I think Mr. Sorenson's explanation does not quite cover everything that the amendment would bring in. If it's in accordance with the laws of the country in which the conviction occurred, you could actually see the Canadian government being asked to enforce sentences that do not exist here, such as stoning by death for adultery or removing of hands for theft.

Therefore, I would ask my colleagues not to support this. There is too much of a potential that the government or the minister would be put into a position of enforcing foreign law that is contrary to Canadian law.

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

We'll go to the question, unless, Mr. Sorenson, you want to speak briefly.

Mr. Kevin Sorenson: If you still have in this bill, in the transfer act, that both countries have to sign on to this, it isn't going to happen. Ms. Jennings' argument isn't going to come to fruition. This is more dealing with the length of time they will be in custody. The other country is not going to be transferring any criminal to Canada if they realize they aren't going to have the timeline that is asked for.

(1555)

The Chair: Mr. Payette.

Mr. Normand Payette: One of the fundamental principles that underlie the legislation is being deferential to the sovereignty of *l'état de condamnation*, the sentencing state.

What we try to do when an individual is transferred to Canada is to try to respect, as much as possible, the sentence that's imposed by a foreign state, to the point where, as I said, we have one of the principles called non-aggravation. If the sentence that is imposed by a foreign state is less than even a minimum sentence that is provided for in Canada, we are under the obligation to respect that sentence. There is an element, as I said, of deference to the sovereignty of the sentencing state.

The Chair: Thank you very much.

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

(Clauses 13 to 16 inclusive agreed to on division)

(On clause 17--*Transfer of young person--12 or 13 years old*)

The Chair: Monsieur Marceau, Bloc amendment 1.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, allow me to read a few notes that I have here. The problem with clause 17 as it is currently worded is that a young person who has been sentenced outside Canada automatically falls under the presumption that he or she is subject to the adult penalty, regardless of circumstances. It should also be added that a young person can no longer even bring contrary evidence that would limit the application of that presumption.

We in the Bloc believe that there is a strong chance, not to say a certainty, that young persons will be subject to excessively heavy penalties compared to those they would have received if they had been sentenced in Canada. The Quebec Court of Appeal gave its opinion in the case of the Government of Quebec's order regarding the reference concerning Bill C-7 on the youth criminal justice system.

This procedure violates the presumption of innocence guaranteed under paragraph 11(d) of the Charter and recognized by the Supreme Court as a fundamental principle that is protected by section 7. Paragraph 11(d) of the Charter establishes the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

On page 63 of the opinion, we read, and I quote:

> The expression “fundamental justice” in the context of section 7 is not limited to rules of procedure, but includes substantive principles. This means that to withstand Charter scrutiny any psychological security violation must be fundamentally warranted not only procedurally but also in relation to the objective, in accordance with the basic tenets of our legal system.

The Quebec Court of Appeal judges added that there is wide consensus about these elements because of the essential role they play in the Canadian legal system. Their vital importance has been recognized even since the very first legislation on the subject-matter. The Quebec Court of Appeal has provided several responses that clearly rankle the present government. The Court of Appeal was categorical: the imposition of an adult sentence is not essential to achieving the goal of the Youth Criminal Justice Act.

So, Mr. Chair, all that to say that Supreme Court case law states that section 7 of the Canadian Charter requires that, at sentencing, the onus is on the Crown to establish beyond a reasonable doubt the aggravating circumstances of the commission of the offence.

Mr. Chair, if we leave the bill as it currently stands, the onus will be on the accused to make that proof, whereas it should be on the minister to do so.

[*English*]

The Chair: Ms. Jennings, do you wish to respond?

I see that Monsieur Payette wishes to respond.

Mrs. Marlene Jennings: I would like to say only one very short thing. I understand that the rules of the committee are such that amendments can be tabled, at the moment, at clause-by-clause. I think it might be something we want to look at again, because it puts those of us who haven't seen the amendments in a difficult position to know whether or not we support them.

I would let Mr. Payette address all of the Bloc amendments, because I only saw them when we sat down.

(1600)

The Chair: To be fair, that's completely in accordance with the rules.

Mrs. Marlene Jennings: I know. I understand that. I say that it's something we may wish, as a committee, to look at in the future, not at this time obviously.

The Chair: We have our procedural guru at the end of the table. His head is just spinning, I can see it. While his head spins, we'll go to Mr. Payette.

[*Translation*]

Mr. Normand Payette: Mr. Marceau, following your appearance on October 1, I asked our colleagues at the Department of Justice who are responsible for the Youth Criminal Justice Act to examine clauses 17 to 20 of the bill again. They assured me that the provisions are consistent with the Youth Criminal Justice Act, even in light of the Quebec Court of Appeal judgment in response to the reference from the Quebec Minister of Justice and Attorney General. They assured me that the provisions are consistent with the act, Mr. Marceau.

Mr. Richard Marceau: So I understand that the same lawyers who wrongly said at the outset that the first version of the act that replaced the Young Offenders Act was consistent with the Canadian Charter of Rights and Freedoms are the ones who are now saying that it's all right.

Is that correct?

M. Normand Payette: Yes, they are lawyers who, as I said, are our colleagues. They gave their opinion in light of the judgment, which they undoubtedly read with care.

Mr. Richard Marceau: All right.

[*English*]

The Chair: Thank you.

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

(Clause 17 agreed to on division)

(On clause 18--*Transfer of young person--14 to 17 years old*)

The Chair: I see BQ-2.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, the same principle applies. So I officially introduce the amendment.

[*English*]

The Chair: Then I can assume we'll officially restate the same answer.

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

(Clause 18 agreed to on division)

(On clause 19--*Parole eligibility for young person convicted of murder--14 to 17 years old*)

The Chair: There are three Bloc amendments, BQ-3, 4, and 5, to clause 19.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, the same reasoning applies.

[*English*]

The Chair: Thank you.

(Amendments negatived [See *Minutes of Proceedings*])

(Clause 19 agreed to on division)

(On clause 20--*Placement*)

The Chair: We will consider BQ-6.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, we are consistent and logical people, so the same position applies. I see that my colleague John McKay is saying he agrees with me as well.

[*English*]

The Chair: Thank you.

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

(Clause 20 agreed to on division)

(Clauses 21 to 43 inclusive agreed to)

(1605)

The Chair: Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

Some hon. members: On division.

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

Some hon. members: Agreed.

Some hon. members: On division.

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

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Thank you very much.

Thank you very much to officials. You'll appreciate that when I had to cast my tie-breaking vote, I didn't ask you for any assistance that would have put you in a very difficult place.

I'm going to suspend to allow the next series of witnesses to come forward.

(1606)

(1612)

The Chair: I call back to order the 77th meeting of the Standing Committee on Justice and Human Rights today, pursuant to the order of reference of Tuesday, April 1, 2003. We're considering Bill C-20, an act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act.

To save a probably lengthier speech by Mr. Lee, I'm going to bring up the fact that bilingual versions of amendments have not been placed on a single page, as we discussed at great length yesterday. So I would remind officials who prepared the amendments--and this is in the case of the government amendments--to take Mr. Lee's very wonderful suggestion under advisement, so that we won't have to listen to Mr. Lee. How's that?

With that, as we agreed, we are here for clause-by-clause consideration of Bill C-20, and I will begin with clause 1.

(Clauses 1 and 2 agreed to on division)

(On clause 3)

The Chair: I see two amendments identified as BQ-1 and 2.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau: Thank you, Mr. Chairman.

It's not a mistake if you see a blank on the page. I wanted to take the opportunity to discuss minimum sentences. It's been mentioned many times that, given the repugnant nature of what we're talking about, the committee should consider the possibility of having a minimum sentence for someone found guilty of child pornography. We unfortunately did not have the opportunity to debate the question when we really had the witnesses before us. I think now is the time to do so, as we conduct the clause-by-clause consideration of the bill. That's the purpose of the amendments that are before us, and that's the reason why I left a blank, since I'm also quite open to discussing the length of a minimum sentence that could be included in the act.

Le président: Thank you, Mr. Marceau.

Mr. Mosley.

[*English*]

Mr. Richard Mosley (Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice): Thank you, Mr. Chair.

If I may speak generally about the subject of mandatory minimum penalties, there are of course existing mandatory minimum penalties in the Criminal Code, but Canada uses mandatory minimums with great restraint. Virtually every study of the use of such penalties over the years has concluded that they are inadvisable, do not achieve the objectives that are sought for them, and can cause considerable difficulty in the administration of justice.

Just recently, at the request of federal and provincial ministers responsible for justice, the department commissioned a study of all of the research literature on mandatory minimum sentences. That was submitted to federal and provincial ministers just about two years ago. The research demonstrates conclusively that the mandatory minimums simply do not achieve the objectives that are sought for them.

There are a number of problems with the administration of such sentences. They tend to shift the exercise of discretion from the individualized sentencing practices of the court to the police and to the Crown. In other words, the police and Crown will often seek to charge some other offence, rather than the one that most properly fits the circumstances and the conduct, in order to avoid the application of the mandatory minimum in the particular case. They are over-inclusive, in that they capture far too much conduct that would not normally satisfy the sentence the court would impose in the circumstances. That's caused them considerable constitutional difficulty. The Supreme Court of Canada has in fact struck down mandatory minimum sentences as being overly broad, over-inclusive.

In the particular example that's before the committee, the range of conduct that's covered by section 151 of the Criminal Code is extraordinarily broad. It covers touching part of the body. That could be, in the particular circumstances of the offence, a fairly—I hate to use the word “minor”—but a comparatively less serious offence. It's very difficult to find a mandatory minimum that would serve the purpose of covering such a broad range of conduct. Accordingly, this is not something the Department of Justice would advise would be appropriate for this offence.

(1615)

The Chair: Thank you very much.

I see Mr. Sorenson, Monsieur Marceau again, and Mr. McKay.

Mr. Kevin Sorenson: First of all, what this amendment is born out of is the frustration that there's really nothing in this bill that guarantees it recognizes the terrible type of crime

that's been committed here. Increasing the maximum penalty really does nothing, and we've seen that. When did the courts ever sentence someone to the maximum sentence? What we have asked and believe is important, and will ask for later and will debate in the House of Commons, is that we have mandatory minimum sentences, perhaps at least in some defined circumstances—not for the touching, or not for some of those Mr. Mosley has mentioned, but for those specified crimes where there is indeed harm and sexual exploitation of children.

Mr. Mosley suggested that mandatory minimums do not solve the problem, but our argument is that neither do the mini-sentences we see the courts handing down now. Do the conditional sentences solve the problem? I don't think anyone can say they do. Again, with the recognition that we cannot tolerate child pornography and cannot tolerate some of the exploitation and some of the other things this bill is dealing with, creating a mandatory minimum penalty is something that should be looked at.

Also, for certain, when it comes to those individuals who are on a second or third or fourth offence, why would we not have a mandatory minimum penalty created?

We would support anything that brought about mandatory minimum sentencing.

The Chair: Thank you, Mr. Sorenson.

I think, Monsieur Marceau, I'll go to Mr. McKay, and that way....

Mr. McKay.

Mr. John McKay: I take Mr. Mosley's comments, and there's a certain merit to them. However, there is also a certain frustration within the Canadian public--and it builds up over time--that the system of justice has become the prerogative and the preserve of the professionals rather than the people.

People react to what is perceived to be an extraordinarily light sentence, and with some justification. So you get statements such as what the police put forward in their brief, that the Department of Justice officials—and I assume that refers to you, Mr. Mosley—

> have shied away from addressing the abysmal sentencing practices of Canada's judiciary in any meaningful way. While Bill C-20 props up maximum sentences for several existing offences, the reality is that courts are frequently issuing light and even non-custodial sentences for sex offences against children. If the Minister of Justice intends to get serious about crimes against children and vulnerable people, he must be prepared to attack the systemic bias that exists against minimum sentences.

That frankly strikes me as far closer to the sentiment I hear on the streets, in my office, and in various justice forums than some academic review saying sometimes minimum sentences don't actually work and create their own distortions. I appreciate that maybe they do create some distortions, but I also appreciate that ultimately this is the people's system of justice, and the people are expressing, I think, through their elected members—at least a number of their elected members—that they're pretty fed up with sentences that don't reflect what they perceive to be the gravity of the crime.

I'm interested in hearing, if you're against minimum sentences such as proposed by Mr. Marceau—and I'm assuming he's going to put that threshold fairly low, because there are blanks here—what the alternative is to this grinding sense that the sentencing practices are “abysmal”.

(1620)

The Chair: Thank you, Mr. McKay.

Mr. Mosley, I should tell you before you answer that saying that your comments made a sort of sense is high praise from Mr. McKay.

Go ahead.

Mr. Richard Mosley: I didn't take it as anything short of that.

I think we do understand the frustration, because we hear about it on a regular basis through correspondence and meetings with Canadians who are upset about sentences imposed on individual cases. It is one of the unfortunate effects of a system of individualized sentencing, which we have. We rely on the courts, and sometimes they make mistakes in sentencing and in individual cases. It may well be that it's time to take another look at the question of sentencing guidelines, which was examined some years ago. There wasn't a consensus or a lot of will behind moving in that direction.

I can tell you that it would be incongruous to put in a mandatory minimum for this offence when the offence of sexual assault, which could in a particular case include a violent rape, has no mandatory minimum at present. This offence covers far too broad a range of conduct. You stand the risk of imposing a sentence that is too harsh for a particular offender.

They also tend to become the ceiling where they are in place: that's what the courts impose. So you could have the unintended result of having the court impose the mandatory minimum but not a higher sentence, which a particular offender may warrant in a particular case. Leaving it, within the range of discretion, to the court allows for a full variety of conduct to be considered in particular sentencing.

The Chair: We'll go back to Mr. McKay.

Mr. John McKay: It seems to me, Mr. Mosley, that your argument is that we can't be consistent because we've been inconsistent before. We don't have a mandatory minimum

with respect to rapes and sexual assaults; therefore, we can't consider putting mandatory minimums in with respect to pornography issues. I'm not persuaded that that's a particularly good argument. I am persuaded that the argument that it will lead to unintended consequences may well have some merit to it. Having said that, there's merit to unintended consequences, i.e., the minimums that in effect become the maximums.

I'm wondering whether in fact the Canadian public is prepared to risk that. What are the unintended consequences? They are the inconsistencies that will in fact generate a response among police and citizens that this is in fact a way to go.

The other thing that I think underlies this is the frustration on the part of police who face an enormous burden in trying to prove these cases. I know when we did the organized crime study we went into rooms that were just packed with boxes of evidence. And it strikes one, as the courts are kind of derailed on this disclosure business, that the disclosure has been that everything you've got, including your underwear, gets to be shown here. So they go through all of this exercise, this enormous exercise of proving a case, and at the end of the day they get a conviction and at the end of the day the sentence is laughable.

The unintended consequence, I would submit, is that the police don't bother laying them any more, or they don't put it in unless this is a case that just falls into their lap, because they're not going to go through the effort.

(1625)

The Chair: Mr. Mosley, and then I'm going to have to go to Monsieur Marceau, who has been waiting a long time, and then Mr. Comartin and Ms. Fry.

Mr. Richard Mosley: I think it's difficult to arrive at conclusions on this based on anecdotal accounts that have been presented to the committee. It's a valid concern. I'm not trying to dismiss or discount the member's concern at all, but it's a serious issue that deserves, I think, a serious consideration with all of the evidence. That includes the actual sentencing practices that the courts are handing down, the real data that is being used in these cases, and the scientific evidence on what benefit you get when you put in a mandatory minimum.

The Chair: Thank you very much.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, the amendment, as it stands, seems cold because it has to be put in context. The amended clause would be: “Every person who, for a sexual purpose, touches a person under the age of fourteen years [...]”

So we're talking about a child under the age of 14, that is to say a pre-adolescent. So regardless of what part of the body is touched--and it is difficult to touch the breast of a girl under the age of 14 because many don't have any--imagine the harm or psychological injury that can be suffered by a child under the age of 14 who is touched for a sexual purpose. That's what we're talking about. I can only agree with my colleague John McKay. The Canadian and Quebec public have had enough of what they perceive as too lenient penalties for people who harm the most sensitive and vulnerable persons in our society. A number of members of this committee speak on behalf of those people who say enough is enough. Perhaps that should be done in other cases--I'm quite open to studying other cases as well--but, unfortunately, today, we have to stick to Bill C-20, which concerns these sections of the Criminal Code.

Are we going to decide to completely overhaul the Criminal Code? I'll be pleased to talk about the issue of minimum penalties, but we can't do that now. If we haven't been precise in the past or if we haven't been very consistent in the past, why should that prevent us from being so in the future? That's an argument that escapes me.

[*English*]

The Chair: Merci, Monsieur Marceau.

To Mr. Comartin.

Mr. Joe Comartin: Thank you, Mr. Chair.

The NDP's position is to be opposed to mandatory minimum sentences. It always has been. We expect it will always be our position, unless we see some change in the reality of what those sentences accomplish or don't accomplish.

Mr. Chair, the reality is that we can sit around this table and can express, as Mr. Marceau and Mr. McKay have done, the public's revulsion for the criminal conduct that we're addressing here. There isn't anybody in this room who's going to disagree with them about that revulsion or the revulsion that exists among the public. As Mr. Marceau said, we're dealing with the most vulnerable in our society. Yes, they are damaged psychologically and oftentimes beyond repair as they move into adulthood.

However, that doesn't mean we should get stampeded into using methodology that clearly does not work. From the time I was in law school--I actually did some research on sentencing as part of one of my criminal law courses--we were considering it then. We analyzed it then. And then there's been, as Mr. Mosley's just told the committee, repeated studies on it. It simply doesn't work.

If we as parliamentarians seriously want to deal with this issue in the way of prevention, which is really what we have to go after, this minimum sentence regime isn't going to do it. We know that from every study we've seen. If we want to do that, we should be looking at providing the police with a lot more resources to get at the criminals.

We know--this is a very valid point about criminal justice--that the only system that really works is if the criminal knows that he or she will get caught. If we can establish that they're going to get caught, that is the methodology we should employ. Minimum sentence isn't going to do it.

(1630)

The Chair: Thank you, Mr. Comartin.

Ms. Fry, and then Mr. O'Brien.

Ms. Hedy Fry (Vancouver Centre, Lib.): I think Mr. Comartin said what I wanted to say very well.

I think what I heard Mr. Mosley say--which in fact has convinced me--is that you need to look at what you're going to put in mandatory minimum sentencing for, and that you need to decide that the crime itself is so heinous that you must put some sort of minimum deterrent on it, so the person cannot get away with only a slap on the wrist.

I think when you talk about violent rape or when you talk about other things, they would seem to me to be reasonable things to consider mandatory minimum sentencing for.

While I understand the revulsion of the sexual touching, and if, as Mr. Mosley explained, it's not going to achieve its end and, in fact, may not only fail to achieve the end but may create the opposite, then I suggest that we do not accept this particular amendment.

The Chair: Mr. O'Brien.

Mr. Pat O'Brien (London—Fanshawe, Lib.): As a non-lawyer on the justice committee, it is interesting--interesting but not surprising--to sit and hear lawyers fundamentally disagree on major issues like this. I say that respectfully and seriously.

I'm inclined to support Mr. Marceau's initiative in this regard. I have a lot of respect for Mr. Comartin's opinion, but he talks about the solution to this being to give the police more resources. That's not what the police have told us. As Mr. McKay has pointed out, they've got the resources, they have a case, they go to all the work and all the trouble, yet end up with a pathetically lenient sentence. It's to the point at which, properly resourced or not, they really wonder whether it's the proper use of those resources to even bother to proceed in some of these cases.

So maybe it is time for a bit of a wake-up call. I don't know how far this legislation will go, frankly, with the rumour mill that's around this place, but I do know that I certainly concur with my colleagues in the absolute disgust--and I'm afraid it starts to border on contempt--with which a lot of the Canadian public is beginning to hold the legal system in this country. I'm not trying to be hyperbolic here, but it concerns me greatly.

We see our committee beginning to look at reviewing things like the appointment process of judges, which our colleague Monsieur Marceau has brought to our attention and which I fully support needs to be reconsidered. I think Mr. Mosley has suggested the idea of reviewing sentencing guidelines. Touché! Let's get on to that one pretty quickly.

But in the spirit of perhaps trying to send a wake-up call, unless I hear more convincing arguments than I've heard today so far, I'm going to support Monsieur Marceau's initiative.

The Chair: Mr. Cadman.

Mr. Chuck Cadman (Surrey North, Canadian Alliance): Thank you, Mr. Chair. Briefly, I'll speak in support of this amendment to this motion for the simple reason of the points that have been made here before.

I think this is born out of frustration on the part of the public with our justice system and with the courts in particular. Certainly, the police that I know are absolutely frustrated with the amount of work they put into cases in gathering evidence, and then to see people walk away on fairly significant, serious charges with virtually no real sanction.

Mr. Mosley, with all due respect, you refer to the courts making mistakes, the odd mistake. Well, I'd suggest that the courts have been making a lot of mistakes for a long time around these issues, and that's why it has come to the frustration that it has.

I agree that it's a serious issue and it may deserve more study. But time and time again, the issue has been raised and the government dismisses it out of hand every time, no matter who brings it up or who proposes anything. It has gone on for years, certainly as long as I've been here. Anytime you bring up mandatory minimums, it's dismissed out of hand and nobody wants to consider it.

Mr. Marceau has left the period for length of time blank, for whatever reason. We can certainly discuss what would be suitable. But I think it's time that maybe this committee sends a message, as Mr. O'Brien said, that it's time to consider this issue. This is maybe one place to start with it.

I'll leave it at that. Thank you, Mr. Chair.

(1635)

The Chair: Thank you, Mr. Cadman.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you, Mr. Chairman. I sympathize with the debate here, but I'm not going to support the amendment for the following reason.

About half a dozen years ago, the House adopted the first ever sentencing statute. That statute has, I believe, had the effect of gathering together, corralling, and bringing together all of the sentencing in this country. It has had a positive effect, but it doesn't ever ensure a perfect sentencing, because in each case a judge decides on the sentence based on all the facts of case, the submissions of counsel, and all of the factors set out in the sentencing statute.

I might even suggest that maybe we really haven't fully evolved in that sentencing envelope. The sentencing statute has had its impact. Judges do get together, judges who do criminal sentencing, and review the sentencing issues. They don't do it publicly, but they do it.

I think we would be throwing a monkey wrench into the system by doing a one-off on this particular statute. It might send a message, but it might be a confusing message. It might look disorderly. I think there might be other ways to address the weak sentencing.

If a sentence is extraordinarily weak, it can be appealed. If a sentence is extraordinarily harsh, it can be appealed. All of those appeals cost money, but that's the price of refining the sentencing regime that's out there.

I think that sending a one-off message on sexual touching would send not a good message from this committee and the House. It would send a message, but it would be a confused one. I prefer to approach the issue in another way.

The Chair: Ms. Jennings and Mr. Macklin.

Mrs. Marlene Jennings: Very briefly, to add my voice to the reasons given by Mr. Comartin, Dr. Fry, and Mr. Lee, I'd like to add something else, and this is not coming from someone who's a lawyer...although I am a lawyer, I never practised criminal law. But this is from someone who has worked with youth protection services serving the English-speaking community in the greater Montreal area, and therefore I have an interest in criminology and youth who are brought into the justice system; it's from someone who has also had an interest in the justice system before ever becoming a lawyer, and therefore I did do a lot of reading about things like minimum sentencing, about things like which segments of our population here in Canada and in the United States--and that's where I usually limit it because it's pretty close to Canada--somehow got the wrong end of the stick within the criminal system. It almost always is those minorities who are the most marginalized, whether they be aboriginal first nations or people of colour. It is always the most marginalized, those who face the most obstacles. The studies on minimum sentencing also show the same thing.

So simply on that basis, rather than supporting these amendments that Mr. Marceau has put forward that would bring in minimum sentencing, I would say, why doesn't the committee at some point look at the issue of sentencing? Minimum sentencing would be part of that. Conduct an actual review where we can review all of the literature and the science on the issue of sentencing, including minimum sentencing.

So I can't support it, but it's definitely not because I'm not horrified by the brutality that our children suffer at times at the hands of adults and at times at the hands of other children.

(1640)

The Chair: Mr. Macklin.

Mr. Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada): I don't wish to add or detract from the arguments that have been presented but rather to simply draw attention to the fact that we are dealing with a motion before this committee that I respectfully submit is totally incomplete. It doesn't have any dates; it doesn't have any times. So although we've had a very interesting and informative academic discussion, the reality is the motion before us is inappropriate because it does not specify any minimum, and accordingly I cannot be supportive.

The Chair: Well, whether or not you support it, it's not admissible as it stands.

Mr. Paul Harold Macklin: That's correct.

The Chair: But when he fills in the blanks, it becomes admissible. I think he was simply testing the committee in the context of what their views were, to sort of get a sense of where he might go with that. I'm going to accept it once he gives me a number.

Before I go to Mr. McKay, I also want to acknowledge that both Ms. Jennings and Mr. Comartin actually acknowledged the fact that they were lawyers. It's unusual, because most of the time those of us on the committee, like Mr. O'Brien...we have distanced ourselves from the profession in the course of this discussion.

Mr. Joe Comartin: I do that too, Mr. Chair.

The Chair: I'm going to go to Mr. McKay and Mr. Mosley.

Mr. John McKay: I understand there's a 12-step program.

Some hon. members: Oh, oh!

The Chair: This is step six.

Mr. John McKay: Step one is “Don't go on the justice committee”.

On Mr. Lee's argument, section 718 was passed five or six years ago, so the courts have actually been working with section 718 and the sentencing principles there, and still the police--a lot of support from the police and various others--say the sentencing practices are abysmal. It looks like Parliament failed to get the judges' attention through section 718.

On the issue of being horrified by the brutality, which was raised by Ms. Jennings, the argument isn't whether we're horrified by the brutality of the action; the question is whether we're horrified by the sentencing practices of the judges. I think that's the issue. There is a sense in which we are horrified by the fact that some of these sentences just seem to be completely out of line. I think that is a position that is more than merely anecdotal.

I wouldn't disagree with the issue that we should look at mandatory minimums, that we should look at the whole sentencing regime, and so on, but you know how this places operates. It doesn't happen. And we all know what the future holds in the next number of months.

So I guess, like Mr. O'Brien, I'm saying, well, section 718 didn't seem to work all that well, the police seem to be pretty upset, the crown attorneys are pretty upset, the ever-escalating burden on the prosecution seems to have got totally out of control, and there are legitimate complaints that people are not getting charged because of the evidentiary burdens and because of the sentencing results. So I'm down to trying mandatory minimums, and I understand that it will create its own distortions.

The Chair: Mr. Mosley, and then I'm going to ask Mr. Marceau to close and provide us with a couple of numerals.

Mr. Richard Mosley: I want to actually stress one thing to underscore the point that Ms. Jennings made.

The research does demonstrate that mandatory minimums exacerbate racial disparities in the application of sentencing. The reality is that where they're available it's not the middle-class white kid who gets the sentence; it tends to be a minority person. That has been substantially demonstrated by a number of studies over the years, and that's a problem that I think has to be taken into consideration before you take a step of this nature.

Also, I don't believe there's any actual evidence before the committee as to what the sentencing practices are for this offence. You're taking a leap in the dark as to what has been the practice since this offence was actually first put into the code, and I would respectfully suggest that in the absence of that information it's very difficult to proceed on a motion to change a problem that may not in fact exist.

(1645)

The Chair: Thank you.

Mr. Marceau, we're all waiting to see what you've drawn from this discussion.

[*Translation*]

Mr. Richard Marceau: Thank you, Mr. Chair.

First I have a question. If the problem is supposedly our lack of information, how much time would it take you to provide us with that information?

[*English*]

Mr. Richard Mosley: Contact the Canadian Centre for Justice Statistics and ask them what they have from the adult criminal court survey. That would be the first step.

I can tell you that in the year since this provision has been put in place, I'm not aware of any representations that have been made to the department--I'm talking about this particular offence now--that the sentencing practices for this offence have been inadequate.

[*Translation*]

Mr. Richard Marceau: But I'm coming back to my question. How much time would that take you?

I'm quite ready not to pass Bill C-20 right away. If you told us that it would take you a day or two, we would come back in a day or two and we would do it. If not, what I propose for paragraph 151(a) is a maximum prison term of 10 years, the minimum penalty being one year. Let's try it. And for paragraph 151(b), I propose a maximum prison term of 18 months, the minimum penalty being three months.

So the minimum isn't too high to prevent some of you from supporting it. I believe we're sending a signal, and that's important because it's true that we have a duty to speak on behalf of the public. We're sending a message that the protection of children, the most vulnerable persons in our society, is something important for us. If only to set a minimum, even if it's very low, the message will be heard, at least I hope so. In any case, that would be the first time the House or parliamentarians would send a very clear message to the judicial system, which, in a democratic country, should normally be attentive to what elected representatives say, that there is a problem, that we feel there is a problem.

So my figures are one year and three months.

[*English*]

The Chair: Okay.

Monsieur Jobin.

[*Translation*]

Mr. Christian Jobin (Lévis-et-Chutes-de-la-Chaudière, Lib.): I'm not a lawyer; I'm an accountant by training. When you talk about figures, I always need columns in order to be able to back up what I say. Today, I'm being asked to decide on a minimum penalty without any statistics, without any documents. We're headed toward passage of a bill without any supporting documents. I'm not comfortable with this situation and I'm going to vote against your motion, Mr. Marceau.

I would prefer us to have more arguments, and I trust the judges. We're saying what the maximum penalty is, and if we say that there is a minimum penalty, I'm afraid that people will remember that it's the minimum penalty that will always apply, whereas that will not be the case. That's not the message we want to send; it's the maximum penalty. So I won't support your motion.

[*English*]

The Chair: I'm going to call the question on amendment BQ-1.

[*Translation*]

Mr. Richard Marceau: Can we have a recorded vote?

[*English*]

The Chair: A recorded vote, Monsieur Marceau?

[*Translation*]

Mr. Richard Marceau: Yes, please.

[*English*]

The Chair: We'll have a recorded vote on amendment BQ-1.

(Amendment negatived: nays 7; yeas 5 [See *Minutes of Proceedings*])

The Chair: Monsieur Marceau, on amendment BQ-2.

(1650)

[*Translation*]

Mr. Richard Marceau: Mr. Chair, since it's the same thing, do I have this committee's unanimous consent to apply the result of the previous vote to this one? It's the same principle. Let's take it for granted that it is entered in the record and that the result is the same.

[*English*]

The Chair: I am seeking unanimous consent to apply the last vote to this amendment. Thank you.

(Amendment negatived: nays 7; yeas 5 [See *Minutes of Proceedings*])

(Clause 3 agreed to on division)

(On clause 4)

The Chair: Monsieur Marceau, on amendment BQ-3.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, it's the same thing: one year, three months. I request unanimous consent to apply the result of the previous vote.

[*English*]

The Chair: Do I have consent to have it applied again?

(Amendment negatived: nays 7; yeas 5 [See *Minutes of Proceedings*])

The Chair: Mr. Macklin, on amendment G-1.

Mr. Paul Harold Macklin: Thank you, Mr. Chair.

Some witnesses of course expressed concern that the proposed reform to section 153 didn't adequately address their concern about a specific type of sexual relationship with a young person--of course, this is dealing with difference in age--namely, a relationship involving a young person. An example that was commonly cited was someone of 14 or 15 years of age and a 40-, 50-, or 60-year-old male.

The proposed amendment is twofold. First of all, it adds to the inclusive listing of factors an additional factor--that is, of course, the age of the young person. This more clearly indicates that the court should consider this factor in addition to the age differential between the younger person and the older person.

The second point would be that this clarifies the intention of Bill C-20 in proposing reform by stating that the court may make an inference, can infer, that this relationship is exploitive from the nature and circumstances of the relationship.

The Chair: We've heard the explanation. Are there any comments?

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

(Clause 4 as amended agreed to on division)

(Clause 5 agreed to on division)

(On clause 6)

The Chair: I see a number of amendments on clause 6. The first one is amendment G-2.

Mr. Macklin.

Mr. Paul Harold Macklin: With respect to this government dealing with voyeurism, we wanted to deal with the question of "sexual activity" and whether or not it was clearly defined. This motion would add the word "explicit" to the expression "sexual activity" in the voyeurism offence.

The words "sexual activity" are meant to be interpreted as including only sexual activities normally conducted in private. Now, in western societies, it does not include kissing. If the courts were to include kissing in the definition of "sexual activity", it would broaden the scope of the offence, adding to places where surreptitious observing or recording is prohibited and potentially creating a charter risk.

In Sharpe, the Supreme Court of Canada did make a statement on this by clarifying that explicit sexual activity does not include kissing. So by adding the word "explicit", we believe it would in fact clarify the meaning of "sexual activity".

The Chair: I don't see any questions.

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

The Chair: Next is BQ-4.

[*Translation*]

Mr. Richard Marceau: Thank you very much, Mr. Chair.

This, in my view, is a minor amendment, but one that supplements what we're trying to do. What it ultimately adds is a provision on advertising. I would like to cover the possibility or the situation in which a person does not print, publish, distribute or circulate, but simply says where to obtain such material. That merely supplements the options that already exist, and I think that covers what could be considered as an omission because there could very well be a Web site advertising another Web site where child pornography can be found. The author of that advertising site would not be included in the proposed subsection 162(4).

(1655)

Le président: Thank you, Mr. Marceau.

Ms. Jennings.

Mme Marlene Jennings: The wording of the proposed subsection 162(4) reads:

> (4) Everyone commits an offence who [...] prints, publishes, distributes, circulates, sells or makes available [...]

My question is for Mr. Mosley. Is the act of advertising included in the expression "makes available"?

[*English*]

Mr. Richard Mosley: The courts generally interpret the meaning of the word "publishing" very broadly, as in making public. So we would expect—

Mrs. Marlene Jennings: Not as advertising? Would that come under the...?

Mr. Richard Mosley: Making public the information would cover advertising it at the same time.

Mrs. Marlene Jennings: No. In the English section, it would be "or makes available".

Mr. Richard Mosley: That also covers the advertising.

Mrs. Marlene Jennings: So would advertising be covered by the courts, or be deemed by them to be making available? That's my question.

Mr. Richard Mosley: Yes, we believe it would.

Mrs. Marlene Jennings: Are there cases?

Ms. Lisette Lafontaine (Senior Counsel, Criminal Law Policy Section, Department of Justice): It is not yet an offence, so we don't have any cases.

The Chair: Mr. McKay, and then Ms. Fry.

Mr. John McKay: I'm taking on this Marceau persona.

An hon. member: Oh, oh!

Mr. Richard Marceau: Good for you.

The Chair: That's good for him, but maybe not good for you.

Some hon. members: Oh, oh!

Mr. John McKay: Yes, I think you're in trouble, Richard.

An hon. member: Did you say “more so”?

Mr. John McKay: Yes, more so, as in “more so” in trouble.

I thought that some of the complaints about child pornography had to do with the fact that these advertisements were popping up on the Internet in completely inappropriate places. I think that “advertising” is an expansionary word, and it's more expansionary than merely publishing something; I can publish something, but certainly not advertise for it. I can distribute something, but certainly not advertise it. I can circulate something and not be advertising it. And I can sell something and not be advertising it.

So I think, actually—

Mrs. Marlene Jennings: What about making it available?

Mr. John McKay: Well, making it available is kind of vague. With the term “advertising”, it seems to me, there's more of a connectedness to expanding your market, if you will. That's why you advertise, to try to expand your market. None of these things necessarily expand your market—publishing, distributing, circulating, selling, or making it available.

So I think it's a good motion.

The Chair: Ms. Fry.

Ms. Hedy Fry: I just wanted to expand on what Mr. McKay said. I think one could stand up at an event, for instance, and speak to the fact that you have this in your possession, especially if you were at an event where you knew like-minded people were. I would call that advertising.

So I would like to see the word “advertising” added, because I think it would expand. I don't see that it would harm; I think it would simply expand.

The Chair: Mr. Mosley.

Mr. Richard Mosley: I wouldn't suggest that it would harm. There may be some confusion about what this amendment is dealing with. We're actually in the voyeurism section, not

the child pornography section. I just say this so that committee is clear on what it's addressing.

I don't think it would cause any harm, either, but we do believe it's already covered.

The Chair: Mr. Cadman has a comment, and then we're going to go to the question.

Mr. Chuck Cadman: I'll speak in favour of this amendment for the very simple reason that I use, as I'm sure many of us do, the Internet a lot. How many of us have had windows pop open out of nowhere advertising any number of things? I've certainly had windows pop open advertising pornography, and the like.

I would support this motion for that reason.

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

The Chair: Mr. Marceau, Bloc amendment 5.

[*Translation*]

Mr. Richard Marceau: It's the same thing again. I put one year, so I would apply the result of the first votes, if there is unanimous consent.

[*English*]

The Chair: Do I have consent to apply the vote on amendment BQ-5?

(Amendment negatived: nays 7; yeas 5 [See *Minutes of Proceedings*])

The Chair: I go now to government amendment G-3. Mr. Macklin.

Mr. Paul Harold Macklin: Yes. This is on the question that came up over the question of motives in looking at voyeurism.

The purpose of this amendment is to correct what appears to be an anomaly in the drafting of the provision. Both paragraphs (a) and (b) of subclause (7), which deal with the question of law and motives, were meant to apply to the interpretation of the public good defence in subclause (6), not to the whole clause, only to subclause (6).

While it is clear that paragraph (a) can only apply to the public good defence, it is not the case for paragraph (b). This amendment would correct the anomaly by making subclause (7) only apply for the purposes of subclause (6).

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

(Clause 6 as amended agreed to)

(On clause 7)

(1700)

The Chair: I see Bloc amendment 6.

[*Translation*]

Mr. Richard Marceau: Thank you, Mr. Chair.

I just saw the amendments moved by the government, because we just received them when we came in. Amendment G-4 seeks to do somewhat what I tried to do with my amendment BQ-6. First I would perhaps like to ask the government to make its presentation because I'm obviously all alone in my office, or nearly so; I have an assistant, whereas the government people have thousands of people with them. So I would like the government to explain its amendment G-4. We're aiming at the same thing, but I have a question on...

[*English*]

The Chair: Actually, under consideration of amendment BQ-6, perhaps the government could answer, incorporating some reference to amendment G-4. But I'm not changing the order in which these are presented.

To whoever would like to respond to Mr. Marceau's comments about his amendment BQ-6....

[*Translation*]

Mr. Richard Marceau: All right, I'm going to do a little more. The purpose of my amendment is this: I believe we have all heard that “public good” was a notion too broad and vague to achieve the purpose, which I believe is that of all the members of this committee. So I've somewhat defined what the public good is as follows:

> [...] serves the public good if the act:
>
> (a) has a medical, educational, psychiatric, scientific or crime-prevention purpose;

The purpose of this is to cover cases where, for medical purposes, for example, someone is trying to treat someone who is a pedophile or has pedophiliac tendencies. The same is true for psychiatric purposes. As for educational purposes, this applies to universities and colleges where police officers or future health workers are taught what child pornography is. For crime fighting, it can obviously be expected that police officers will have some, if only to explain to innocent members of Parliament what child pornography is. Lastly, I believe that the meaning of “for a scientific purpose” is self-evident. That's paragraph (a) of my amendment.

Paragraph (b) of my amendment responds to what Radio-Canada came and told us about fears that journalists might have when they investigate and find themselves in possession of such material in the context of their investigation. This is taken virtually word for word from the Radio-Canada brief.

[*English*]

The Chair: Mr. Macklin.

Mr. Paul Harold Macklin: Let me start, and then I'll pass over to Ms. Morency.

What I'd like to say is that I think we're both striving for the same goal here, whether it be through Mr. Marceau's amendment or not. I think we're trying to put, as a lot of witnesses brought forward, some substance to public good. But first of all, the way Mr. Marceau has worded proposed paragraph (6.1)(a) has made it limiting, I think. If you look at the Sharpe case, when the Supreme Court of Canada did their definition, they said that public good has been interpreted as “necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest”. They didn't in any way intend to limit it. So, first of all, that would be one comment I'd have.

Two, I think, is that clearly when you talk of crime prevention.... For example, how do we deal with prosecution? How do we deal with investigation? These aren't necessarily caught under the concept of crime prevention, as I would see it.

(1705)

Mr. Richard Marceau: It's the English version that's not correct.

Mr. Paul Harold Macklin: Oh, it's not correct, okay. Anyway, clearly, that would be a concern.

With respect to paragraph (b), I'm still very concerned as to whether we should say that our police should have a more restricted process than journalists should. Police are required to obtain a warrant to go and do their investigative work. Surely, we're not going to say that our journalists have more freedom than do our police.

I would pass over to Ms. Morency, though, to carry on with more a detailed explanation.

Mrs. Carole Morency (Senior Counsel, Criminal Law Policy Section, Department of Justice): In addition to what you've heard, this is a more expansive definition. From the comments that I believe some of the witnesses made, in particular the CBC, their concerns were being expressed primarily in the context of the voyeurism. So I understand the intent here.

It is possible, if you looked at, for example, a newspaper or another printed form of public information.... Would that include, for example, a billboard as a printed form of information out in the public? Was that the intent?

As Mr. Macklin has said, the strength of trying to rely on the Supreme Court's understanding and interpretation of this term really goes quite a way in terms of ensuring the interpretation, post this bill, that the committee is looking at right now. That's why there is the inclusive and similar language to what you see in the government motion.

The Chair: Thank you very much, Monsieur Marceau.

I'm going to go to the question on Bloc amendment 6.

Oh, sorry, Mr. McKay.

Mr. John McKay: I like the government's approach here of “necessary or advantageous”. I think that seems to be a little more precise.

The question I would have, though, is that in his amendment Mr. Marceau has put things like journalistic activities, newspaper broadcasts, and things of that nature to address specific things that the committee heard. Is there any reason why, when you say “necessary or advantageous to the administration of justice or the pursuit of science, medicine, education or art”, that you couldn't add something such as “journalistic activities” or “broadcasting”? Does that bring any more precision to the defence, and more specificity?

Frankly, at the end of listening to the evidence on this public good defence, I didn't know whether I was coming or going. I frankly didn't know whether the government's proposal was a better proposal than what previously existed, because of vagueness. There was vagueness going both ways. If the issue is vagueness, then why not be more specific with your public good defence by being a little bit more precise, such as Mr. Marceau has been in his motion?

The Chair: Mr. Mosley, and then I have a longer list.

Mr. Richard Mosley: The government motion does attempt to address the concerns of the witnesses about vagueness, although we would argue that the reference to public good in the bill before the committee does encompass the common law on that, going back for a hundred years. That would have invested the term with meaning so as to avoid the vagueness argument as a matter of law.

We do understand that people want to have a better understanding of what it means when they look at the actual statute. Hence, the government motion does spell out precisely what it's intended to mean.

The difficulty with Mr. Marceau's motion is that we fear it is too broad. It is adding meaning that goes beyond what the Supreme Court has already said is a matter of going to the public good.

What does “journalistic activities” mean? How broadly would that be interpreted? We suspect it might lead to the kinds of abuses that the committee is concerned about in terms of the publication of matters that are child porn. Would Mr. Sharpe be permitted, for example, to start publishing his own pedophile's digest with material that otherwise meets the definition? Is that the kind of journalistic activity that could conceivably be interpreted as following within...? So that's our concern. We have less concern about the notions of science, medicine, education, and even art, because we believe that there you can rely on expert evidence as to what is necessary or advantageous to those ends. Journalism is a wide open field.

(1710)

The Chair: Mr. Lee.

Mr. Derek Lee: Thank you.

I commend Mr. Marceau for his effort, and it really is a difficult thing. We're wading into territory that hundreds of lawyers and drafters and the Supreme Court and other courts have had difficulty with. I'll simply add to the comments of Mr. Mosley.

It's my view that the journalistic exemption here would be a field day for our friends in the tabloid newspaper business. It would take us right over the top. Mr. Marceau has attempted to frame a reasonable set of exemptions from the very broad definitions of child pornography.

One of the categories of art, if you will, that was explained to us at the hearings was what I'll call *The Boys of St. Vincent* genre of docudrama. I guess the purpose is part entertainment, but that particular movie made for television described abuse of young boys. So I take it at some point that type of film would cross the line into the definition of what is child pornography.

So can I ask Mr. Mosley or one of the other witnesses if our broadcasters and filmmakers would still be in a position, under the new guidelines, to make a movie like *The Boys of St. Vincent*? And under what exemption would they find themselves?

The Chair: Ms. Morency.

Mrs. Carole Morency: Again, I will take it back to the very basic part of the child pornography provision. Does the film in question, *The Boys of St. Vincent*, even meet the definition of child pornography? I would suggest that it does not in this case. If the material in question did, then certainly you have to go through the other elements and look to...the defence doesn't come up until the later stage.

On that type of information that was provided to the committee in terms of the works that were cited as examples, there would be considerable question on whether they even fell within the definition in the first place.

Mr. Derek Lee: That's it.

The Chair: Mr. Comartin.

Mr. Joe Comartin: I think I'm speaking on behalf of Mr. Nystrom as much as myself now, Mr. Chair, on the difficulty we're having with this. I would say to Mr. Marceau that we're more inclined to go down the route he's gone down with his amendment than down that of the government's amendment. We don't think the proposed government amendment adds much.

I think Mr. Mosley is quite correct that it's already there in the common law and precedent. And I don't think their amendment really enhances the goal we're trying to strive towards, which is to get at the defences and try to limit them specifically in the child porn area. Certainly the government didn't accomplish it, and I'm afraid, Mr. Marceau, I don't think you have either. I think your attempt was well worthwhile.

Having said that--and I'm again apologizing for both myself and Mr. Nystrom--we don't have it yet. We've been working on this and we don't have specific proposals, but we can't see that proposed subsection (7) is going to accomplish what we're trying to do, so we will be voting against both the amendments.

The Chair: On that note, I'm going to go to amendment BQ-6.

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

(1715)

The Chair: Next is amendment G-4.

(Amendment agreed to on division [See *Minutes of Proceedings*])

(Clause 7 as amended agreed to)

(Clause 8 agreed to)

(On clause 9)

The Chair: I see amendment BQ-7 in clause 9.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, the purpose of this amendment is this. Like me, you've heard of the problem police officers can face when an inventory of child pornography pictures is on a computer and police officers are unable to break the code of an encrypted file. This amendment would make it possible to punish a person who refuses to provide the encryption key to the investigating police department. So it's to help police officers who, even though they have impressive technological resources, will one day have to face a little boy or little girl who is smarter than them and who has encrypted pornographic files in a fairly impressive manner, thus withholding evidence from police officers.

[*English*]

The Chair: Any response?

Monsieur Mosley.

Mr. Richard Mosley: Yes, I have some difficulty with how the motion is structured. I'm not sure whether it's in the right place, but that we'll leave to the procedural experts of the committee.

But as to the general intent of this, we have been working on the issue of electronic surveillance and related matters under the heading of a project entitled Lawful Access. There has been extensive consultation on that.

About three years ago we started to hear that there were concerns about a potential problem with encryption. That does not appear to have actually materialized, and I thought it instructive, Mr. Chairman, recently, in coming across a report out of the United States General Accounting Office in which they had examined this issue.... I seem to have misplaced my reference, but off the top of my head, I can say that they had looked at reports from the federal authorities in the United States and from state and local authorities. In the year 2002, the federal authorities had reported that they had not found any cases of encrypted material. The state and local authorities said they found 16, but of those 16, they had not had difficulty opening the text of what they were seeking to get at.

The witness who I think planted the seed for this motion before the committee suggested, as I understand it, that there was a similar law in place in the United Kingdom, and that is

not in fact the case. The witness suggested that the persons who possessed the data were subject to a requirement to give up the code to undo the encryption. The particular statute in case in the United Kingdom is something called RIPA, the Regulation of Investigatory Powers Act, if my memory serves me correctly. That actually deals with third parties who hold public key in escrow on behalf of other persons.

We would have real concerns about the constitutionality of a provision that required the target, the accused, to in effect make a statement incriminating himself or herself by providing access to the data. Certainly we're working with the law enforcement community to ensure that the laws relating to technology are up to date, but this is not an amendment that we think should be adopted by the committee.

(1720)

The Chair: Thank you very much.

The question is on Bloc amendment 7.

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

(Clauses 9 to 24 inclusive agreed to)

(On clause 25)

The Chair: Government amendment 5, Mr. Macklin.

Mr. Paul Harold Macklin: Thank you, Mr. Chairman.

These are two motions that were proposed to clarify the provisions that will govern the receipt of evidence of a child under 14. The motions respond to the concerns that were raised by the Canadian Bar Association and also Professor Nick Bala and to some written submissions that were made.

The first motion will clarify that section 16 of the former provision applies only to witnesses over 14 and to the mentally challenged.

The second motion basically replaces clause 26 and proposes a redrafted new section 16.1 and will apply to children under age 14.

The proposed new section 16.1 clarifies that the new test for receipt of a child's evidence is that they are able to understand and respond to questions.

The motion seeks to further clarify the new approach to receiving child's testimony by making it clear that a child under 14 cannot be required to take an oath or make a solemn declaration, by making it clear that where a party challenges the ability of the child to understand and respond to questions, they need only establish that there is an issue as to capacity. At that point the court, and not the defence counsel, would inquire into the child's capacity.

In addition, the child will be required to promise to tell the truth. The promise underlines the importance of the occasion. Moreover, all children have the experience of making promises, although they may not be able to define this as a particular concept.

No questions will be permitted about the child's understanding of the meaning of a promise. These inquiries would subvert the intention of the new law, which is to receive the evidence of the child if they're able to understand and respond to questions.

Finally, the new provision clarifies that the evidence received from the child, after giving the promise, has the same effect as if given under oath.

So, as for other witnesses, the cogency or weight to be given to the evidence will be determined by the judge.

The Chair: Thank you, Mr. Macklin.

Mr. McKay.

Mr. John McKay: Only a comment, Mr. Chair. I don't have any really serious objections to the amendment. I think it reflects the evidence and it's a good idea.

Having said that, it's pretty darned substantive. This is a very significant change to the Canada Evidence Act in terms of receiving children's evidence, and it's being kind of slipped in under the whole child pornography business. As I said, I don't think it's such a bad idea. I think it actually does reflect the evidence we heard, but procedurally it sort of bothers me a little too much.

The Chair: You've attracted some attention, Mr. McKay.

Ms. Kane.

Ms. Catherine Kane (Senior Counsel, Policy Centre for Victims, Department of Justice): Thank you.

I'd like to clarify. It does look like a very substantial change, but the underlying concept is exactly what we intended in the original provisions as drafted. The witnesses, not so much in what they said but what they submitted in their briefs--Professor Bala and the Canadian Bar Association and the Centre for Children and Families and what not--focused on some of these provisions and highlighted the need for clarity. So while we have a lot more subsections in this model than we did in the other, we're not changing the approach except to clarify it.

So we say clearly that for children under 14 this is the regime they are governed by. Their evidence must be given unsworn. There's no question of maybe trying it out to see if they can take the oath. That's not an option. They must give their evidence in this manner.

The only difference in this regime is basically to say, you're required to promise to tell the truth. Professor Bala's research seems to highlight that there's significance in giving that promise because children understand what a promise is all about. That's the only real difference with this model; the rest is all by way of clarification. I agree we've gone from three subsections to eight, but that's in the interests of clarity.

(1725)

The Chair: Thank you very much.

Ms. Fry.

Ms. Hedy Fry: I would like to ask a question.

Again, not being a lawyer, I really don't understand. When you say a proposed witness is a person whose mental capacity is challenged, you can't presume that a child under 14 may or may not be mentally challenged. Suppose you have 13-year-olds who are mentally challenged. Would they fall under the mentally challenged piece or would they fall under the under 14 piece?

Mrs. Catherine Kane: They fall under the under-14 provision. But the test is whether they are able to understand and respond to questions. A person who has a significant mental disability or cognitive development problem would likely not be able to meet that test, whether you're trying to get them to take an oath or are trying to say they're under 14, if they were asked to promise to tell the truth. So they wouldn't even get past the first hurdle, likely, concerning their ability to understand and respond to questions.

Ms. Hedy Fry: Thank you.

The Chair: Mr. Comartin.

Mr. Joe Comartin: I'm with Mr. McKay on this one.

Ms. Kane, so we're clear, this is not applying the way witnesses of this nature will be treated henceforth in our courtrooms just to this legislation; you're amending the Evidence Act, and they will be required to testify under these rules in all cases where these categories would be called as witnesses.

Mrs. Catherine Kane: Yes, but this is in the original Bill C-20. Clauses 25 and 26 there are amendments to the Canada Evidence Act.

As the government indicated at the outset, the purpose of these amendments is to deal with the situation that has arisen in our courts where the evidence of children cannot be admitted because too much emphasis is placed on ancillary issues, including their ability to understand the religious underpinnings of oaths and affirmations and their ability to define “promise”, which is quite a difficult concept to define, although most kids know what a promise is, because it's a part of their day-to-day life to make promises and to have promises broken.

The intention to amend the Canada Evidence Act has always been there. The amendments that are proposed today are not contrary to the government's original intention in this bill. They are merely elaborating what those intentions are, because the witnesses have made it quite clear that more clarity is needed, and to avoid....

One of the other provisions raising the issue of the capacity of the witness to understand and respond to questions is really just lining up the French and the English versions more precisely.

Mr. Joe Comartin: Mr. Chair, I'd like to pursue this.

Obviously I wasn't here as a witness, and I don't know the research that was put in front of you. I have some concerns. As much as I have respect for Professor Bala, I don't know if in his research he took into account cross-cultural mores in coming to the assessment he made about a child understanding a promise more than swearing an oath.

My concern is that this is a pretty fundamental change to the way we've treated young witnesses and witnesses with limited capacity in our courts, going back for probably well over 100 years. I must admit I'm concerned about it coming in at this last minute without.... I'm saying this obviously at a disadvantage, not knowing how much material was put before this committee to be able to draw a conclusion as to whether in fact the research is valid and whether these amendments are consistent with good public policy.

The Chair: Mr. Mosley.

Mr. Richard Mosley: I understand the concerns that are being raised by both Mr. McKay and Mr. Comartin about the amendments. The motions to amend the bill are simply to add clarity to what's already in the bill.

What was in the bill came as the result of an extensive and prolonged national consultation process that involved all the provinces and territories and discussions with a wide range of experts dealing on a day-to-day basis with the problem of receiving children's evidence in the courts. That's the starting point with these motions. It's just an attempt to clarify, based on questions raised by the witnesses before the committee.

The Chair: Are there any other interventions? If not, I'm going to call the question on amendment G-5.

(Amendment agreed to on division [See *Minutes of Proceedings*])

(Clause 25 as amended agreed to on division)

(On clause 26)

The Chair: Under clause 26 there is amendment G-6.

Mr. Macklin.

(1730)

Mr. Paul Harold Macklin: I spoke to that one as part of my previous motion, by reference, and I think it is clear.

The Chair: Thank you.

(Amendment agreed to on division [See *Minutes of Proceedings*])

(Clause 26 as amended agreed to on division)

(Clauses 27 and 28 agreed to)

The Chair: Shall the preamble carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

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

Some hon. members: Agreed.

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

Some hon. members: Agreed.

The Chair: Thank you.

Before everybody races off, let me say we had not intended to do this with such efficiency, so we don't have anything lined up for tomorrow. I guess I needn't go any further.

Please be prepared, then, on Tuesday next week, to begin the process of giving some instruction. At this point, we had thought this was going to take us right until November 7. We have next week.

I want to thank the panel for their support. I want to also commend Mr. Marceau and his single support staff for the efforts they brought to this exercise.

[*Translation*]

Mr. Richard Marceau: Mr. Chair, since we're only going to meet next week and the House has unanimously passed my motion M-288 on the judicial appointments process, would it be possible to ask our colleagues to send the clerk names of witnesses who could appear when we address this subject so that we can examine this at our next meeting?

[*English*]

The Chair: Here's the deal. Absent a meeting tomorrow to discuss future business—and I see a look of relief on Patrick's face—we have homework. We have the issues for future consideration, which will be made available to everybody in their offices tomorrow.

Mrs. Marlene Jennings: Tomorrow when?

The Chair: As soon as we can get this document to them. You can actually look at this.

I'm going to proceed, unless somebody objects at this moment, with Monsieur Marceau, so that we can actually begin the process of getting some stuff set up for next week. I don't want to lose the week. We probably won't be doing it at the same pace as we've been doing it for the last two or three weeks. I see relief, and I'm going to get a free dinner from the clerk.

We all understand each other. You're going to get a list. I want to hear what people want to do, but in the meantime we're proceeding with Monsieur Marceau.

The meeting is adjourned.