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Chair

Mr. John Maloney

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● (0925)

[*English*]

The Chair (Mr. John Maloney (Welland, Lib.)): I'd like to call the meeting to order. This is the 42nd meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

We're about to undertake clause-by-clause consideration of Bill C-2.

Are there any preliminary comments, or are we ready to get right into it?

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Mr. Chairman, as you will certainly know, there have been negotiations on Bill C-2. The Liberal Party of Canada, that is to say the government, the Conservative Party and the Bloc seem to have agreed on the duration of minimum sentences to include in Bill C-2.

Then, to proceed in the most correct way possible, all BQ amendments concerning minimum sentences are withdrawn. I have here the minimum sentences amendments on which the three parties have agreed.

[*English*]

The Chair: Were you referring to clause 7, Mr. Marceau?

[*Translation*]

Mr. Richard Marceau: Yes, Mr. Chairman, my amendments deal with section 7. There are also some additions. Sections 3 and 4 are also amended.

[*English*]

The Chair: Okay. Shall we deal with them as we come to them?

[*Translation*]

Mr. Richard Marceau: Okay.

You have asked me if I had any preliminary comments. These are my comments.

[*English*]

The Chair: Okay, fine. Thank you.

Mr. Comartin, and then Mr. Toews.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

I'm not clear. I haven't seen the amendments on the minimum sentences. Are they in this package?

The Chair: No, they would have been separate.

Mr. Joe Comartin: Thank you.

The Chair: Mr. Toews.

Mr. Vic Toews (Provencher, CPC): That's correct. The Conservative Party had introduced a number of amendments with respect to minimum penalties. Pursuant to discussions with the Bloc and the government, we are agreed on the minimum sentence provisions that we have now jointly put forward

With respect to two other issues, one being a set of amendments related to raising the age of consent, I will be proceeding with those. I understand there is probably not sufficient consent to pass this in committee, but I believe the NDP is supporting them.

We then have one amendment dealing with the defence of art that we are putting forward. I believe there is no unanimous or majority consent for that either, but I will be putting that forward. I don't anticipate the discussions will take very long.

The Chair: Okay. Let's continue then.

(Clause 1 agreed to)

(On clause 2)

The Chair: We have a number of amendments on clause 2.

Mr. Toews.

Mr. Vic Toews: As I indicated, the amendments relate to raising the age of sexual consent to the age of 16 years. I believe the Conservative amendments CPC-1, CPC-2, CPC-3, and CPC-4 all relate to that. I only wanted to indicate that we had raised the age.

We are proposing to raise the age of consent and add a close-in-age exemption to that, which is found in amendment CPC-2:

> it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused:
>
> (a) is less than five years older than the complainant; and
>
> (b) is neither in a position of trust or authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

Those are all the comments I'll be making with respect to those amendments.

The Chair: Mr. Macklin.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): I would ask Mrs. Morency to simply put on the record some comments from the government's perspective on that issue.

Mrs. Carole Morency (Senior Counsel, Criminal Law Policy Section, Department of Justice): Thank you.

I'd like to explain, once again, the issue of age of consent, the way the current Criminal Code addresses this issue, the protection of young persons under the age of 18, and what Bill C-2 does to enhance this protection. First, recall that all non-consensual sexual activity, no matter the age of the person, is a sexual assault and is now clearly prohibited in the code. Secondly, the age of consent, as it applies to exploitative or predatory conduct, is 18 years.

With this approach, 18 years applies to pornography, prostitution, and sexual activity where there's a relationship of trust, authority, or dependency. For these types of activity, the age of consent is already 18 years. The only circumstances where age of consent is below that, where it's 14 years, have to do with relationships involving non-predatory, non-exploitative sexual activity.

There is an exception with respect to a young person 12 or 13 years of age, provided that (1) the other person is under the age of 16 and less than two years older, and (2) there's no relationship of trust, dependency or authority. So the exception in the Criminal Code applies to a 12- or 13-year-old engaged in a sexual relationship with a partner less than two years older than the 12- or 13-year-old, where the partner is not a coach, a babysitter, or something of that nature.

The other thing to recall is that in all of these prohibitions dealing with sexual activity with a young person, or any sexual assault, we're talking about the prohibitions against all forms of sexual activity—from sexual touching, such as a kiss, up to and including sexual intercourse. So the existing framework in the Criminal Code is fairly extensive. It applies to all forms of sexual activity, and the age of consent for predatory, exploitative behaviour is 18.

Bill C-2 acknowledges that we could provide better protection. This protection applies in particular to the 14- to 18-year-old group, because of the concern attached to their ability to consent to sexual activity. The bill tries to better protect them against exploitative, predatory behaviour, which I believe was the nature of the evidence provided to the committee.

Bill C-2 proposes an amendment to section 153 of the Criminal Code. This section now prohibits sexual activity where there's a relationship of trust, authority or dependency. Bill C-2 expands this category to create a new prohibition. It directs a court to infer that the relationship is exploitative or predatory by looking to the facts and circumstances of the case. Factors are provided to guide the court, but it's not an exhaustive listing, so the court can be guided by factors unique to the individual in the case.

There's recognition that not all 14-year-olds, not all 16-year-olds, have the same level of maturity. So Bill C-2 directs the court to infer exploitative sexual activity by looking at the age of the young person, the difference in age between the young person and the partner, the evolution of the relationship, and the degree of control or influence exercised over the young person. As I say, it's not an exhaustive list.

The court can be guided by other factors unique to that relationship. However, the age of the younger person, the difference in age between the young person and the other, the nature and evolution of the relationship—did it evolve secretly, over the Internet, without knowledge of parents or friends? These are issues of concern. These are all factors that the court can take into account to find whether the relationship is exploitative of the young person, in which case it would be prohibited.

There have been some concerns. What does this mean? Does it draw a clear enough line? You'll recall that the provision that exists now—dependency, authority, and trust prohibition—has already been considered by the Supreme Court of Canada, has already been found to be constitutional, and is being used by police and prosecutors to address these situations.

● (0930)

Again, based on that, based on the proposals, section 153, the amendment of Bill C-2, builds on that and proposes to provide greater protection, not only to 14- and 15-year-olds, which is the subject of the age-of-consent amendments that raise it to 16, but to 14- to 18-year-olds. In this way it addresses the type of conduct that the committee heard from witnesses needs to be better addressed without criminalizing the sexual activity that, as the committee also heard, young people in Canada are engaging in from the age of... well, at least 12—depending on the latest evidence from Health Canada and Statistics Canada on this—and up.

So Bill C-2's approach gives broader protection from the exploitative, predatory type of behaviour, and it sets the age at 18.

● (0935)

The Chair: Mr. Comartin.

Mr. Joe Comartin: I am supportive of the amendments proposed by Mr. Toews. It seems to me it's a policy decision that we're confronted with here, Mr. Chair. You just heard from Ms. Morency the one side of it, using the dependency-exploitative relationship methodology. And in spite of the additional amendment that's going in to try to clarify that, the reality is it has not worked. We heard from the prosecutor—it was the one from Toronto, and I'm sorry I forget his name—who was quite negative about the use of it as it is in our law now, in particular in the 16- to 18-year category. I recognize the Supreme Court has said this is acceptable as a policy; it's not offensive to the charter—I don't see why it would be, quite frankly. But the bottom line is that at a practical level, in those courtrooms across the country, it doesn't work.

It seems to me as legislators we're faced with the contrary approach, at least an alternative approach. It's more rigid with regard to fixing the age of consent. There is a potential charter challenge there, that is, somebody between the ages of 14 and 16 challenging it. I think that is generally addressed by Mr. Toews' amendment, which will allow for the near-age defence of five years. In terms of making that policy choice between what the government is proposing and going with the fixed-age methodology, I've opted to support the latter because I think it's the one that will actually work most effectively in protecting youth in that category.

I just want to make one final point that I don't think the government approach addresses. We've heard some evidence of this, and I know from other experiences and other people I've talked to within the psychiatric field that the reality is that in the majority of cases of youth between 14 and 16, they in fact don't have the maturity to make an informed decision of engaging in sexual relations. They just don't. The psychological evidence is quite overwhelming in that regard. Based on that, trying to ascertain, if you're sitting there as a judge, whether this is a dependency relationship, an exploitative relationship, you're going to be relying to some significant degree on that youth, the victim, in that relationship. That person, quite frankly, Mr. Chair, just simply does not have the ability to make that decision.

Thank you.

The Chair: Are there any further comments?

Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): This whole area is troubling to me because of my past experience. The 14- and 15-year-olds are living with 25-year-olds, and the parents have absolutely no avenue to turn to in trying to remove them from those situations, because they have consented to it. I just want to point out that those cases out there now, where parents are crying for help, are real, and they've been real for a long time—I'm basing that on the experience I've had as a principal of a high school—and there's no avenue for them to turn to.

I believe we must create an avenue for people of these ages, and I think Mr. Toews' amendment does exactly that.

The Chair: I'll call the question on amendment CPC-1.

(Amendment negatived)

The Chair: We go to amendment CPC-2, Mr. Toews.

Mr. Vic Toews: This is with respect to the same issue. I don't think I have any further comments. Mr. Comartin has summarized very clearly what the purpose of this is: an exemption for a difference in age of less than five years. It addresses the close-in-age issue. But with this first one failing, I don't think the second one makes any sense any more. We still have to vote on it, though.

● (0940)

The Chair: Shall we apply the vote to CPC-2, CPC-3, and CPC-4?

Mr. Vic Toews: I think that's logical.

Mr. Comartin?

Mr. Joe Comartin: Yes.

The Chair: All those would fail then?

Mr. Vic Toews: Yes.

(Clause 2 agreed to on division)

(On clause 3)

The Chair: We're on CPC-5. Mr. Toews.

Mr. Vic Toews: CPC-5 is, again, a similar provision. The vote should simply apply to that, if I'm not mistaken, and it fails.

The Chair: Is everyone agreed on that?

Some hon. members: Agreed.

The Chair: CPC-6, then, Mr. Toews.

Mr. Vic Toews: In respect of all of the minimum punishment amendments I've brought forward, after some discussion we have agreed with the government's proposals, and I believe the Bloc agrees with those as well. So the CPC amendments with respect to minimum penalties will all be withdrawn, and we will be supporting the government amendments, which came about as a result of discussions yesterday between....

Pardon me?

Hon. Paul Harold Macklin: There will be Mr. Marceau's amendments. He's bringing these amendments to replace yours.

Mr. Vic Toews: So we're relying on Mr. Marceau's amendments. I will be withdrawing all the CPC amendments that deal with minimum sentences in favour of the Bloc amendments. These amendments were agreed upon after discussion among the Bloc, the Conservatives, and the Liberals.

The Chair: To avoid confusion, do you want to point out which ones you're going to withdraw?

Mr. Vic Toews: They're every one that is a CPC amendment that deals with anything imposing a minimum punishment of imprisonment, so CPC-6 and CPC-7. Now, is CPC-8 related—

Ms. Susan Baldwin: That's one the vote applies to.

Mr. Vic Toews: Yes, that one would fail then. Then CPC-9 would be withdrawn, so would CPC-10, and then CPC-11 is another one related to CPC-1. Then CPC-12 would be withdrawn, CPC-13 is withdrawn, CPC-14 is withdrawn, and CPC-15 is withdrawn.

On some of these there will be no corresponding Bloc amendment, but we have dealt with this in an entire package, so just because we are withdrawing them, it doesn't mean there will be another one put in its place by the Bloc. Is that correct, Mr. Macklin?

Hon. Paul Harold Macklin: That's correct.

Mr. Vic Toews: CPC-16 is withdrawn.

The Chair: For CPC-17, is the CPC-1 vote to be applied?

Mr. Vic Toews: Yes, and then CPC-18, CPC-19, and CPC-20 would be withdrawn.

Then we get into the NDP amendments. I'll just skip over those quickly.

CPC-21 and CPC-22 inclusive would be withdrawn.

● (0945)

Ms. Susan Baldwin: BQ-1 has already been withdrawn.

Mr. Vic Toews: That's BQ-1, so I'm just going to leave it. That's going to be withdrawn by the Bloc?

The Chair: Monsieur Marceau, is that correct?

Mr. Richard Marceau: We're going to introduce a new one.

Mr. Vic Toews: CPC-23 is withdrawn.

Then again, there's a Bloc one that will be withdrawn as well?

The Chair: BQ-2, Mr. Marceau?

Mr. Richard Marceau: Yes.

Mr. Vic Toews: CPC-24 to CPC-28 inclusive would be withdrawn, but CPC-29 is a different issue. That stays there.

Then there are Bloc amendments.

The Chair: So CPC-30 we'll deal with.

Mr. Vic Toews: Why is that? It's exactly the same.

Ms. Susan Baldwin: It looks to me as if Mr. Thompson put it forward and then it got included under yours, Mr. Toews. That's how it happened.

Mr. Vic Toews: I see. So they're identical.

The Chair: So you'll withdraw one of them?

Mr. Vic Toews: We'll withdraw mine and we'll proceed on Mr. Thompson's.

The Chair: So we'll proceed on CPC-30.

Mr. Vic Toews: We will proceed on CPC-29; that's Mr. Thompson's. CPC-30 will be withdrawn because it's a duplicate.

Then there are the Bloc amendments, which I understand are to be withdrawn.

The Chair: Is that correct, Mr. Marceau?

Mr. Richard Marceau: Yes.

Mr. Vic Toews: CPC-31 to CPC-39 inclusive would be withdrawn.

Then we have the Bloc amendment, to be withdrawn as well.

The Chair: Is that correct, Mr. Marceau?

[*Translation*]

Mr. Richard Marceau: Yes.

[*English*]

Mr. Vic Toews: CPC-40 to CPC-43 inclusive would be withdrawn.

BQ-5, BQ-6, BQ-7, and BQ-8—what's happening with those? Are they withdrawn?

The Chair: Is that correct, Mr. Marceau?

[*Translation*]

Mr. Richard Marceau: Yes, Mr. Chairman.

[*English*]

Mr. Vic Toews: Then we have the NDP amendments.

The Chair: Yes, Mr. Comartin.

Mr. Joe Comartin: I just want to go back to BQ-8. That is being withdrawn but being replaced with another one.

The Chair: That's understood.

Mr. Vic Toews: I believe that takes care of all the CPC amendments. As to how we will be dealing with them, we still have to deal with Mr. Thompson's amendment, CPC-29, in a substantive way. We will be addressing that.

The Chair: We're now back to clause 3 again.

[*Translation*]

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

Everyone has received five pages of amendments dealing with sections 151, 152, 153, 163.1, 170, 171 and 212 of the Criminal Code. If you give a number to those five pages and go to page 4, you will find a proposed amendment on which the Conservatives, the Liberals and the Bloc have agreed and that deal with section 3. You must have it too.

During our discussions yesterday, we tried to be the most coherent possible and make sure that in these circumstances there be a minimum sentence of 14 days if we proceed on summary conviction and 45 days if we proceed on indictment. This is the agreement we have arrived at yesterday with the Parliamentary Secretary and Mr. Toews.

[*English*]

The Chair: Mr. Macklin, comments?

Hon. Paul Harold Macklin: That would be with respect to sections 151, 152, and 153, reflected on pages 3 and 4 of the submission by the Bloc.

● (0950)

Ms. Susan Baldwin: It would be to clause 3 on pages 2 and 3 and to clause 4 on page 4. Let's do it by the clause numbers, at least at first, and by the bill page numbers. I'm sorry, but we didn't have time to put a clerk's code up at the top; if we stick to the clause and page numbers of the bill, I hope it'll be a little clearer to us all.

Hon. Paul Harold Macklin: Very good.

[*Translation*]

Mr. Richard Marceau: We are referring to section 3, on pages 2 and 3 of Bill C-2.

[*English*]

The Chair: Are you making that motion now, Mr. Marceau?

[*Translation*]

Mr. Richard Marceau: Yes, I do move it.

[*English*]

The Chair: Is everyone clear?

Mr. Vic Toews: I just want to state briefly that we did come to this agreement and that we will be voting in favour of these amendments. I am still concerned that some of these minimum penalties are not strong enough, but in the interest of moving forward with the idea of minimum prison sentences for these kinds of offences, the Conservative Party is agreeing with this.

The most significant change to occur is that this will effectively oust the jurisdiction of the courts to give conditional sentences or house arrests in these kinds of cases. We hope the courts won't consider these minimum sentences to be maximums, but will be consistent with the sentencing principles they have applied. For example, in the past, a court has said this is worthy of a six-month sentence, and then they'll apply the conditional sentence and the person will serve six months in house arrest. If the courts were truly honest, they would say this is a six-month sentence, and because conditional sentences are no longer applicable, this individual will now serve six months. We will see whether the courts remain intellectually honest and apply the same reasoning or whether they will now say, well, this 14 days is now really what we want to apply. I am concerned that the courts, generally speaking, will try to find the lowest common denominator.

We will be monitoring this. I know Mr. Macklin is proposing a review of this process in the next five years, and I think that's an important step.

I just wanted to make our comments very clear on the record that these are not the new maximums; we want ordinary sentencing principles to apply, with the exception now that conditional sentences will not be applicable but the accused will be properly sentenced to prison or jail.

Thank you.

The Chair: Mr. Comartin.

Mr. Joe Comartin: On procedure, I'm going to be asking questions on these points repeatedly today, just to get all the facts on the record. I am unalterably opposed to these amendments with regard to minimum sentence in these circumstances.

We had the understanding on Tuesday that if necessary we would go beyond 11 o'clock. Is that still the case?

● (0955)

The Chair: Yes.

Mr. Joe Comartin: I'll be as cooperative as I can, but I think the committee needs to understand what we're doing here, and I'm not sure we do.

The concern I have about this particular section and the four or five that are going to be coming is that these minimum sentences will have this impact—assuming they're not plea-bargained away, and I'll come back to that in a moment. Because of the shortness of the sentences, they will be placed in either local jails or the provincial system. So the federal government will be imposing additional responsibilities on the provinces, obviously without any additional transfer of funds to take care of them. It will be expensive.

I'm going to ask Ms. Morency to tell us, for each one of these charges, how many are non-custodial now, or have been in the pattern of the last few years. So they're going to be expensive. They're also going to clog our prisons to some degree. Most of our provincial prisons are at very close to maximum, if not over maximum. Our local jails in most cases are tapped out. We have more people incarcerated there waiting for trial than they can accommodate, and this is going to add to it.

When we put them in for these short periods of time, there is no way they will get any treatment at all. So unless the order also contains a provision for probation, there will be no treatment. There certainly won't be any treatment while they're in the facility, because they won't be there long enough to access it. In most cases those facilities don't have treatment, in any event. Certainly the local jails don't right across the country.

So the effect of this will be punitive, pure and simple. We've heard more than enough evidence to recognize that given the sophisticated pedophile, the committed pedophile, deterrence is of no value on an individual basis or collectively. So using our prisons as an attempt at deterrence is a non-starter, because it has no impact on those particular criminals.

On the other point I want to make...again I'm going to ask Ms. Morency on each occasion as we go through. I believe on each one of these charges, because we're focusing on children at this point, there are alternative charges that could be laid under the code that don't have minimum sentences. So it's really questionable whether this is going to be effective if defence counsel can convince, in a plea-bargaining process, that the other charges be laid where there is no minimum.

I think the other reality is that because this will tend to clog up our courts somewhat, the accused person is going to be more likely to take these cases to trial in order to avoid conviction. That means we will expose more children to trials, and our courts will end up being clogged as the prosecutors are faced with that clogging problem. I've seen that certainly in my own experience. I've used it as a defence counsel. If you can clog the courts you know you can then negotiate with the prosecutor for either a lesser offence or to have the charge withdrawn completely. So it's going to have a negative impact from that vantage point as well.

Having made those comments on this particular section, I would ask Ms. Morency to tell us how many charges were laid under this, how many were custodial, and how many were non-custodial.

Mrs. Carole Morency: Looking at numbers from the adult criminal court survey, statistics for the 2002-03 cases tracked through Statistics Canada and the Canadian Centre for Justice Statistics—and right now we're dealing with sections 151, 152, and 153—show that for section 151, there were 669 reported cases where guilty pleas or convictions were entered. Of those, 65% proceeded on indictment. For section 152, there were 113 cases, and 55% of those proceeded on indictment. For sexual exploitation, section 153, there were 110 cases, 60% of which proceeded on indictment.

Looking at custodial sentences, it's the number of cases reported in that survey; it's not 100% coverage for the country. If you look at those that received a custodial sentence as the most serious penalty imposed, for section 151, sexual interference, it was 330 cases.

● (1000)

Mr. Joe Comartin: Roughly 50% of them.

Mrs. Carole Morency: Roughly, yes.

Of those, 73% proceeded on indictment. For section 152, invitation to sexual touching, there were 65 cases, so again just under half; 63% of those proceeded on indictment. For the contact offence of sexual exploitation, section 153, 50 received a custodial sentence, so 46% of the total; 68% of those proceeded on indictment.

Does that answer your question?

Mr. Joe Comartin: That's fine.

We're going to incarcerate, as a result of these amendments, every single one of those additional people. That's the end result. So we're going to increase the incarceration rate by a full 100%, in round figures. Again, that's assuming that plea bargaining doesn't go on, and we have to assume that at least some of that will happen.

So that's going to be the consequence. I don't see where that provides any additional protection for our children. Those people are not going to get any treatment, and at least some of them would in fact benefit from treatment in the lower-end cases. It's going to cost us a lot, it's going to clog our courts, it's going to clog our prison system.

Thanks, Mr. Chair.

The Chair: Mr. Cullen.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chair.

I'm not sure I follow the argument presented by Mr. Comartin that they won't get any treatment. Presumably, if there were no minimums, and they didn't do any time, I don't imagine they'd be getting a lot of treatment then, either, unless they did it voluntarily.

Mr. Joe Comartin: No, but they'd do it under probation orders.

Hon. Roy Cullen: Yes, well, I'm sure they could do the same....

In terms of the summary, we started out at seven days originally, is that right, and now we've moved to 14 days? To pick up on Mr. Toews' argument, I think the point he made the other day about the seven days—and I'm not a lawyer, I've never worked in the courts—is that by the time they get all the paperwork done, and the person has been in custody for a couple of days, the person will never actually do time.

I'd just like to clarify my position on it, that it's not just punishment for punishment's sake; it's to send a strong signal that this is not to be tolerated, and won't be tolerated.

I'm wondering if we could hear from Mr. Macklin and the officials—perhaps you, Ms. Morency—about whether, at 14 days, the person will actually do time, even if it's fairly limited. And why the 14 days as opposed to, let's say, 20 days, or 30 days?

Hon. Paul Harold Macklin: Mr. Chair, let me start by saying, first of all, that as part of a minority government...and the proposition that we see before us also within this committee is that we have to come to an understanding that on certain issues there has to be some type of mediated middle ground, if we possibly can, in terms of trying to come to a consensus on issues before us.

In this case we have done that reluctantly, but also by understanding the reality of the situation. We would much prefer that we left the courts with full opportunity to examine all of the factors that come with sentencing. I do hear the message that within the court system there at least is an appearance, with certain cases, that possibly the full extent of the law has not been meted out. Quite often that is an exceptional case, or in many cases the full facts haven't been brought before us.

The second point I'd like to make with respect to mandatory minimums is that faced with this reality, my position has been, or the government's position has been, that we should have these minimums as low as possible to allow the court to have as much room to manoeuvre as possible within this context.

And lastly, because I see this to some extent as an experiment to see if in fact this does have an effect, that is why, as Mr. Toews mentioned, the government is bringing forward a statutory review section that would have this entire statute reviewed at the five-year mark. With that review I believe we will see whether in fact the effectiveness that was sought by this committee's review in the bringing forward of this bill with these amendments has really found its mark within the judicial system and whether in fact we are actually achieving the goals we wish to achieve.

I think this takes into account Mr. Comartin's comments as well. I think we need to ultimately have a point where we stop the process and re-examine the data. I think any sort of review prior to five years would likely be premature in terms of getting statistics that would be meaningful and that would properly represent a fully implemented bill as it's going forward now.

With those comments, I would defer to Ms. Morency to make further comments as to Mr. Cullen's thoughts and concerns.

● (1005)

Mrs. Carole Morency: I'm not sure I'm going to be able to elaborate on Mr. Toews' comments any more. If it's seven days or 14 days, the expectation is that time would be served. My recollection was that his comments were that it might be served in different ways, whether on weekends or by things of that nature, and that may still happen.

The only other thing I might add is that the statistics I gave you cited the numbers of persons who had served custodial time for those offences. If you look at those statistics for the same three offences, for those who received a conditional sentence as the most serious penalty for those offences, the numbers are less than half of that. So 137 persons for a section 151 sexual interference offence, 15 persons for a section 152 offence—that's the invitation to a sexual touching—and then 27 persons for a section 153 offence. The numbers are considerably lower than the ones I indicated, which were for the ones who had received custodial time.

The Chair: Okay.

Ms. Neville, Mr. Sgro, and then Mr. Toews.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Let me begin by saying that I'm pleased that we're putting in the statutory review period of five years. I think that's very important.

Having said that, I share many of the concerns that Mr. Comartin has articulated, and I'm not going to repeat them. My primary concern in this matter is that there will be a plea bargain prior to moving forward and that charges will not be laid in a number of these issues. So I will not be supporting minimum mandatories on some of the amendments that are being put forward.

The Chair: Ms. Sgro.

Hon. Judy Sgro (York West, Lib.): Going on to Mr. Comartin's comment, on some of these cases, in addition to this minimum of 14 days, or whatever the minimum is, is there any reference in the legislation or any mechanism to ensure that they have to get some sort of treatment in addition to serving time, or are we just going to leave that up to a judge to decide whether or not he wants to...? Are we making any reference in the legislation to this? I haven't read it all—being new here—but I think it's important that we use whatever mechanisms we have to deal with people who are clearly exploiting the children on this aspect so that they not only get minimum sentencing but they are also forced to get some additional treatment.

Ms. Catherine Kane (Senior Counsel, Director, Policy Centre for Victim Issues, Department of Justice): I can provide a few comments.

Basically, criminal law power doesn't provide an opportunity to order that people take treatment. Convicted offenders often avail themselves of treatment that's made available to them, and certainly our colleagues at Correctional Service Canada, where somebody is getting a two-year-plus sentence, has renowned programs available. But the offenders must avail themselves of them.

In the provincial jails there are also some treatment programs, but again, it's up to the offender, looking at what's in his best interest, to take that treatment. What has happened in the past is that sometimes a probation order will include a provision to take treatment for a variety of behavioural or other issues, assuming there is an appropriate program in existence that the person can access.

We have the same issue with respect to persons who are found not criminally responsible. We can't even order treatment for that category. Also, more recently, the Supreme Court of Canada has acknowledged that treatment can be ordered as a condition of a conditional sentence, and that's perfectly appropriate as well.

So those are the options, as Mr. Comartin mentioned: probation that requires a person to take treatment, or a conditional sentence with a requirement to take treatment, or the offender taking the initiative to avail himself of treatment.

Hon. Judy Sgro: I think with some of these people, treatment is clearly required if we're going to deal with the issue. It's one thing to be punitive. Throw the book away, as far as I'm concerned, and never let them out. Again, that's the side of me that isn't necessarily.... It's the redneck side of me.

The second part is that there need to be some alternatives. We've got to push them. It's one thing to just say, well, he should avail himself of treatment, and the guy doesn't go for the treatment, and six months later we're going to find he's back in the system again.

● (1010)

Ms. Catherine Kane: That's very true, but there's not a homogenous type of treatment that will apply to all individuals. It's not like saying someone needs to learn a new trade. These programs have to be fairly tailored to the particular characteristics of the individuals if they present with certain characteristics. It also depends on what treatment is available, and then that gets into provincial social services.

So it's a very complicated issue and it's something we do raise when we meet with our provincial officials, particularly on the sentencing side. There are therapeutic sentences and so on. This is an emerging issue. How do you craft sentences to deal with the particular person's problem? We need provincial cooperation to make sure a whole range of those therapeutic programs are developed and are available.

Hon. Judy Sgro: Are those discussions ongoing with the provinces in relation to Bill C-2?

Ms. Catherine Kane: They are ongoing with the provinces in the context of sentencing. As I say, it's not a new issue, but it's a new name: therapeutic sentences. For example, we see domestic violence treatment courts springing up in the provinces where these are attached as part of the sentencing package. We now see mental health courts with similar approaches, and drug treatment courts. So it is something that is evolving, and hopefully it will evolve to address other kinds of offending as well.

Hon. Judy Sgro: Thank you.

The Chair: Mr. Toews.

Mr. Vic Toews: Thank you. I have a few comments to make, and perhaps there will be some response from the witnesses.

The basic problem with the entire sentencing process is conditional sentences. That's really what the problem is, and in many ways, what is being proposed here is simply a stopgap measure. Provincial authorities realize the problem: conditional sentences cannot be enforced. It's as simple as that.

I learned that very quickly as the Attorney General of Manitoba. I hear that every day from the prosecutors. Conditional sentences simply aren't enforced. They provide the fiction to the people of Canada that something is actually being done.

We had suspended sentences for many years, and we still have them. Instead of getting sent to prison, people would receive a suspended sentence. If you screw up during the course of let's say the two-year suspended sentence, you can be brought back and resentenced on that matter.

With a conditional sentence, what happens is they breach their conditions, and they breach them three, four, five times before they're actually brought back. What the court is left with is being able to sentence someone based only on what is remaining in the conditional sentence. So what you keep on doing—and the defence counsel learned this very quickly—is adjourning until your resentenced time is a week or is gone. So your remedy is gone. The problem is the failure of the conditional sentencing regime, and that's notorious.

I just came back from British Columbia three or four weeks ago. It's getting so bad there that offenders are coming into court and the crown attorneys are asking for them to be resentenced on the conditional sentence. In one particular court case, the RCMP told me the accused was there for the third time on a breach of a conditional sentence, and the judge said, “Well, it's apparent this individual has learning nothing from this conditional sentence”, so he removed all the conditions and sent the person back out onto the street. That is the recognition. Conditional sentences are what the real problem is here, and this government simply refuses to acknowledge that, despite the fact that virtually all of the attorneys general in Canada have stated that.

The Manitoba attorney general, who is a New Democrat, has long called for the removal of these conditional sentences. He's not concerned about the prisons filling up with individuals who in fact abuse our children, or so he says, so I know his ministry will take the brunt of the increase, if any.

The second issue I want to address is the issue of plea bargaining. Ms. Neville has suggested that somehow crown attorneys and police are not going to lay charges because there are minimum sentences. I can assure you, and I'm speaking as a former prosecutor, the absolute opposite is true. Police will be encouraged to lay charges and ordered to because they know at least there's something now. So that in fact will happen. We will see police and prosecutors more vigorously enforcing this.

Will the prosecutors make a deal and say, “Let's forgo the case” where there's a minimum sentence in favour of something else? That might happen, but the general rule for a prosecutor is that you do not make a deal on a case when you have an open and shut case.

Part of the problem again is the number of cases these individuals have. They simply can't keep up, but quite frankly we will not see a decrease in the number of charges being laid because there are minimum sentences. We in fact will see the opposite. We'll see more vigorous enforcement of the Criminal Code, and if we care about children, that is the right way to go.

I share Ms. Sgro's concern about the issue of treatment. I'm very concerned about that. Whether treatment is particularly helpful in many of these cases remains to be seen, but I would prefer to leave that to the discretion of the courts.

We have the notorious example of Karla Homolka, probably a person who could at least consider treatment and yet has steadfastly refused to take any treatment. After 12 years she is out on the street. What should really happen in a case like hers—and this again is another thing that we need to establish in the criminal law—is that after any major sentence like that, there should always be a period of parole tacked on, and that should be done at the time of sentencing. So if you're in for 12 years, you also get a two-year parole period tacked on after that. If you do rehabilitation, if you take treatment—that kind of thing—you can qualify for your mandatory parole and get out earlier, and we wouldn't have to rely on that two years at the end. But I believe we do need, in the case of serious offenders, a parole period in each and every case where those who refuse to take treatment during the course of their incarceration have at least a monitoring period as they are eased back into society.

● (1015)

That's the problem we're facing now with Karla Homolka, where we have the Ontario Attorney General bringing forward applications under section 810 of the Criminal Code to get a peace bond.

Quite frankly, what is very important about these minimum sentences here is that many of these individuals who are dealing in child pornography and abusing children are ordinary, so to speak, white, middle-class men such as me, and I find it utterly disgusting that these men are abusing children in that way. And quite frankly, the only thing they're scared of is going to jail. That will make a difference to the ordinary, middle-class individual. That will make a difference.

Two weeks isn't a lot, but I think it will send a message that says they're going to get sent to jail where the other prisoners don't necessarily like people who take advantage of children. That is a real concern to these individuals, and I think it's worth putting into this bill.

The Chair: This is just a comment on the conditional sentences, Mr. Toews. You may recall, I think, that we discussed the Edmonson case, where a decision of the Court of Appeal of Saskatchewan indicated that conditional sentences were not appropriate in situations of sexual assault. And I understand—and perhaps Ms. Morency might help us—there is another recent case, *Regina v. Fice*, where a decision of the Supreme Court of Canada indicated that conditional sentences weren't appropriate in situations of violent offences.

Does anyone have a comment?

Mr. Vic Toews: Just on that Edmonson case, we have to realize that there were pretty horrible circumstances there. A 12-year-old native girl was fed liquor by three white men between the ages of 20 and 25 and was then abused by these individuals. And the judge in this particular case has said that these boys—and those are the words the judge used—thought this girl was 14. Can you imagine? They thought she was 14, so it was all right to feed her liquor and rape her. Thank God somebody in the Saskatchewan Court of Appeal had some brains. It appears the lower court didn't have any.

But the point is that these kinds of cases should be prohibited in our Criminal Code. The fact that a judge could even consider this is horrifying to me as a member of this society.

● (1020)

The Chair: Do you have any comments on the Fice case?

Mrs. Carole Morency: If I could, I'd like to make a couple of points on conditional sentences. The first is just to remind the committee that the minister, when he appeared on Bill C-2 and more recently on the main estimates, indicated to the committee that in recent discussions with his provincial-territorial counterparts at the January meeting this year, across the board there was support from all provinces and territories for the use of conditional sentences. They are working well in many instances.

There was recognition that in some cases there are some issues needing closer examination. Those issues are being reviewed at the FPT level, and also, as I said, the minister indicated that this committee had previously been looking at the issue of conditional sentences. We now understand that such a review will happen through the Senate.

That's just to put on the record that the broader issue will be examined, but the evidence to this point is indicating that they are working well in many instances.

Thank you for the reference to the Edmonson case. It was a very clear part of the Court of Appeal's decision in that case that it was not at all appropriate there, so there was strong direction from the courts in that instance. The decision on the Fice case from the Supreme Court recently was also helpful in terms of providing guidance on the use of conditional sentences. The point in that case was primarily in terms of how much credit is given to an offender for time spent pre-trial and whether that counts towards the calculation for conditional sentences.

So again, experience is developing with the conditional sentence orders. For the most part they are working well. Some of the issues you've identified are being addressed more directly by the courts, so it is coming. We are having a better understanding of how they work, when they're appropriate and when they're not. This contributes to that process.

The Chair: Thank you.

Mr. Warawa, and then Mr. Cullen.

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

I shared with the witnesses a story from my riding of Langley, where a resident had sexually assaulted two young girls. That individual is serving his sentence as a conditional sentence. These victims live on each side of him. I think the committee needs to take that into consideration, where a conditional sentence has been used in this case.

We've heard from Mr. Comartin about the expense of this. Well, we need to ask, what's the expense long term on these victims to see their attacker on a daily basis, as he serves his sentence living right next door to them?

It is our responsibility to protect our children. I believe there's abuse of conditional sentences. We've heard that approximately 50% of the time conditional sentences are being used for sexual assaults. It's inappropriate, and I think minimum sentences for sexual assaults will be eliminated. I thought that was the consensus, the agreement we had. I have great difficulty supporting 14 days as a minimum. I think it's totally inappropriate, but I will support that on the condition that we remove conditional sentencing for sexual assault.

The Chair: Are there any comments?

Hon. Roy Cullen: I'm a little confused. I thought putting in minimum sentences effectively eliminated conditional sentencing.

Mr. Mark Warawa: That's why I'll support it.

Hon. Roy Cullen: That's fine.

I know Mr. Toews said the government doesn't get it. I think we're getting it here, aren't we?

Mr. Vic Toews: Well, you are in a limited way. It would be better if you simply eliminated conditional sentences and just went back to the old suspended sentences, which are a much more effective way of dealing with the issue.

Conditional sentences simply give Canadians the false illusion that people are actually serving their time. That's what the courts are saying. These people are actually serving time at home. Nobody believes them. It's a fiction that we're trying to perpetrate to the Canadian people.

The Chair: If there's no further discussion, I will call the question on Mr. Marceau's amendment to clause 3. Can I call it B and G-1?

Mr. Comartin.

Mr. Joe Comartin: This may be for Ms. Sgro, because I'm not sure this has come out clearly.

By putting in minimum sentences we eliminate conditional sentences. I wasn't sure if that came on the floor, and I just wanted to be clear on that.

The Chair: Yes, it just did.

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

(Clause 3 as amended agreed to on division)

(On clause 4)

● (1025)

The Chair: Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: This motion is to amend section 153 dealing with sexual exploitation. If we proceed on indictment, the maximum sentence is 10 years. We are suggesting a minimum sentence of 45 days. If the Crown decides to proceed on summary conviction, the maximum sentence is 18 months and we are suggesting a minimum sentence of 14 days.

[*English*]

Ms. Susan Baldwin: I think the next one we should be doing is the amendment to clause 4 on page 4.

Mr. Richard Marceau: That's what I'm doing.

Ms. Susan Baldwin: Okay, sorry.

[*Translation*]

Mr. Richard Marceau: Mr. Chairman, I am not sure that we should debate on each and every time the appropriateness of minimum sentences. I think that we have already done it quite eloquently on both sides during the previous discussions.

As I said, this amends section 153 on sexual exploitation. I do not think that in such a case a minimum sentence of 14 days is excessive.

[*English*]

The Chair: Is there any discussion?

Mr. Comartin.

Mr. Joe Comartin: I just asked Ms. Morency about the number of charges that were laid under this section.

Mrs. Carole Morency: Sorry, we are discussing clause 4, which is proposed section 153. I thought you were asking me about section 170.

Mr. Joe Comartin: I thought we were at section 170. Excuse me.

The Chair: Okay.

(Amendment agreed to on division)

(Clause 4 as amended agreed to on division)

(Clause 5 agreed to on division)

(On clause 6)

The Chair: We have NDP-1 and NDP-2.

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

This amendment is a direct response to the proposal from the lawyer who came for the CBC and expressed concerns. This is the voyeurism section of these amendments. It has to do with building in additional protection for the journalistic sector of our society. The present wording includes them, stating that if it's for the purpose of journalistic investigation and distributing news then it would be an exception to the rest of the provisions making voyeurism a crime.

Mr. Chair, I want to point out that I'm supportive of creating a crime of voyeurism. I think we have to be careful that we're not affecting the ability of our news services to get out information. Initially, I did not see the need to have this protection, but I was convinced by the presentation.

I think there's a danger in the existing wording. If we leave it the way it is, journalistic sources could be negatively affected, particularly in their investigative work. One of the examples she used when she was testifying was that some of the work they did on prostitution, some of the material they gathered at that time, which they needed in order to present their story to the public, would in her opinion have contravened these clauses.

I'm proposing that we provide them with this protection so they will not get caught in those circumstances.

● (1030)

The Chair: Any other comments?

Mr. Macklin.

Hon. Paul Harold Macklin: The amendment would serve to broaden the scope of the public good defence provided in the bill. The effect is twofold: it would allow any person to escape criminal liability for voyeuristic actions that serve the public good, even though these actions far exceed what the public good requires; and it would allow the press to conduct activities that fall under the offence of voyeurism when they gather information for publication.

The bill already provides a defence for the gathering of information through voyeuristic means and the publication of the information obtained in that manner when these means are necessary to serve the public good. This amendment would permit the press to engage in voyeurism in order to investigate any matter the public might be curious about. Public news is not limited to high-minded matters or matters of public interest. It might also include the sexual life of public figures. Indeed, some papers specialize in this type of news. While some news organizations apply ethical standards, not all of them do.

Even the police are not given as much discretion to use voyeuristic means for the investigation of a crime as the amendment would give to the press. I think that's important. In order to use such means, the police must obtain the permission of a judge. This permission is granted only if certain criteria are met. With this amendment, the press would be able to use voyeuristic means without any outside supervision.

As much as I recognize the importance of protecting the freedom of the press, the bill proposes to do so with a public good defence. I believe it creates an appropriate balance between the right of the press to obtain information necessary to the public good and the right to sexual privacy of any Canadian, including public personalities. The amendment would add to the defence a requirement that the acts be in the public interest. I do not believe these words are necessary. If an act serves the public good, it is in the public interest.

I understand that the amendment intends to respond to the concerns about freedom of the press, but I believe these concerns are taken care of as the bill stands. Therefore, I can't support the amendment. I'm concerned that it would nullify, for any person who is newsworthy, the protection of sexual privacy that the offence of voyeurism would create.

Those are my comments, Mr. Chair.

Mr. Joe Comartin: Just in response to the issue of the balance we're trying to strike here, I don't think it's unreasonable to say that in fact the balance should be in favour of freedom of the press when you're looking at the role we assign to police and the limits we impose on them, that we should err on the side of freedom of the press in these circumstances.

I draw the committee's attention to the Arar case and the O'Neill decision, the decision by the police under the pretext of national security in those circumstances and the chill this section puts on the press with regard to investigative journalism. Coming out of what they saw happen to Ms. O'Neill, it seems to me it well behooves us to take a close look at whether in fact we are providing the proper balance here. We should be providing this extra protection to the journalism field.

The Chair: All those in favour of amendment NDP-1.

(Amendment negatived)

The Chair: We're now on amendment NDP-2.

Mr. Joe Comartin: It really flows out of that, Mr. Chair, so we may as well just apply the same vote. All it does is delete the necessity of motivation and not being relevant.

(Clause 6 agreed to)

(On clause 7)

The Chair: Mr. Marceau.

[*Translation*]

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

What you are proposing amends sub-paragraphs 163.1(2)(a) and 163.1(2)(b), sub-paragraphs 163.1(4)(a) and 163.1(4)(b), as well as sub-paragraphs 163.1(4.1)(a) and 163.1(4.1)(b). It is about...

● (1035)

[*English*]

The Chair: The amendment is marked Bill C-2, clause 7, pages 7 and 8.

[*Translation*]

Mr. Richard Marceau: Exactly.

So it is about production, distribution, possession and access to child pornography. Once again, minimum sentences that are proposed are in proportion to the purpose of this Bill. As concerns sub-paragraphs 163.1(2)(a) and 163.1(2)(b), the maximum sentence is 10 years and the minimum sentence would be 90 days.

The next paragraph refers to a minimum sentence of one year or 90 days depending on the prosecution process chosen by the Crown.

Then, for a possession offence, we are proposing a minimum sentence of 45 days and a maximum sentence of five years. If we proceed by summary conviction, the maximum sentence is 18 months and the minimum sentence would be 14 days.

Finally, as concerns access to child pornography, a maximum sentence of five years and a minimum sentence of 45 days are proposed. If we proceed on summary conviction, the minimum sentence would be 14 days.

[*English*]

The Chair: Thank you.

Mr. Comartin, did you want to ask your standard question?

Mr. Joe Comartin: Ms. Morency, do you know how many charges were laid under these sections, how many were custodial versus non-custodial?

Mrs. Carole Morency: Again, for the same period of time from the same adult criminal court survey, 2002-03, for production and possession for the purposes of production charges, convictions were eight; for distribution, transmission, which is a subsection 163.1(3) offence, there were 15 guilty; and on possession and accessing, there were 113 cases.

If you look at the numbers for custodial sentences, where that was the most serious penalty imposed, on subsection 163.1(2), the making offence, there were two.

Mr. Joe Comartin: So that's two out of eight?

Mrs. Carole Morency: That's 25%, yes, two out of eight.

On distribution and transmission, or the subsection 163.1(3) offence, there were three cases, representing 21%.

And then on the possession or accessing offence, under subsections 163.1(4) or (4.1), there were 35 cases, so about a third.

Then if you look at conditional sentences granted or imposed in the same cases, there was one on the making offence, subsection (2); six received a conditional sentence on subsection (3), the distribution offence; and then for possession and accessing, there were 42, or approximately 38%.

Mr. Joe Comartin: What would the balance of the disposition have been, probation? I'm sorry, does it show?

● (1040)

Mrs. Carole Morency: Yes, on probation...so we had two in custodial sentence.... For making child pornography, we had two imprisoned, one on conditional sentence, and three on probation.

For the distribution offence, subsection 163.1(3), we would have had three for custodial sentence, six for conditional sentence, and five for probation.

And then for the possession, accessing offence, 35 received a custodial sentence; 42 received a conditional sentence; and 30 received probation.

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

The Chair: Shall the amendment of Mr. Marceau marked clause 7, pages 7 and 8—which I might name amendment B and G-3—carry on division?

(Amendment agreed to on division)

The Chair: Mr. Thompson, on Conservative amendment 29. That's the one that was duplicated.

Mr. Myron Thompson: Yes. Thank you, Mr. Chairman.

I think those of you who've known me through the last 12 years since I've been here know that one of the major fights I've had in government is doing my best to bring about some meaningful legislation to deal with child pornography.

Child pornography is an item that is totally unaccepted by society at large. They just will not accept exploiting our children through child pornography.

During the last 12 years the child pornography industry has grown through organized crime and through the introduction of the Internet and the computer age—whatever the case might be. I think we all are quite aware of how serious this problem has become.

During this period, John Sharpe was charged and was taken to court and the judge declared that certain charges would be dismissed based on a clause...or referring to the fact that some of the material may have artistic merit. This changed the attitude of society as a whole, I think everybody will agree, to absolute outrage at that time.

Society is calling for total protection of our children. They are recognizing many things in the legislation that exist regarding medicine, regarding education, and regarding law enforcement. But society has never accepted the idea that art and child pornography would have any connection.

I have vowed through private members' bills, which always seem to die on the Order Paper, that I would do my utmost to remove artistic merit as a defence mechanism for child pornography. I still have a private member's bill in place to do just that, and I'm ready to debate it any day. Nothing would please me more than to see this committee adopt this amendment whereby I could withdraw my private member's bill.

I think when we listen to the witnesses we all recognize the importance of children and art. Children are art. Children are a beautiful creation. We have all seen thousands and thousands of examples of children being used to demonstrate the value of art and their connection. Sexual exploitation should never, ever even be implicated to the slightest degree.

We've heard testimony from Mr. Gillespie, from the Ontario police officers, and from the lady who was here who distributed some pictures for our view. We've seen the impact this is having on those investigators throughout the country who have to go through this material day after day after day to continue to declare or determine whether it has any artistic value to it at all.

Having talked to various members of Parliament throughout the years from all parties, I have a large endorsement from all parties' members to pursue this with all the strength and energy I have.

I've probably made a dozen speeches regarding this in the House of Commons, and I know some of you here have heard many of them. I'm almost to the begging point, to the pleading point, for the sake of our children, let's not provide any defence to these individuals who would dare exploit and cause harm to these young people any further.

I believe this is one major step that would make a big difference. I strongly encourage this committee to support this amendment.

The Chair: Thank you, Mr. Thompson.

Mr. Macklin, and then Mr. Cullen.

● (1045)

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

I think I'm going to defer this matter to Ms. Morency, but I think initially we have to understand that clearly the constitutionality of our law without this as a defence is in question, and in serious question. So I do believe that there is a fundamental reason why we need to leave the protection in. I'll defer to Carole Morency to enlighten the committee.

Mrs. Carole Morency: Thank you.

Just to clarify again for the record, Mr. Sharpe was in fact convicted of possession of photographs that met the definition of child pornography. His acquittal was on the basis that the written stories, the written material he had self-authored and was proposing to publish, did not meet the definition of our existing definition of written child pornography, in that the court found they did not advocate or counsel unlawful sexual activity. In the alternative, the court found, as they will, in case the decision is appealed, that Mr. Sharpe would have been able to avail himself of the artistic merit defence.

Bill C-2 directly responds to that case on two fronts. One, it broadens the definition of written child pornography to include not only written material that advocates or counsels unlawful sexual activity with children, but also written material that has, as its predominant characteristic, the description of unlawful sexual activity with children, where it's done for a sexual purpose. So number one, it directly responds to that first issue.

Secondly, on the point of when the issue of artistic merit becomes available as a defence, Bill C-2 amends the existing two defences that are now in the code and combines them into one.

First, it's a legitimate purpose related to, as the member has said, administration of justice, science, medicine, education, or art. The second full test that was not a question at all when the court considered the Sharpe decision—even if the act in question had a legitimate purpose related to one of those endeavours—is does this pose an undue risk of harm to children?

So there is a significant change in terms of how the test of the existing artistic merit test was applied in the Sharpe case, but more importantly, the whole defence has changed altogether in terms of the requirement for the legitimate purpose.

I would also refer to and reiterate the remarks Mr. Macklin made about the importance of having art as part of it, not to say that anyone suggests child pornography.... Child pornography remains child pornography if it meets the definition. But without that in the defence, the constitutionality of the entire child pornography provisions would be in serious question, and that could cause a downfall of the entire prohibitions the committee has been working so hard to support, in strengthening the prohibitions.

I would note as well that the police who appeared before the committee—Detective Gillespie, the Ontario Provincial Police, I believe even Chief Bevan, and also the Canadian Professional Police Association—all said that from a practical perspective police have no problem applying the law as it exists now and how it will apply with Bill C-2. From a practical perspective, when they're looking at these images, there's never a doubt about whether this is art or child pornography. In the images the committee saw in some of the material from the OPP, and that you've seen on other occasions... there's never any doubt about what's in question there.

If we look at the reported case law that we have up to this point, there are two cases where art has been an issue. One is the Langer case from the nineties, which was discussed, and of course Sharpe. So Bill C-2 does directly respond to that in terms of providing extra safeguards that we didn't have before Bill C-2—a clearer, narrower defence—and applies the “undue risk of harm to children” standard that the Supreme Court has set in the Sharpe decision. That's not a practical impediment for police on a day-to-day basis.

The Chair: Thank you.

Mr. Cullen.

Hon. Roy Cullen: Thank you, Mr. Chair.

I only wanted to say that I understand Mr. Thompson's perspective on this, and I certainly support his intention. The idea of artistic merit is a difficult one, but I think the argument is that if we don't leave any escape in terms of artistic merit, we could jeopardize this entire regime.

I take comfort in the fact that, as you'll recall, when the Association of Chiefs of Police was here and gave us the option of looking at some child pornography, I didn't want to view it. They categorize child pornography on a scale of one to ten, ten being the very worst and one being the least worst of the bunch. I was told that what they showed us was somewhere in the range of four. I didn't see it, and I didn't want to see it. But I think when you get into areas of artistic merit, they'd probably be at the lower end of this grid.

If you talk to the police right now, they will tell you, as they presented here, that the most heinous type of child pornography, levels ten, nine, eight, seven, six, and down, is going to keep them busy forever. So I take comfort in the fact that, as Ms. Morency said, from a practical point of view, this is really not an issue. It can be dealt with by the police and they are dealing with it.

I understand the member's intention, and I recognize all his hard work in this particular area, but for the sake of keeping this whole regime intact, I won't be supporting this amendment on that basis.

● (1050)

The Chair: Mr. Comartin.

Mr. Joe Comartin: This is a little difficult for me, but I want to speak directly to Mr. Thompson about this. I've done it once before at this committee, and I only want to repeat it.

I do not for a second question his sincerity in wanting to protect children. Equally, those of us who would not support this motion should not have our sincerity questioned in regard to the extent of our desire to protect our children. I would say to him, and to others who would support this type of an amendment, that the sincerity is misplaced.

I believe this country has wasted a huge amount of effort, time, and resources on the whole artistic merit defence. We've had three charges since 1993—only three charges. It has been to the Supreme Court. I think our judges and lawyers, both prosecutors and defence lawyers, have focused on this in terms of a debate. But the reality is that any concern we have is not there. The three charges have all ended in acquittals, including the Beattie case, the most recent one.

We need to be concentrating our efforts, resources, talents, and skills in giving police forces the ability to deal with child porn, particularly on the Internet. It means spending some more tax dollars. I'm quite convinced of that. We don't need to spend more time on this defence when it's only been used three times, and when we heard from Mr. Gillespie and all the other people who are on the front lines that they don't consider it to be a concern when they're looking at the material that we saw before us a month or two ago.

I suppose I'm saying to the Conservative Party, and Mr. Thompson directly, to keep up the effort on fighting this issue, but direct it to that one area.

We could be implementing technology that would help us. There are programs that Manitoba has put into place, which are modelled after the U.K. The federal government finally came on earlier this year, screening this and using the Internet against child pornographers. There are all those techniques. That's where we should be deploying our resources and our talents.

The Chair: I'll call the question on CPC-29.

Mr. Myron Thompson: If I may—

● (1055)

The Chair: Mr. Thompson, go ahead.

Mr. Myron Thompson: This will be my last comment. I think probably what brought not just this amendment but the private members' bills I've talked about many times is the fact that although there are millions of bits of material that are confiscated and investigated, actual charges laid against the individuals from whom they have confiscated this garbage are very minimal compared to the number of people they are trying to charge under the present law. And this has become increasingly more difficult as a result of the John Sharpe case. That was the report we got on a regular basis.

When we tried to introduce the idea that merely a portion of the pornography would suffice to bring charges forward, that never came about. In the case of drugs, a sampling can bring about a charge, but for pornography a sampling cannot. If you confiscate a pile of pornography from an individual, the entire amount has to be checked thoroughly to make sure there is not a legitimate defence under the category of art. That's what I'm trying to stop, and this has been reported in a number of cases across the country. These are quite knowledgeable....

If you can correct me on that, Ms. Morency, please do so, but the last report we got was that the actual number of charges laid as a result of the millions of pieces of material they've confiscated was very low because of the time it takes to go through the entire contents of the boxes of material they get.

Mrs. Carole Morency: Your comments raise a number of issues, and I'll try to address them. One, it's true that when police seize the evidence they do go through it, and it is time-consuming and it is very difficult. For those of us who look at it, doing so is very difficult. They go through it for a number of reasons. For one thing, they have to satisfy themselves that the material seized fits the definition so that they can lay the charges.

Once they've made that determination for that purpose, they can choose to lay charges based on each image or they can choose to charge on a sample of the seizure. It's their choice, with the advice of the Crown, and they do do that. They do make those decisions, but they do go through the entire contents for other reasons, most importantly for the identification of the victims.

Sampling child pornography evidence, to avoid having to go through it, doesn't help us identify victims. We've had some well-publicized cases recently, including out of Toronto in particular, where they have been able to identify victims because of that effort.

Also, there are various practices for how charges are laid based on the material. They can charge on each one or they can charge on some or they can lay multiple charges or counts for the same material. Again, it's a question of what the most expeditious way of bringing the matter before the courts is. If we look at the reported case law, we do see judges saying routinely, *x* number of photographs—two, five, a hundred, a thousand—were in the possession of this accused. So they are being made aware of the size of the seizure or the evidence in the case.

The issues are difficult, and the police do have to grapple with them from a resource perspective, but they're doing it also to identify the victims, and they are having more success than we've seen in the past. I believe you've had evidence about the National Child Exploitation Coordination Centre, which is based in the RCMP and is implementing the national strategy to better protect children against sexual exploitation on the Internet. It is working towards a database on child pornography, in conjunction with the G-8, which is working on a bigger exercise for the same purpose.

All of this will combine to facilitate the process. For the time being the evidence is there, the police are able to deal with it, and they can bring charges on all the material or on some as determined to be appropriate in the circumstances. Police need to be able to go through the material, which is not uniform, for the pieces that will form the basis on which to lay charges, to ensure that it does meet the definition of the offence, before they can lay the charges, and to try to identify victims and if possible rescue them if they are currently being sexually abused.

Mr. Myron Thompson: As a final note then, I would just like to say that as Mr. Comartin expressed his opinion regarding his amendment, he would rather err on the side of freedom of the press. I want to assure this committee that I would rather err on the side of the safety of our children.

The Chair: Thank you, Mr. Thompson.

Amendment CPC-29.

Those in...I'm sorry, Mr. Cullen, one last comment.

● (1100)

Hon. Roy Cullen: I have just a quick intervention. I agree with Mr. Comartin in terms of where we should be focusing our efforts, and there is clearly a lot more to be done, but I wouldn't want to leave the impression that it's all despair. In fact, the RCMP, working with Microsoft and other law enforcement agencies, has just launched a new child exploitation tracking system, a state-of-the-art system that will track child porn through the Internet and result in some arrests and convictions, I'm sure.

The Chair: Ms. Sgro.

Hon. Judy Sgro: Mrs. Morency, I just have a question about Mr. Thompson's amendment. Does it, in your humble opinion, jeopardize the legislation if it is part of it?

Mrs. Carole Morency: Without any question, the deletion of the term “art” would bring into question not just the application of the prohibitions against some parts of child pornography, but the whole scheme.

The Chair: Is the committee ready for the question?

(Amendment negatived)

(Clause 7 as amended agreed to)

(Clauses 8 and 9 agreed to)

The Chair: We have a new clause.

Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: Mr. Chairman, I am speaking about a minimum sentence and it is important to understand what it means. This is about a parent or guardian procuring sexual activity, which means a parent or guardian who…

[*English*]

The Chair: You're referring to your clause 9.1 on your page 11, B and G-4, if I can mark it.

[*Translation*]

Mr. Richard Marceau: Exactly. It applies to a parent or guardian who is procuring his child to a third person for sexual activity. There is nothing more disgusting! If the child is less than 14 years old, we are asking for a minimum sentence of six months. If the child is between 14 and 18 years old, there is a minimum sentence of 45 days.

As I said, this applies to a parent who is procuring his child to a third person that will sexually exploit the child. This is abhorrent and it is difficult to understand why there is no minimum sentence presently.

As concerns section 171, it applies to a householder permitting a prohibited sexual activity in his home or in premises that he owns. Here again, if the child is less than 14 years old, the minimum sentence is six months. If the child is between 14 and 18 years old, the minimum sentence is 45 days.

This is aimed at someone who puts his home at the disposal of individuals to have prohibited sexual activities with minors, which is also disgusting.

[*English*]

The Chair: Any comments?

(Amendment agreed to on division)

(Clause 10 agreed to on division)

The Chair: We have a new clause 10.1.

Mr. Marceau, we'll call that B and G-5; new clause 10.1 on page 11 is how you have it.

[*Translation*]

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

In fact, this is about procuring. This is about living on the avails of prostitution of a person under the age of 18 years. It is someone who benefits from the sexual exploitation of children. Once again, this is something rather revolting.

There already is a maximum sentence of 14 years. We would like to add a minimum sentence of two years. As concerns paragraph 212 (4), when the maximum sentence is five years the minimum sentence would be six months.

Paragraphs 212(2) and 212(4) would be amended.

● (1105)

[*English*]

The Chair: Are there any questions?

(Amendment agreed to on division)

(Clauses 11 to 14 inclusive agreed to)

(On clause 15)

The Chair: Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: Mr. Chairman, I wish to thank the Department of Justice and particularly Ms. Kane for helping us draft those amendments and for their continuous cooperation. This "issue"—I am starting to speak French like Jean Chrétien—was very important to me and Joe Comartin as well. This is to facilitate the testimony of vulnerable persons.

We had a discussion yesterday. I am not sure that we want to have another one today. We had a very informal exchange yesterday. I am ready to put it directly to a vote unless there are questions.

[*English*]

The Chair: Mr. Comartin.

Mr. Joe Comartin: I have one, maybe just for clarification, received from Ms. Kane.

We had to be very careful here to be sure that as much as possible it was clear that the judge making the decision on the interim order—that is, pre-trial order—would be the presiding judge. It's fairly technical, but if any of you are catching this, it does require the presiding judge to make the interim order.

I think the practice is pretty common across the country. On any kind of serious criminal matter, you know in advance who the presiding judge is going to be. There may be the odd occasion when the presiding judge gets changed at the last minute. I certainly know that has happened to me on a number of occasions. So it happens—not often, but it does happen.

What would occur in those circumstances is that the order would have to be confirmed by the then presiding judge at the start of the trial. But it would allow the prosecutor, and most importantly the child and the child's family, to be prepared, knowing they would have the protections that are being given here under the Canada Evidence Act.

The Chair: Are there any other comments or questions?

To be clear, we're dealing with Mr. Marceau's amendment regarding clause 15. It's marked pages 13 to 18.

(Amendment agreed to)

(Clause 15 as amended agreed to)

(Clauses 16 to 25 inclusive agreed to)

(On clause 26)

The Chair: On clause 26, we have amendment NDP-3.

Mr. Comartin.

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

This one and the subsequent one address the same issue, and I have to say again that Ms. Kane caught another section, subsection 16(5), that would have to be amended.

What this is really doing is reducing the age from 14 to 12, allowing youth of that age to be able to testify without having to go through all of these procedures. It would in effect change the presumption from age 14 to age 12, so that at age 12 a youth is capable of understanding an oath and of testifying in that respect as an adult. We heard evidence quite clearly from Professor Bala of Queen's University, arguably the expert, or certainly one of the experts, in the country on children testifying, that we should be moving to that age.

It avoids some of the extensive procedures that take place now in assessing whether youth between ages 12 and 14 should be categorized as younger children. Professor Bala was fairly categorical in his recommendations that we should be moving at this time to do this, so I've brought forward the amendments to accomplish this. Although NDP-4 is fairly lengthy, all it does in fact is to change the age in each one of the sections from 14 down to 12, as it does in clause 26. We would have to add an additional amendment to make it consistent with subsection 16(5); it's the final one that would have to be added, but it's not here, because I missed adding that one paragraph.

I would propose, Mr. Chair, that we address the issue first, and then if I'm successful, that the committee permit me to make one further amendment on the floor today to amend subsection 16(5) for the same purpose.

● (1110)

The Chair: Okay.

Would we also be dealing with NDP-4? Are these all part of the same package?

Mr. Joe Comartin: NDP-3 and NDP-4 both deal with the same thing.

The Chair: Mr. Macklin.

Hon. Paul Harold Macklin: Thank you very much, Chair.

Going to this point, the amendments that Mr. Comartin proposes to the new provisions for the Canada Evidence Act would result in a new regime intended to apply to children under age 14, or be applicable only to child witnesses under the age of 12.

As has just been mentioned, Professor Bala did make this suggestion in his testimony. The government is not supportive of this and would call it a drastic change. Since the 18th century, the law has set 14 as the age above which persons are regarded as adults for the purposes of their evidence, and no other witness beyond Professor Bala made such a recommendation and no other witnesses or briefs commented on a change in age.

A change of this nature is so significant that we believe it should be subject to a greater consultative process than what has obviously gone on in this particular hearing. Given that there will be a five-year review clause, and given that the proposed changes to the Canada Evidence Act are important in permitting the evidence of young witnesses to be received, and given that these reforms should be monitored, I propose that the parliamentary committee undertaking the five-year review revisit the appropriate age and Professor Bala's suggestion in the review at that time. That would provide an opportunity for those who work with child victims and witnesses to be consulted and for us to obtain an evaluation before a reform of that nature occurs.

Based on the evidence we've received, I think it's far too major a step to take without a great deal more evidence being received on the topic. I realize Professor Bala has done a great deal of work in this area, but I think simply relying on one person, when we consider all of the witnesses we've heard, and going forward and making a dramatic change is not appropriate at this time.

The Chair: Thank you.

Ms. Neville.

Ms. Anita Neville: Just very briefly, Mr. Chairman, Mr. Macklin basically said what I wanted to say. I think it would be somewhat disingenuous to move forward with an amendment of this scope without allowing others, who quite obviously care about this issue, the opportunity to come forward and present. So I wouldn't support an amendment of this sort.

The Chair: Mr. Comartin.

Mr. Joe Comartin: Actually, I have a question for Mr. Macklin, or perhaps for the officials. I'm not aware of any consultative process going on at this point. I'd like to know if there is, or if one is being planned. Maybe I just don't know of it, but I thought I would ask.

Ms. Catherine Kane: If you mean consultative process on changing the age to 12 years, that was first raised by Professor Bala. We had a consultation paper out in the public domain, I think in 2000-01, on child victims in the criminal justice system, which has formed the basis for a lot of these amendments that find their way into Bill C-2. That was a long, involved process, and many submissions were received. Canada Evidence Act changes were canvassed in that process.

I think what Mr. Macklin is suggesting is that in planning for the five-year review, we will turn our minds to looking at these amendments and to whether there should be any change in age, prospectively.

These reforms, even on their own, are quite a shift to make sure that the evidence of children can be received where they're capable of understanding and responding to questions and it is given the appropriate weight. We want to assess those amendments very carefully, in any event. In that process we can look at what other countries are doing, what age limits exist, what the social science evidence is of the difference between the child's capacity at 12 years of age, as opposed to at 14 years, and so on.

● (1115)

The Chair: Yes, Mr. Comartin, and then Mr. Toews.

Mr. Joe Comartin: Chair, it's just that I'm finished. Under these circumstances, if the government is moving along those lines and the five-year review is coming, I'll withdraw these amendments. I do think we do need to look into it.

The Chair: All right. Well, that would require unanimous consent.

Do we have unanimous consent to withdraw amendment NDP-3?

Some hon. members: Agreed.

(Clause 26 agreed to)

(On clause 27)

The Chair: Would amendment NDP-4 be withdrawn as well, Mr. Comartin?

Mr. Joe Comartin: Yes.

The Chair: Mr. Marceau, are you prepared to put another amendment?

[*Translation*]

Mr. Richard Marceau: What amendment are you talking about, Mr. Chairman?

[*English*]

The Chair: Clause 27, pages 24 and 25. Or is this a government amendment?

Ms. Catherine Kane: Perhaps I can explain.

Was it amendment NDP-5 that seeks to make a change to clause 27?

The Chair: Yes.

Ms. Catherine Kane: We proposed, and we shared with Mr. Comartin, the same wording that would accomplish the same result, but there's also an additional amendment added to clarify subsection 16(1) of that same provision, about requiring a child to take an oath.

Some witnesses said it seemed a bit vague whether or not the child was required to take an oath. The whole intention of the provision is that they not take the oath. So we just deleted some language there. That's included in the alternate motion that includes both amendments, the one proposed by Mr. Comartin and the additional government-suggested wording.

The Chair: Okay.

Hon. Paul Harold Macklin: Mr. Chair, that amendment is headed “Clause 27”...“Pages 24 and 25”.

The Chair: Would someone like to move that amendment?

Mr. Comartin.

Mr. Joe Comartin: Agreed.

The Chair: Any discussion?

Mr. Joe Comartin: I just want to be clear.

Ms. Kane, that will then take care of my amendment NDP-5.

Ms. Catherine Kane: That is included.

Mr. Joe Comartin: So I would be withdrawing my amendment NDP-5, Mr. Chair, and replacing it with these two amendments.

The Chair: Any discussion? Is the new amendment to clause 27 carried?

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

(Clause 27 as amended agreed to)

The Chair: New clause 27.1, amendment G-1.

Hon. Paul Harold Macklin: Mr. Chair, this is what I commented on earlier. This is setting the stage for a review and report to Parliament five years after this bill becomes an act and is enforced. The whole purpose is that a comprehensive review of this act take place at that time. We can then form an opinion as to whether or not the amendments have been successful or whether other additions, as we've just spoken about with respect to Mr. Comartin's concern about whether the age should be 12 or 14 years for being able to testify under oath, can be then brought forward and reviewed.

That is the main purpose of amendment G-1.

The Chair: Are there any comments or questions?

(Amendment agreed to)

(Clauses 28 and 29 agreed to)

The Chair: Shall the preamble carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

● (1120)

[*Translation*]

Mr. Richard Marceau: Mr. Chairman, how much time do I have to table my dissenting report?

[*English*]

Mr. Vic Toews: What other options do we have on the name of the bill?

The Chair: What name would you suggest, Mr. Toews?

Mr. Vic Toews: I don't know. It's always said, will the name carry? If there was something more interesting, perhaps we could entertain it.

The Chair: Well, I think we've already carried that one. I'm not prepared to revisit it.

Shall the bill as amended carry?

Some hon. members: Agreed.

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

Some hon. members: Agreed.

Mr. Joe Comartin: 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.

The Chair: I would like to thank all parties and acknowledge all the work that went into reaching a consensus on most of these items. I think this is the minority government working as it should. I would also like to acknowledge and thank our officials for the time they've put in bringing the bill to this stage.

Thank you very much.

Mr. Vic Toews: Thank you very much.

Mr. Chair, I want to thank the draftsmen who did all the drafts for us. I know sometimes they might think the work is not appreciated because the amendments didn't go ahead. In fact, that work is essential for the kind of consensus that took place today.

The Chair: I understand they were done on very short notice.

Mr. Vic Toews: That's correct, and they did a very good job.

Thank you.

The Chair: I'll certainly convey that to them.

The meeting is adjourned.

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