House of Commons
CANADA

Standing Committee on Environment and Sustainable Development

ENVI • NUMBER 018 • 2nd SESSION • 40th PARLIAMENT

EVIDENCE

Tuesday, May 5, 2009

Chair

Mr. James Bezan

Standing Committee on Environment and Sustainable Development

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● (0915)

[*Translation*]

The Vice-Chair (Mr. Francis Scarpaleggia): The meeting will resume in public.

Mr. Bigras.

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): It seems to me we agreed at the last committee meeting to ask the Department of Justice to come and make a presentation to us to provide answers to the questions raised by the industry before we proceed with the clause-by-clause consideration. I saw there were some witnesses on the agenda. Does that mean that the Department of Justice officials will be testifying this morning before we proceed with the clause-by-clause consideration?

The Acting Chair (Mr. Francis Scarpaleggia): That's my understanding of the matter.

We will now hear from Renée Caron, Sarah Cosgrove, Linda Tingley and Raymond MacCallum. Mr. MacCallum is from the Department of Justice, Ms. Caron, Ms. Tingley and Ms. Cosgrove from the Department of the Environment.

You are aware that we have invited you first to inform us about certain reservations, certain demands that the marine industry made last Thursday when some of its officials appeared. You know that we've invited you to clarify their concerns. I imagine you've prepared evidence or that you have a few words to say to us before we move on to questions.

Mrs. Renée Caron (Executive Director, Legislative Governance, Department of the Environment): Mr. Chairman, we haven't prepared a presentation, but we are ready to answer all the questions committee members may have.

The Vice-Chair (Mr. Francis Scarpaleggia): We'll start with Mr. McGuinty.

Mr. David McGuinty (Ottawa South, Lib.): Thank you, Mr. Chairman.

[*English*]

Good morning, everyone, ladies and gentlemen.

May I ask, first of all, have you read the transcripts of the last meeting?

Mrs. Renée Caron: Yes, we have.

Mr. David McGuinty: Okay. Have you synthesized through those transcripts and distilled down from those transcripts, either through questions from us or from the witnesses, the salient points we'd like you to address?

Mrs. Renée Caron: We certainly have studied that testimony, Mr. Chairman, and we hope we would be able to answer the questions that the members may have.

Mr. David McGuinty: I see my colleague Monsieur Bigras exhibiting some concern.

We're hoping you're here to address the particulars of the issues raised by the last set of witnesses. We need some guidance here from you as experts. As independent and objective public servants, we need your help in navigating through this. There are different positions that have been put forward to the committee, to Canadians, and to us. We are not the experts, so we're hoping that you have had an opportunity to distill the fundamental questions that have been raised by the shipowners and other parties in the last meeting, and that you are here in a position to provide us with some guidance and some answers about the merits of their concerns and how we ought to proceed, so as parliamentarians and legislators we can make this bill better.

Are we ready to go? I can go into tough questions, but I'm hoping you're in a position in the half hour to help us understand how we ought to proceed.

Mrs. Renée Caron: Yes, Mr. Chairman, Environment Canada can give a little bit more information to the committee regarding the consultations that were done in relation to the bill. That point was raised. Another key point that was raised, I believe, regarded the impact that the bill might or might not have regarding the economic viability of the shipping industry, in a general sense, but also in relation to their ability to recruit seafarers. We also can address—

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): I'm just trying to understand the questions.

I received a letter dated May 4 to Mr. Bezan, the chair, from Cynthia Wright, the acting assistant deputy minister, which attached some detailed responses from the ministry to the issues that were raised by the shipping industry. As a matter of a point of order, I just wanted to be sure that has been given to all of the members, because it seems to me to be the starting point for our discussions this morning.

The Vice-Chair (Mr. Francis Scarpaleggia): Your point is noted.

Mr. Bigras.

● (0920)

[*Translation*]

Mr. Bernard Bigras: I understand what Mr. Woodworth is telling us. However, there was an agreement at the last committee meeting that Department of Justice officials would appear. We've received an explanatory letter from the department, just as certain witnesses who appear before our committee file briefs. That doesn't prevent us from asking witnesses questions. It's not because the department has submitted an explanatory letter that Mr. McGuinty can't ask a number of questions.

[*English*]

The Vice-Chair (Mr. Francis Scarpaleggia): I'd have to agree.

[*Translation*]

We'll continue. Mr. McGuinty will continue asking his questions.

[*English*]

Mr. David McGuinty: Thanks, Mr. Chair.

I agree with Mr. Woodworth, except that the letter sent to the chair was delivered to me seven minutes ago. It might have been distributed by e-mail, but this is the first time we've seen it, so no one has been in a position to actually look at the detailed answers provided by Ms. Wright.

So you're on a good track, Madame Caron. You were just breaking it down for us, so maybe you could help us work through it. There were a number of particular legal issues that my colleague Mr. Woodworth and I and others raised, and we're hoping you're in a position to give us some clarity on how to strike the appropriate balance here.

Mrs. Renée Caron: Thank you, Mr. Chairman.

The third point that Environment Canada could speak on, again with some support from our colleagues at Justice, would be the impacts, if any, of the bill with regard to the civil liability convention and the Marine Liability Act regime. Of course there are the legal issues, and we would turn that over to the Department of Justice to be able to speak to the question of strict liability and imprisonment in particular.

Mr. David McGuinty: Could you also address in your legal comments, if you can, quickly, not just the strict liability and imprisonment but also the question of conflict of laws between domestic and international? That was raised repeatedly by all sides of this committee, what impact it will have, and I recall a witness, whose name escapes me, Mr. Chair, who sat over there where Ms. Cosgrove is, the lawyer from the Maritime Law—

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Giaschi.

Mr. David McGuinty: Mr. Giaschi repeatedly raised questions in his answers about the question of conflict here. And then there were a number of questions raised about the constitutionality.

If someone can start and maybe walk us through that, that would be very helpful.

Mrs. Renée Caron: Mr. Chairman, would you like us to start with the Environment Canada issues or the Department of Justice legal issues?

The Vice-Chair (Mr. Francis Scarpaleggia): It doesn't matter to me. What does Mr. McGuinty want?

Mrs. Renée Caron: In relation to the issue of consultation, Environment Canada proceeded with the usual practice through the development of Bill C-16, and that included the protection of cabinet confidence. During the development of the bill, Environment Canada did consult internally with other affected government departments, including extensive consultations with Transport Canada. These consultations with Transport Canada were at both formal and informal working levels, and these definitely informed the development of the bill.

Also per the usual process, the provisions of the bill were fully vetted by the Department of Justice all the way through the bill's development to ensure that it was consistent with the charter and with the Constitution.

The day after the bill was tabled, on March 5, Environment Canada did send out a notice to a long list of stakeholders affected by the bill, covering many different industries. This included several in the shipping industry, notably the Shipping Federation of Canada, the Canadian Shipowners Association, and the Canadian Maritime Law Association. We opened the lines of communication with stakeholders as soon as possible after the bill was tabled. Representatives of the shipping industry did provide valuable input during the process following the March 5 notice that was sent, and the government wishes to address a number of unintended errors in the bill that were identified. Accordingly, eight draft government motions, which relate to the shipping industry's concerns, have been brought forward, and we look forward to continuing the dialogue with the shipping industry as we hope to move forward with the implementation of Bill C-16.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you.

Do you have another issue to address?

Mrs. Renée Caron: Would you like me, Mr. Chairman, to take questions on the issue of consultation or just move to the next point?

The Vice-Chair (Mr. Francis Scarpaleggia): Do you want to follow up? We're not proceeding the way we normally do. Normally we would have started with a presentation from the witnesses, answering the points that we raised, and then we would have gone to questions, but now we're sort of moving in two directions at once.

Would the members like the witnesses to continue and say what they have to say, and then we'll get back to Mr. McGuinty?

Some hon. members: Agreed.

The Chair: Maybe that's the best thing, then.

● (0925)

Mrs. Renée Caron: Thank you, Mr. Chairman.

I do apologize to the members of the committee, as I was expecting questions and didn't prepare a presentation, but I do have some other points.

Regarding the question of the shipping industry's economic viability and how Bill C-16 might affect that, we understand this issue in relation to two principal concerns that were raised. One was the issue of there being strict liability plus high fines—because maximum fines have increased under the bill. The other is that of strict liability plus imprisonment. My understanding was that those issues were raised by two different witnesses who appeared before you on Thursday, but who didn't necessarily share the same view. But those are the two main issues.

I'd like to point out to the committee that no other industry has raised similar concerns with Environment Canada, although these other industries are also subject to strict liability plus imprisonment, and strict liability plus the fine amounts, as identified in the bill.

Regarding the issue of strict liability plus imprisonment, the Department of Justice can speak more to the legal fine points. Nonetheless, this is actually a long-standing reality under the Canada Shipping Act and the MBCA, and even before the due diligence defence was legislated in statute, it was available as common law. So all the MBCA did was codify that due diligence defence.

Also, regarding the issue of strict liability plus imprisonment, the point of aggravating factors was raised on Thursday. I want the committee members to be sure to understand that aggravating factors do not come into play in the determination of whether imprisonment should be part of the sentence; they only relate to the issue of fines.

Regarding the point about strict liability plus the high fines, the committee heard several times of $6 million as a maximum fine under the bill for a first offence, and $12 million as a maximum for repeat offenders. I'd like the committee members to be aware that the regime for fines is a tiered regime and there are many gradations within that regime as to how much of a fine might be imposed. The regime is tiered along the lines of the type of offender as well as the lines of the seriousness of the offence. For individuals, including an individual seafarer, there was actually no change in the maximum fine for a serious offence; and because we created the new category of less serious offences, the maximum there is lower than what it would have been in the legislation previously. In addition, all of the fines are even lower if the prosecutor pursues by summary conviction rather than indictment. So this is another way the fines can be tailored to the seriousness of the offence.

For large corporations and large vessels, the $6 million for a first offence is the maximum and the $12 million is for a repeat offence. And those are for the most serious offences. For less serious offences, the maximums are $500,000 for a first offence and $1 million for a repeat offence.

Finally, there is a third type of offender in terms of their financial capacity, and this one is in between the individual and the large corporation or large vessel. This third one is the small revenue corporation or smaller vessel. For them the maximum fines are lower than what they are for the large corporations and large vessels.

Regarding the $6 million and $12 million, or the maximum fines, we expect that they will rarely be imposed in practice. Also, regarding the maximum amounts, as was indicated in previous testimony by Environment Canada, those amounts were borrowed from the Ontario legislation after a review of the maximums across Canada. In relation to this point, I would say that while the acknowledged purpose of the bill, in part, is to increase penalties, the ultimate aim is to protect the environment, not to put more people in prison or to collect more fines.

● (0930)

I'd like to move on to the Marine Liability Act. The Migratory Birds Convention Act currently allows for a vessel to be charged with an offence if it disposes of some material or some pollutant in water, harming migratory birds. That could be an oil spill or some other type of pollution damage. The bill doesn't change that. The current MBCA also allows the court to order an offender to pay compensation for remedial work the government might do that flows from the offence that occurred.

The existing MBCA clearly preserves the limitation of liability regime, which is set out in the Marine Liability Act in subsection 17.1(3). So in the case of an oil spill, provided it wasn't intentional or reckless, the Marine Liability Act establishes the regime limiting liability, and essentially, in my layperson's understanding of it, it's an international insurance scheme. The MBCA doesn't detract from that, and in fact it preserves it. The shipping industries did mention to us that some of the other statutes could have a similar provision, and accordingly, there are four government motions to add similar language to other bills to ensure the Marine Liability Act does apply.

I would turn it over to the Department of Justice to deal with the more constitutional and charter issues.

The Vice-Chair (Mr. Francis Scarpaleggia): Do we figure we need another five minutes from the witnesses before we move to questions? What do you think, Mr. MacCallum?

Mr. Raymond MacCallum (Senior Counsel, Human Rights Law Section, Department of Justice): I can make a quick summation of the relevant legal issues in about five minutes, if that's what the committee wants.

The Vice-Chair (Mr. Francis Scarpaleggia): Yes.

Mr. McGuinty.

Mr. David McGuinty: A summation is helpful, but proposed answers are even more helpful. I think we can get a summation of the legal issues; we can all distill back from the last set of witnesses. What we're looking for is how you propose we proceed to deal with the illegal issues that have been raised, in your answer, in your five minutes, if you could.

Mr. Raymond MacCallum: I think my answer, Mr. Chair, will hopefully allay some of the concerns that committee members may have. I think there has been incomplete information provided to the committee so far on the nature of the legal questions raised by a strict reliability approach to regulatory offences. A lot has been made, and appropriately so, of the Supreme Court's decision in 1991 in Regina v. Wholesale Travel Group, which was the first time the court considered a strict liability offence under the rubric of the charter. It was a close 5 to 4 decision, as has been mentioned before.

I think what's important for the committee to know is that that decision was then affirmed three times subsequently by a unanimous Supreme Court in very cursory fashion. Regina. v. Wholesale Travel Group dealt with an offence of false and misleading advertising under the Competition Act. In three subsequent cases that the Supreme Court dealt with on the basis of Regina v. Wholesale Travel Group in upholding and applying its general reasoning, which is that strict liability offences that involve the imposition of an onus on the accused to prove that he or she acted duly diligent were justifiable under the charter, the court very summarily upheld that result.

One of those decisions dealt with a provision very similar to what was at issue in Wholesale Travel Group, and that was under the Food and Drugs Act in the case of Regina v. Rube in 1992. It dealt with false and misleading sale of food.

The next case they dealt with was Regina v. Ellis-Don Limited and Rocco Morra, which involved charges against both Ellis-Don as a corporation and one of its employees. That was a charge under Ontario's Occupational Health and Safety Act about maintaining an unsafe workplace. It was a very different context; nonetheless, they very summarily applied the conclusion they had reached in Regina v. Wholesale Travel Group, that it was consistent with the charter to impose liability on the basis of a reverse onus due diligence offence, a strict liability offence.

Finally, in Regina v. Martin, they dealt with a charge under the Export and Import Permits Act, and the offence was the export of goods that were contained on the export control list. Again, it was a very different context, but the court very cursorily and summarily said that in light of our reasoning in Regina v. Wholesale Travel Group, taking a strict liability approach to that offence and the enforcement of the Export and Import Permits Act was consistent with section 1 of the charter.

In each of these three subsequent decisions, the only thing the court focused on was the general holding reached in Regina v. Wholesale Travel Group, that the approach of strict liability was constitutional in the context of a regulatory regime, in the context of legislation whose ultimate purpose was the imposition of standards for those subject to its rules to have to meet and the requirement that they be able to show that they have met them in situations in which infractions have occurred, whether it's oil pollution, an injury on a work site, or exporting as a business contrary to the rules that apply to the export of controlled goods, which are goods in which Canada has a security or national security interest. So they focused on the nature of the legislation broadly as being regulatory legislation rather than true crimes, and with a public welfare orientation, and the need to encourage people who participate in that industry to abide by certain legislated norms.

I think it's necessary to appreciate that despite the complex division in Regina v. Wholesale Travel Group in which there was a comprehensive explanation of the principles, in the subsequent decisions the court generally accepted that this is an appropriate approach for legislatures to take in imposing liability for the breach of regulated norms in complicated areas of society and economic life.

● (0935)

Having said that, I'm not sure whether there's more information the committee would like that I should leave for questioning. I will note that these issues were raised in 2005, and in the intervening four years, nothing in terms of the legal landscape has changed to call into question the validity of taking this kind of approach, the imposition of penal liability in a regulatory context.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you, Mr. MacCallum.

Since none of the other witnesses have anything to add, I gather, why don't we more or less start over with questioning from Mr. McGuinty.

Go ahead, Mr. McGuinty.

Mr. David McGuinty: Ms. Caron, why did the shipowners come here and say that they weren't consulted?

Mrs. Renée Caron: It is my understanding that we did not contact every shipping organization on March 5. Unfortunately, some shipping organizations didn't find out through the March 5 notice. That is certainly regrettable.

In any event, I understand that they did follow up quickly, and they were put in touch with Ms. Cosgrove very soon after the bill was tabled.

Mr. David McGuinty: Were the witnesses who came here in the last meeting consulted?

Mrs. Renée Caron: We were in touch with the International Ship-Owners Alliance of Canada. Ms. Kaity Stein was here last week. We did contact the Canadian Maritime Law Association on March 5.

In relation to the other witnesses, I'll turn it over to Ms. Cosgrove.

● (0940)

Ms. Sarah Cosgrove (Manager, Legislative Advice Section, Department of the Environment): We also were in touch with the Shipping Federation of Canada. We received contact from them and had conversations after the tabling of the bill.

The remainder of the organizations we learned of through their briefs to the committee.

Mr. David McGuinty: I don't want to make a big thing of this, but I want to get the chronology right.

So they were consulted long after the bill was tabled.

Mrs. Renée Caron: Long after the bill was tabled? Just a day after the bill was tabled.

Mr. David McGuinty: They weren't consulted in advance of the bill being tabled.

Mrs. Renée Caron: No, that's right, Mr. Chairman. The bill was developed following the usual process. Cabinet confidence was applied in the development of the bill.

Mr. David McGuinty: So the day after the bill was tabled, they were approached. Great. Thank you.

Mr. MacCallum, you lost me after you said "incomplete information" was supplied. You'll forgive me; I used to be a lawyer, but I'm not a lawyer anymore. There are really good lawyers around this table and I'm not one of them.

I'd like to understand: if the folks who were here last week had heard you speak, would they be in agreement with you?

Mr. Raymond MacCallum: One of the key pieces of legal advice that they rely on, I understand, is the advice provided to one of the industry groups previously—on Bill C-15 in 2005—by Alan Gold, the eminent defence counsel in Canada. Alan Gold acknowledges in his opinion that the courts across this country, and lawyers generally, accept the position that I articulated, that it is consistent with the charter to rely on reverse onus due diligence as the approach to imposing penal liability in the regulatory context.

So whether or not the individuals who were actually here would agree with that result, the lawyer who advised them certainly acknowledged that, and took, in my view, an academic approach to saying, well, despite the fact that this may be true, arguments can be marshalled that this approach is not constitutional.

I don't want to speculate too much, but they may have had incomplete information themselves, or as lay people, they may not have appreciated sometimes the nuances that we lawyers tend to inject into our legal opinions. But there's a difference between arguments that can be marshalled that this is unconstitutional and a conclusion or a statement of fact that this *is* unconstitutional.

Mr. David McGuinty: So with regard to the concerns raised by the Maritime Law Association representative about, for example, potential conflicts here between domestic legal changes contemplated in this bill and international obligations that we've undertaken through a number of international treaties, there is no conflict?

Mr. Raymond MacCallum: I apologize, but I am actually not competent to speak to that. I advise exclusively on the Charter of Rights and Freedoms, and it would be other Department of Justice officials who would have to explain that issue to you.

The Vice-Chair (Mr. Francis Scarpaleggia): Does anyone have anything to add on this?

Ms. Caron.

Mrs. Renée Caron: Mr. Chairman, I would like to flag to the committee members that the two issues regarding international law.... I am no longer a lawyer, so I'm not going to comment on legal points, but UNCLOS was one convention, and the civil liability convention was the other. I alluded to the civil liability convention earlier. I just wanted to flag that issue two and issue three in the letter provided by the acting ADM, Cynthia Wright, do address the issues of UNCLOS and the civil liability convention. I believe the members have the copy of that letter.

The Vice-Chair (Mr. Francis Scarpaleggia): We'll have to move on now to Mr. Bigras.

[*Translation*]

Mr. Bernard Bigras: Thank you very much, Mr. Chairman.

I want to thank Mr. MacCallum for his explanations. He has provided quite a comprehensive treatment of this question. I think that proves there should have been evidence. Based, among other things, on the 1978 judgment of the Supreme Court, which concerned Sault Ste. Marie, and on the judgment concerning the Wholesale Travel Group Inc., you think that strict liability does not mean a presumption of guilt.

Is that in fact what must be understood from your presentation?

[*English*]

Mr. Raymond MacCallum: That's correct.

It's fair to say, and the courts have clearly held this, that when you impose an obligation on the defence, the requirement to do something assertive to avoid conviction—and that's what strict liability does; it imposes on the accused the obligation to prove on a balance of probabilities that they met the appropriate standard of care in trying to avoid the prohibited act—limits the presumption of innocence that's guaranteed under the charter. However, all guarantees under the charter are subject only to such limits as can be reasonably and demonstrably justified in a free and democratic society.

So yes, there's a limitation of the presumption of innocence when you impose a reverse onus, but those limitations can be justified, and the courts have generally held that they are, in a regulatory context.

● (0945)

[*Translation*]

Mr. Bernard Bigras: And I want to get to those limitations. Without necessarily stating it with any certainty, the industry suggested to us that the 1991 judgment couldn't apply in the case before us. What certainty do you have? Perhaps the industry could institute proceedings to establish that the Wholesale Travel Group Inc. judgment does not have to apply in the case before us, with respect to the provision of Bill C-16 or to the act as such.

Do you have any legal opinions? What certainty do you have that this doesn't open the door to legal challenges?

[*English*]

Mr. Raymond MacCallum: Mr. Chair, there is never certainty in law, unfortunately. So it's a range of arguments, reasonable arguments on both sides of any issue, which is why ultimately we need judges to decide them. But in approaching the issues, we tend to look at, obviously, the leading authorities and all the lower court jurisprudence interpreting and applying those authorities. In the case of due diligence as a standard of liability in the regulatory context, the lower courts in almost any context are almost universal in accepting the constitutionality of the reverse onus provisions imposed across the board by every provincial and territorial legislature in the regulatory context.

Sometimes under the section 1 analysis, which is the Oakes test, which is the burden the government has to meet in demonstrating that it's justified in limiting a charter right or freedom in a particular context.... In some cases that analysis is much more particularized than in others, and sometimes general conclusions can apply quite broadly, and it doesn't depend so much on the context.

With respect to the due diligence defence, what the courts have almost without exception recognized consistently since 1991 is that when the object of the legislation is to require the participants in a particular sector of the economy or society to meet a reasonable standard of care, those objects are best met when we impose on those participants the reverse onus due diligence defence, because in order to be able to meet that in a situation where there is an accident, they're going to have to be able to show that they've put in place systems and procedures that are, within their knowledge, best to know whether they have done it, that demonstrate that they've taken reasonable measures to avoid whatever the prohibited act might be, in this case pollution in the oceans or in waters.

[*Translation*]

Mr. Bernard Bigras: Ms. Caron, do you think that Bill C-16 is consistent with Canada's international commitments respecting the Convention on the Law of the Sea?

[*English*]

Mrs. Renée Caron: I'm not a lawyer so I can't give a legal opinion. What I can say is that the Department of Justice did fully vet the bill through all stages of development. So we are confident that the Department of Justice did conclude that regarding everything from international obligations, charter obligations...the bill was appropriate.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you.

We now move on to Ms. Duncan.

Ms. Linda Duncan (Edmonton—Strathcona, NDP): Thank you, Mr. Chairman.

I have two questions.

The first one is on section 280 of CEPA, on the issue of due diligence This is one of the issues that were raised, and it's one that's troubling me.

The argument is made that they're not unduly prejudiced with the strict liability because they can raise, potentially, the defence of due diligence. Yet as I understand it, the new wording being provided by the government for section 280 is saying that if either the master or the chief engineer is found guilty, both may be convicted. I'm finding that troubling, and I would appreciate somebody explaining that. If it was that either the master or the chief engineer may be found guilty and either the master or the chief engineer may raise the defence of due diligence so they can be absolved of liability, then that would tell me that either one of the them can raise due diligence.

I would appreciate having explained to me how exactly that provision is to be applied.

● (0950)

Mrs. Renée Caron: I believe this is one of the issues that the shipping industry raised, which was a good point. It is now the subject of a draft government motion to ensure that this doesn't happen and that this issue is corrected. Under the current scheme it was either/or, and it's not supposed to be both. It wasn't intended to change that.

Ms. Linda Duncan: So it may be a drafting error.

Mrs. Renée Caron: Exactly.

Ms. Linda Duncan: So we can anticipate another amendment coming forward.

A voice: [*Inaudible—Editor*]

Ms. Linda Duncan: Okay, very good. That was one that troubled me.

On the second point, I appreciated your note on...okay, this may be what the letter of the law says, but here's how it will be applied. The thing that troubles me is, as parliamentarians, we're having to analyze this not as legal counsel but as legislators, so we need to know exactly what are the eventualities and how might this law be applied. I've raised a number of times the request that when the laws come before us, could we please also see any revisions to the enforcement and compliance policy. I think that would certainly allay my concerns and a number of concerns that I think are still not answered properly about the potential conflict between UNCLOS and other international laws that we have signed and ratified and the domestic law.

I noted that you didn't mention you actually consulted the seafarers association, which is troubling to me. I think they're particularly concerned and vulnerable because they're open to the charges.

When CEPA was first tabled, Environment Canada took it upon itself to actually table an enforcement and compliance policy so people actually knew what would happen with each of these offences, and what's the likely penalty, and so forth. There were also briefings with all the sectors that were potentially impacted. It seems like that practice has gone off the table.

I wonder if you could speak to that. I think it would certainly be helpful to me at the table and, I would think, to my colleagues at the table if we could know. We have a few paragraphs here. It's sort of saying, well, of course, the Attorney General will decide whatever; and if a person has no legal background at all, they're going to be really in difficulty understanding how the letter of the law here is applied, how international law might come into play, when does one take precedence over the other. It wouldn't be a bad idea, if you already have an enforcement and compliance policy on how these various provisions of the statutes are applied.... I think it would help me, certainly, in my deliberations.

Even having been chief of enforcement, I'm a little bit puzzled by what's written in.... “Oh, of course this won't happen.” Well, that's not very reassuring to the person who's worried about potential liability.

I'm just wondering if there's a possibility of an enforcement and compliance policy or some kind of document—even if only we received it—where we could have explained to us what is likely to happen with these provisions.

My third question very quickly is this. I'm disappointed that we couldn't have had somebody here actually speaking specifically to the issue of the potential conflict between international law and domestic law. I took the time to contact maritime law experts at Dalhousie University, and they have raised, with me, that there are potential conflicts, but it also goes to the pith and substance of the law. In other words, if some of these provisions are considered to be bird welfare and not marine pollution, then they don't conflict with the international law that deals with marine pollution. We are in a quandary here trying to say, okay, this looks all right, but we don't really have the briefings before us.

So that's one issue that I think would be really helpful to us. I think we anticipated that we would have a witness here from Justice actually speaking to that specific issue.

The Vice-Chair (Mr. Francis Scarpaleggia): Could you answer that quickly?

Ms. Sarah Cosgrove: There are two points raised there, Mr. Chair. The first related to international law and the application of UNCLOS. It's a matter of reliable practice that the Attorney General is made aware if charges are ever laid in the zones of maritime waters that would trigger UNCLOS requirements and restrictions on the use of prisons. The Attorney General would not, at that time or during sentencing hearings, request prison. So the bill as drafted is not in violation of international law, and it is a matter of reliable practice that prison terms are not sought when they are in contravention of international law. There has been no history of that scheme not working to date.

In terms of enforcement policies, I believe Cynthia Wright answered that question when we first appeared. We've been focusing, obviously, on the development of this bill. If and when it comes into force, we would update existing enforcement policies and procedures. Those do exist now, and they obviously don't currently reflect Bill C-16. We definitely need to see how this evolves through the parliamentary process first. Those policies and procedure will then be updated, though.

Mr. Chair.

● (0955)

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Warawa, please.

Mr. Mark Warawa (Langley, CPC): I will provide my time to Mr. Woodworth.

Mr. Stephen Woodworth: Thank you very much.

I want to begin by commending Ms. Duncan and thanking her for raising the issue of section 280 in CEPA. That's the one thing that bothered me as well. I was happy to see the new government amendment G-7.1, located at page 28.1 in the amendment package. It now makes that liability disjunctive.

I would like to hit on a couple of easy things first.

Mr. MacCallum, in the three cases you mentioned to us—R. v. Rube, R. v. Ellis-Don Ltd., and R. v. Martin— did the legislation in those cases involve liability for prison terms?

Mr. Raymond MacCallum: Yes, in Rube it was up to three years of imprisonment; for Ellis-Don, it was 12 months; and for Martin, it was five years.

Mr. Stephen Woodworth: In that sense, it's on all fours with the legislation we're dealing with.

Secondly, Mr. MacCallum, in response to Mr. Bigras' question about what degree of certainty you feel on this issue, I want to verify that I heard the answer correctly. Did you say that the courts almost universally accept the position that you're proposing in analyzing Bill C-16?

Mr. Raymond MacCallum: Yes, that's correct.

Mr. Stephen Woodworth: Okay, that's pretty high, and quite acceptable—at least to me. I hope the others on the committee might agree.

The next easy question is about the sequence of events in the consultations. As I understand it, the bill was tabled, there were consultations, and then there were government amendments tabled to deal with those consultations—or at least with some of the issues in those consultations. Is that correct?

Mrs. Renée Caron: Yes, that's correct.

Mr. Stephen Woodworth: And the majority of those government motions were in fact tabled to deal with those issues prior to the witnesses having testified. Is that correct?

Mrs. Renée Caron: Yes, that's correct. I believe the only motion is the one about section 280, put forward following the—

Mr. Stephen Woodworth: Thank you.

The next and more difficult issue I want to talk about is the international aspect of this and UNCLOS. I'm going to deal with it in as non-legal way as I can, by talking about the Canada Shipping Act.

On the face of it, does the Canada Shipping Act apply to foreign vessels that would otherwise be subject to international law and the UN Convention on the Law of the Sea?

Ms. Sarah Cosgrove: Yes, that is our understanding.

Mr. Stephen Woodworth: Does the Canada Shipping Act, like Bill C-16, generally impose liability, including prison terms?

Ms. Sarah Cosgrove: Yes, it does under the same type of regime.

Mr. Stephen Woodworth: On the face of it, the prison terms in the Canada Shipping Act, if they were applied to a foreign vessel subject to UNCLOS, would contravene UNCLOS. Is that correct?

Ms. Sarah Cosgrove: That's our understanding. The same provisions of UNCLOS apply.

Mr. Stephen Woodworth: So there's a prosecutorial policy regarding the Canada Shipping Act, saying that the government will not seek prison terms under the Canada Shipping Act. Were it to do so, it would offend UNCLOS. Is that correct?

Ms. Sarah Cosgrove: That's our understanding. That policy is in place broadly for any federal statute that might have prison terms apply in those zones.

Mr. Stephen Woodworth: When I asked the witnesses the other day whether they were aware if there had been any problems with that policy as it relates to the Canada Shipping Act, they couldn't tell me of any problems. Are you aware of any problems with that policy being applied?

● (1000)

Ms. Sarah Cosgrove: We're not, no.

Mr. Stephen Woodworth: Is it proposed that the same prosecutorial policy that has been used and is currently being used for the Canada Shipping Act will also apply to prosecutions under the legislation referred to in Bill C-16?

Ms. Sarah Cosgrove: Yes, again, it's government-wide, standard practice.

Mr. Stephen Woodworth: All right. To me, that says this isn't anything new and that it doesn't contravene UNCLOS, or else the Canada Shipping Act would contravene UNCLOS. Am I looking at it the right way?

Ms. Sarah Cosgrove: I believe so, yes.

Mr. Stephen Woodworth: The next question I had is whether these policy directives are written down.

Ms. Sarah Cosgrove: Our enforcement division folks aren't here, but I am definitely aware there are various enforcement policies and procedural documents, and those currently exist, yes.

Mr. Stephen Woodworth: What I was thinking of specifically regards the application of UNCLOS.

Ms. Sarah Cosgrove: I am not aware of whether that is written down, but I could find out.

Mr. Stephen Woodworth: Another issue is that the Canada Shipping Act does not require notification to the Attorney General in a prosecution, does it?

The Vice-Chair (Mr. Francis Scarpaleggia): That will have to be the last question, Mr. Woodworth.

Mr. Stephen Woodworth: It's a line I'm following, but maybe I'll get another chance. I'll skip that for now and I'll stop here. Thank you.

The Vice-Chair (Mr. Francis Scarpaleggia): We've done one round. Is there a need for a second round? Okay, let's go to a second five-minute round.

Mr. David McGuinty: Madame Caron, not to ping-pong back and forth, but I want to go back to the economic viability and recruitment theme that you raised at the beginning. Serious comments were made about the impact of this proposed regime on the ability to attract investment, expand fleets, and recruit folks to work in this industry. The government recently called for full costing of another bill, Bill C-311, which we will get to here at some point—in June, we hope. Did you cost the implications of this new regime and what impact it might have in economic terms on investment in the country, or its affect on difficulty of recruiting new staff?

Mrs. Renée Caron: This bill doesn't change any of the requirements that are established at law for the shipping industry or, for that matter, other industries. All it does is change the maximum fines that can be imposed. It creates a tiered regime for fines and tries to bring penalties up to date, some of which were very badly out of date. In practice, all the legal requirements and the prohibitions that apply are the same; those haven't changed, so the industry is subject to the same regime as it was subject to before.

Mr. David McGuinty: I take it that no economic analysis was performed.

Ms. Sarah Cosgrove: We did consult internally with economists in relation to the setting of fines as part of our research. Again, primarily we did that, but we also looked at other jurisdictions as models for fine ranges. It was not necessary to do any economic analysis in terms of actual technical requirements or obligations being placed on the industry, because again, those aren't changing. Pollution control requirements remain the same, and practical obligations in the nine statutes being amended are not changing.

Mr. David McGuinty: Did you read the testimony of two of the four witnesses from last session?

Mrs. Renée Caron: Yes, Mr. Chair, I read all the testimony from Thursday.

Mr. David McGuinty: How do you respond, then, to the repeated concerns raised by the representative from Toronto and the other fellow who was here, whose name escapes me? It will come back to me. Who was the fellow who came last week from...?

● (1005)

The Vice-Chair (Mr. Francis Scarpaleggia): Do you mean Mr. Giaschi?

Mr. David McGuinty: No, not the lawyer, but the other one. The other gentleman came here representing the labour movement or the union workers, I believe, and I'm just wondering whether or not—

A voice: [*Inaudible—Editor*]

Mr. David McGuinty: Was it Mr. Lahay?

A voice: Yes.

Mr. David McGuinty: Were their concerns unfounded? When they speak about the difficulty of attracting business, about ramifications of these changes internationally, our competitive positioning, and our ability to attract—all of those things that were repeated I don't know how many times—are they unfounded?

Mrs. Renée Caron: Mr. Chairman, I would say that perhaps there was a little too much emphasis on the $6 million and the $12 million. Certainly from my reading of the testimony, that seems to be the point that was retained.

In relation to the human resource challenges that are faced by the industry, it's important for the members to know that the maximums for serious offences for individuals don't change under the bill. Moreover, for less serious offences, the maximums actually come down for individuals under the regime. This tier or gradation system now tries to match appropriately the degree of the penalty with the seriousness of the offence.

The human resource challenges may be caused by a number of factors, which I wouldn't necessarily be able to comment on, but I would point out that the regime doesn't change the maximums to which individuals could be subject.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you. We'll move now to the Conservatives.

Mr. Woodworth, do you want to continue?

Mr. Stephen Woodworth: Yes, if that would be all right. Thank you.

If I can pick up the thread I was trying to reach before, the Canada Shipping Act does not require notification to the Attorney General for prosecutions of foreign vessels, am I correct? Maybe you don't know.

Ms. Sarah Cosgrove: I would want to verify that.

Mr. Stephen Woodworth: Okay. Let me phrase it in the opposite manner, then. Bill C-16 does require notification to the Attorney General in relation to prosecution of foreign vessels where UNCLOS might be involved. Am I right about that?

Ms. Sarah Cosgrove: Under two statutes, the Canadian Environmental Protection Act and the Migratory Birds Convention Act, the Attorney General's consent is required.

Mr. Stephen Woodworth: Okay.

Ms. Sarah Cosgrove: That's the intention behind that. That's in the existing statutes. The intention is to ensure that appropriate notice is taken prior to proceeding and that international laws are considered.

Mr. Stephen Woodworth: Translating what you just said into the words I'm dealing with, am I to understand that the reason for notification of the Attorney General is to ensure that this prosecutorial policy of not seeking a prison sentence or violating UNCLOS is adhered to?

Ms. Sarah Cosgrove: That is the policy intention behind that provision being in those statutes.

Mr. Stephen Woodworth: Thank you.

With respect to the questions around the economic analysis, to be honest with you, my reaction to hearing shippers come before us telling us our penalties are too high and therefore they're not going to come into our waters is, fine, I have no problem with that. If our penalties are there to encourage people not to pollute and they say they're worried about polluting and therefore they're going to take our business elsewhere, I don't have a problem with that personally.

But I do want to understand one point on the issue of head offices and economic issues. These penalties are fixed on people who ship through Canadian waters, regardless of where their head offices are, aren't they?

Mrs. Renée Caron: Yes. That's correct, Mr. Chair.

Mr. Stephen Woodworth: So I suppose if someone is saying they'll relocate their head office elsewhere, that's just so they can avoid actually having the money taken out of their bank account.

Would you have any insight into how the enforcement works on fines or the collection of fines? They're a little harder to collect if the head office is overseas than if they're in Canada. Is that the way it works?

● (1010)

Mrs. Renée Caron: My understanding is that if the vessel were to be charged—and a vessel could be charged—then the vessel itself could be an asset.

Mr. Stephen Woodworth: There's one last thing I want to double-check. The issues around international conventions and liability of ships are generally enacted into Canadian law through the Marine Liability Act. Am I right about that?

Mrs. Renée Caron: My understanding is that the Marine Liability Act puts into law in Canada those conventions that Canada has ratified. In particular, the civil liability convention is reflected in part 6. I believe there is a bill before Parliament, Bill C-7, which would put into law in Canada a new bunker oil convention as well as a convention whose acronym is LLMC, the name of which I can't recall right now. My understanding is that it's reflected in the provisions of part 3 of the Marine Liability Act currently, although it has never been formally ratified in Canada. My understanding is that Bill C-7 will have the effect of formally ratifying it in Canada.

Mr. Stephen Woodworth: One of the amendments you presented us with previously—and we see an updated version this morning—is in fact to exempt shippers from Bill C-16 if the Marine Liability Act and the international conventions it enforces apply. Is that correct?

Mrs. Renée Caron: Yes, Mr. Chairman. Such a provision currently exists in the MBCA, and the provision is opened up in the bill in order to make a consequential amendment. In addition, the government has four draft government motions that would bring exactly the same kind of provision into other acts where the conflict could arise.

The Vice-Chair (Mr. Francis Scarpaleggia): Time is just about up, Mr. Woodworth.

I'm told the government has no other questions. We can go to the Bloc and the NDP for five minutes each.

There are no questions from the Bloc.

Ms. Duncan, do you have a question?

Ms. Linda Duncan: I have a quick question, following up on Mr. McGuinty's question.

In drafting these laws, was there consideration given to the availability or affordability of onshore in-Canada bilge or other waste disposal facilities or alternatives to dumping at sea?

Ms. Sarah Cosgrove: I apologize, but can you repeat the question?

Ms. Linda Duncan: This is following up on an earlier question asked by Mr. McGuinty.

In the course of drafting these amendments to these statutes in relation to illegal shipping dumping, I'm asking if consideration was given to the availability or affordability of onshore in-Canada bilge or other waste disposal facilities—in other words, an alternative to dumping at sea, which is something that may well come up in a due diligence defence.

Ms. Sarah Cosgrove: Consideration to that specific issue wasn't given in preparation of this bill, because we didn't change any of the substantive requirements found, for example, in division 3 of the statute. The requirements weren't changing. We only amended the sentencing and enforcement tools.

Ms. Linda Duncan: Right, but you have increased the maximum and minimum penalties. Did you not do any costing? Surely there must have been some kind of economic rationale for why you imposed the minimum or maximum as opposed to.... Is it not considered a deterrent if you didn't do any assessment? I'm trying to figure out how you came to the determination of what the new maximum and minimum would be.

Ms. Sarah Cosgrove: The amounts found in the tiered fine scheme apply broadly across the entire Canadian Environmental Protection Act as well as the other nine statutes amended by the bill. We did look at a number of factors. Primarily we based those new fine ranges on an Ontario model. We looked across Canada at where the maximums and minimums were, and we based our maximums on the Ontario model.

Ms. Linda Duncan: You didn't do any specific costing. Yes or no.

Ms. Sarah Cosgrove: As I said, we looked at other models to determine it.

Ms. Linda Duncan: Thank you.

● (1015)

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you very much for those informative replies.

We're now ready to proceed with clause-by-clause consideration of the bill pursuant to Standing Order 75(1).

Is it my understanding that all of you, or some of you, will be staying for clause-by-clause?

Mrs. Renée Caron: Mr. Chairman, Ms. Cosgrove, Ms. Tingley, and I will be staying. I think Mr. MacCallum would take his leave of the committee unless the committee felt that the issue of due diligence needed to be explored further.

The Vice-Chair (Mr. Francis Scarpaleggia): I have no objection, unless someone else does.

Thank you, Mr. MacCallum, for your insight.

Please bear with me. I've never done clause-by-clause in this position, so I'm relying a great deal on Mr. Côté, our legislative clerk.

[*Translation*]

Pursuant to Standing Order 75(1), clause 1 is reserved.

I shall call clause 2.

Mr. Warawa.

[*English*]

Mr. Mark Warawa: Chair, Bill C-16 is a huge bill, but there's a suggestion of how to deal with it efficiently. Maybe the legislative clerk can give us some guidance.

If we were to begin with "Shall clauses 2 to 11 carry?", we could deal with that in a lump, because there are no amendments proposed to any of those clauses. The first amendment deals with clause 12, and then we can deal with the amendment. I don't know if there's consensus support to move that way, quickly and efficiently.

[*Translation*]

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Bigras, go ahead.

Mr. Bernard Bigras: I understand how Mr. Warawa wants to proceed, but it seems to me the rules don't allow us to adopt clauses in blocks. We consider them clause by clause. It can go quickly. I insist that we proceed with a clause-by-clause consideration, not by blocks of clauses.

The Vice-Chair (Mr. Francis Scarpaleggia): Shall clauses 2 to 11 carry?

(Clauses 2 to 11 inclusive agreed to)

The Vice-Chair (Mr. Francis Scarpaleggia): We now turn to clause 12.

(Clause 12)

The Vice-Chair (Mr. Francis Scarpaleggia): The Bloc Québécois is moving an amendment.

Mr. Bigras, do you wish to read your amendment?

Mr. Bernard Bigras: Thank you, Mr. Chairman. I move that Bill C-16, in clause 12, be amended by replacing lines 5 and 6 on page 9 with the following:

perpétration de l'infranction;

There's a minor correction to be made here, because it's written "l'infranction".

The Vice-Chair (Mr. Francis Scarpaleggia): Have you finished?

Are there any comments?

Mr. Woodworth.

[*English*]

Mr. Stephen Woodworth: First, as a point of order, does one ordinarily ask the mover to speak in favour of the proposition, or should I begin without hearing that? I don't know what the usual procedure is.

[*Translation*]

The Vice-Chair (Mr. Francis Scarpaleggia): Do you want to say anything else?

Mr. Bernard Bigras: I began by introducing it. The purpose of this amendment, Mr. Chairman, is to ensure that the aggravating factors which the court must consider include, among others, the fact that the offender has failed to take reasonable steps to prevent the offence.

We would delete, at line 5, the following words: "despite having the financial means to do so". Some NGO representatives appeared before us and said that it would be difficult to demonstrate the financial means of a business. Where aggravating factors are concerned, we should take into account the fact that the offender has failed to take reasonable steps to prevent the commission of the offence, quite simply, and not talk about financial means.

● (1020)

The Vice-Chair (Mr. Francis Scarpaleggia): Would other committee members like to speak to this point?

Mr. Woodworth, go ahead please.

[*English*]

Mr. Stephen Woodworth: *Merci beaucoup*. The thing to understand about this is that it applies only to the question of what a judge will consider aggravating. The lack of taking reasonable steps is a lack of due diligence, and that alone is required to convict in every case. If you remove the words that Monsieur Bigras has requested, all that's left, in effect, is a failure to take reasonable steps or a lack of due diligence, and that section would no longer have any reason for existence because in every case there must be a lack of due diligence in order to convict. In that sense, it's not an aggravating feature, it's a feature of every conviction.

What the section as it's presently worded intends to do is to say that everybody who is convicted has failed to take due diligence or reasonable steps, but if you have a larger financial means and you still fail to take due diligence or reasonable steps, then that's aggravating. Companies that have greater resources and fail to use them should be treated more harshly, if you will, than companies that do not.

That's why those words are there. Without those words, you could as easily strike that whole subparagraph. I think it makes sense that the offender's ability to take reasonable steps may be considered an aggravating feature, so I'm opposed to the motion.

[*Translation*]

The Vice-Chair (Mr. Francis Scarpaleggia): Are there any other remarks?

Mr. Bigras, go ahead.

Mr. Bernard Bigras: I agree on the first part of what Mr. Woodworth said. We believe in due diligence, but we don't think that should be a factor regarding the financial means of the business. That shouldn't be considered with regard to aggravating factors.

The Vice-Chair (Mr. Francis Scarpaleggia): Are there any other comments?

Mr. McGuinty, go ahead.

[*English*]

Mr. David McGuinty: I'm sorry, I don't know how far apart we are on this. Can we get a better understanding here from both sides? Mr. Woodworth, I don't understand what you're telling us, and I don't understand what Monsieur Bigras' concern is. Can you please repeat, *en français simple*, in plain English, please, what your differences are? This is through you, Mr. Chair.

Mr. Stephen Woodworth: The words in question are the only words that make a difference to paragraph (d). Due diligence is required for any conviction, therefore there is no need to consider lack of due diligence to be aggravating. Of course it's aggravating, otherwise there would be no conviction. But it's not particularly more aggravating in one case or another. What is particularly aggravating, however, is if an offender has a greater financial capacity. Financial capacity has always been considered to be important in sentencing. If you have a greater ability to look after these things and you don't, then it's aggravating. If you take that out, you might as well strike the whole subparagraph, because mere lack of due diligence is required for every offence. There's nothing more or less aggravating about it in any given case; it's the means to take action and not using those means that makes it more or less aggravating.

● (1025)

[*Translation*]

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Bigras, over to you.

Mr. Bernard Bigras: I'd like to ask the official why financial means were included in aggravating factors.

Mrs. Renée Caron: That's the way it has been in common law for a long time now. This is a codification of what exists in common law.

Moreover, if you delete the words “despite having the financial means to do so”, as Mr. Woodworth mentioned, that will make it so this clause on aggravating factors will not really make any sense because the question of due diligence applies where there is a determination of guilt, not at the time of sentencing.

Mr. Bernard Bigras: I am prepared to withdraw my amendments, Mr. Chairman.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you.

Mr. Trudeau, over to you.

[*English*]

Mr. Justin Trudeau (Papineau, Lib.): Basically, one of the things we're establishing is that one of the many aggravating factors would be that someone has extraordinary resources—a significant amount of financial resources—and didn't act responsibly despite that. There's not really a possibility here that someone would say it can't apply to them because they can't pay the minimum fine. I think that is the point that was brought up by some of the witnesses a few weeks ago.

Is that more or less a read on that?

Ms. Sarah Cosgrove: You're correct. This would be a separate consideration from the determination of undue hardship—I think that's what you're getting at—and then the exemption of the minimum. Yes, this would be separate. You're correct.

[*Translation*]

Mr. Francis Scarpaleggia: Indeed, Mr. Bigras wants to withdraw the amendment, but the unanimous consent of the committee is required to do so.

Does everyone agree to allow Mr. Bigras to withdraw his amendment?

(Amendment withdrawn)

Mr. Francis Scarpaleggia: In view of the fact that that amendment was related to amendments BQ-3, BQ-5, BQ-7, BQ-9, BQ-11, BQ-13 and BQ-15, I imagine that those other amendments will thereby be withdrawn as well.

(Amendments withdrawn)

The Vice-Chair (Mr. Francis Scarpaleggia): Shall clauses 12 to 16 carry?

(Clauses 12 to 16 inclusive carried)

The Vice-Chair (Mr. Francis Scarpaleggia): We are now on clause 17. The government is introducing an amendment.

(Clause 17)

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Warawa, do you want to introduce the amendment?

[*English*]

Mr. Mark Warawa: Chair, the amendment is that Bill C-16 in clause 17 be amended by replacing lines 32 to 35 on page 23 with the following: (5.1) Paragraph 66(1)(m)

Would you like me to read the whole text?

The Vice-Chair (Mr. Francis Scarpaleggia): Sure.

Mr. Mark Warawa: In the English version of the act, paragraph 66(1)(m) is replaced by the following:

> directing the offender to pay, in the manner prescribed by the court, an amount to an educational institution for scholarships for students enrolled in studies related to the environment;

And under subclause 17(6), paragraph 66(1)(n) of the act is replaced by the following....

The Vice-Chair (Mr. Francis Scarpaleggia): Would you like to explain the amendment?

Mr. Mark Warawa: I'll have Mr. Woodworth elaborate.

Mr. Stephen Woodworth: Mr. Chair, one of the things the bill attempts to do is to make the sentencing options that are available to judges uniform across a number of the acts that are being amended. In the course of reviewing the bill after it was tabled, it was discovered that some of the sentencing powers that were intended to be made uniform were in fact left out of parts of Bill C-16. So this is a housekeeping thing.

We're now in the area of the Arctic.... I'm sorry, I've lost track of the name of the act, but it's the Antarctic waters act or something like that. In this particular act, the amendment of Bill C-16 inadvertently left off an ability for the judge to direct an offender to pay an amount to an educational institution for scholarships for students enrolled in studies relating to the environment. It was an inadvertent omission, and because we're trying to give uniform powers to judges for all of these acts, it should apply to this act as well as to others. In fact, that provision was omitted from some of the others too, so we're putting it in to ensure that there's uniformity.

These studies that are related to the environment can include, for example, a broad array of subject matters, including biology, geography, engineering, and other disciplines, and the term that was used in Bill C-16 in fact only referred to environmental studies. So we have broadened that out to "studies related to the environment" in order to make it consistent and broad across the board.

● (1030)

The Vice-Chair (Mr. Francis Scarpaleggia): Would anyone like to raise an issue?

Mr. McGuinty.

Mr. David McGuinty: Madam Caron, Mr. Woodworth has just said this is going to make uniform what now exists in a number of other statutes being affected by this bill. Is that the case?

Mrs. Renée Caron: We are trying to spread a full suite of creative sentencing options across all of the statutes. As Mr. Woodworth indicated, the change is to broaden the wording from "environmental studies" to capture studies related to the environment in biology, geography, and engineering. The current wording could be slightly narrower, so the proposal is to ensure that it is broadly applicable.

Mr. David McGuinty: So how many of the eight primary statutes being amended here already speak to the notion of allowing courts to order offenders to pay for educational funding?

Ms. Sarah Cosgrove: There are two or three, but I'm verifying that.

Mr. David McGuinty: How many are being amended? Take your time.

Ms. Sarah Cosgrove: Three already do, and there are proposals to ensure that all nine being amended by Bill C-16 contain this provision.

Mr. David McGuinty: So all nine will be made consistent with this wording?

Ms. Sarah Cosgrove: That's right.

Mr. David McGuinty: Do you have any idea how much money we're talking about?

Ms. Sarah Cosgrove: This is a discretionary power, so it would be very case specific. In addition to this order power, the judiciary would have a suite of creative sentencing tools. It would be at the judge's discretion.

Mr. David McGuinty: I understand.

Previous to this bill, how many of these statutes contained this discretionary order?

Ms. Sarah Cosgrove: I'm aware of three, although it said "environmental studies" as opposed to this broader wording.

Mr. David McGuinty: Do you know how often it was used and how much money was involved?

Ms. Sarah Cosgrove: I would have to find an example of that for you. I don't know that off the top of my head.

Mr. David McGuinty: Is the phrase "studies related to the environment" defined anywhere?

Ms. Sarah Cosgrove: That term will be left for the judiciary to interpret. Given that environmental studies is an actual academic field, it was felt that it was best to broaden the language to allow additional consideration by the judiciary.

Mr. David McGuinty: Presumably the discretion would be with the judge to decide, for example, whether this money could be allocated to colleges, universities, high schools, apprenticeships, work placements, co-ops, research and development, or laboratories.

● (1035)

Mrs. Renée Caron: It would have to be to an educational institution, so I don't think it could go to employers. There is a separate provision in the full suite on an order of funds to research.

Mr. David McGuinty: Do you think it would be helpful for judges, who interpret this with their discretion, to be given more guidance? If I were taking this in its plain English meaning and were told that I had discretion, "studies related to the environment" could embrace pretty much all of what I've just enumerated, but they're not necessarily affiliated with an educational institution.

Mrs. Renée Caron: It would be specific to the establishment of a scholarship. Certainly guidance could be provided by the prosecutor to request that this type of order be made with some specific requests that might relate to the offence at hand. It would allow a flexible regime that could be tailored to the specific situation at hand.

Mr. David McGuinty: I hear you. I'm still a little worried about it.

For example, would a judge be able to allocate these resources to the guild that was represented here last week, to help the industry and the labourers involved in the industry take cooperative courses or take additional training or to become better versed in the new environmental standards that we're trying to bring to bear here? Would that be included?

Mrs. Renée Caron: That's not the purpose of this particular provision, because this would go to an educational institution. If this order were made, it would be for funds to go to an educational institution, not to the guild, for example.

Mr. David McGuinty: A hairdressing school would be included, would it?

Ms. Sarah Cosgrove: Studies must relate to the environment.

Mr. David McGuinty: I'm not being facetious, I only want to get a sense here. We want to make sure this is actually being directed to the right.... I mean, if you're learning how to handle toxic materials in a hairdressing salon school, that's related to the environment.

Mrs. Renée Caron: I think it would be for an educational institution, so it can't go to a hair salon or to an employer or to a business. It has to go to an educational institution. Mr. Chairman, I believe the member mentioned colleges and perhaps universities. So it could be those types of organizations to which these kinds of awards could be directed, and it would have to be for a scholarship.

Mr. David McGuinty: Well, I'm more concerned because.... I can't remember the statistics, but my recollection is that roughly 80% of high school graduates don't go on past high school, so they would be excluded from receiving any benefits, as we try to drive up environmental awareness, environmental training, shop steward training, millwright training, all of the things that go with the front-line application of environmental standards and environmental enforcement. I'm simply trying to see if we can broaden this somehow and try to get a better understanding.

I mean, it's fine to direct this to a scholarship form in college and university, but you're not going to catch the majority of Canadian society.

[*Translation*]

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Bigras.

Mr. Bernard Bigras: Thank you, Mr. Chairman.

This amendment is quite vague. Did you speak to the universities and provinces before introducing this amendment? It's somewhat paradoxical to give the judge discretion to pay the money directly to the universities.

Mrs. Renée Caron: Mr. Chairman, this amendment concerns a provision that appears in three current acts. We'd have to go back to the start to see, but at the time Bill C-16—

Mr. Bernard Bigras: You've already told us that. We're examining an amendment. I suppose that, if there's an amendment, there is consultation. Were the provinces and universities consulted before this amendment was introduced in committee?

● (1040)

[*English*]

Ms. Sarah Cosgrove: We did have extensive discussions with federal prosecutors and they did see our proposals. I don't recall a specific example where this particular provision was used, but I believe we were given some. I simply don't remember the details. And there were no issues raised; the prosecutors have never seen this provision used too broadly.

[*Translation*]

Mr. Bernard Bigras: I understand that the choice of educational institution will be left to the judge's discretion. How will the funds be paid to the University of Ottawa, which is offering an environmental specialty, rather than to the Université de Montréal, which has a department of environmental sciences? Will the judge make that decision? Based on what criteria?

[*English*]

Ms. Sarah Cosgrove: I can add, Mr. Chair, that I guess the discretion is with the judiciary. The judiciary bases decisions on material presented at the time of sentencing by prosecutors and the defence.

In addition to the text of that actual order clause, that clause falls under the chapeau of the order power. I have in front of me the Canadian Environmental Protection Act chapeau, which gives additional direction to the courts—not the Antarctic Environmental Protection Act. As an example, this section says:

> Where an offender has been convicted of an offence under this Act, in addition to any other punishment that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects...

This is one of those order powers available under that section. So the judge is bound to have regard to the nature of the offence and the circumstances surrounding the offence and to tailor, again, the order to those considerations, in addition to being bound to direct an amount to an educational institution for scholarships.

The Vice-Chair (Mr. Francis Scarpaleggia): I have Ms. Duncan, Mr. Woodward, Mr. McGuinty, Mr. Trudeau, and Mr. Ouellet.

Ms. Linda Duncan: Mr. Chair, I'd actually like to speak in defence of the amendment.

I'm glad that the words “relate to the environment” are added in, if I'm correct that they are. I think that is a good addition. But I'd like to repeat the same concern I've had all along. We are reviewing statutes with blinders on, without any comprehension or direction from the various departments or the Department of the Environment on how they intend to apply these provisions or how they have applied them in the past.

I happen to have personal information, from my own experience, in knowing how these provisions are used, but I think it's really important for us to have the information from the government on how this would be applied and how it is going to be made useful. Even though the law has to rely on the word of the law itself, I think it's helpful if we have the context.

For example, will the enforcement officers be conferring with and advising the prosecutor, in the case of a penalty, on their recommendations for where the money should go? Normally that's the case. When these laws first came into effect, that wasn't the case, but now both the provincial and federal agencies have evolved so that in fact they do think ahead. They do provide advice to the crown, and in turn, the crown provides advice to the judge.

But we're looking at this as a blank slate. I'm presuming that in practice something like this is going to occur. I happen to know that at least one region of Environment Canada has thought ahead and actually has a running list of organizations and individuals that might benefit from sentencing. But I think it would be helpful to have a framework around how it's intended that this is going to be applied and made sensible.

Otherwise, I'm fully in favour of adding in that phrase. I think it's completely appropriate.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you, Ms. Duncan.

Mr. Woodward.

Mr. Stephen Woodworth: Thank you.

Since we're here to decide whether or not to enact this amendment, we need to be very clear about the consequences of not enacting it. If we do not approve this amendment, then it means, in this case for the Antarctic Environmental Protection Act, that a court will have no explicit ability to direct money for scholarships. The wording of the Antarctic Environmental Protection Act will then be out of sync in terms of enforcement with all the other acts we're amending, or at least with the three that have been mentioned, which already contain this or a similar provision. I don't see any reason in the world why we would not want to give at least some ability to a judge to order scholarships, although I take some of the comments that perhaps on another day, if we did a comprehensive study of all the environmental enforcements that have occurred in Canada, we could get a notion of what kinds of scholarships might be useful, to whom, and where. I don't think it's our job as legislators to try to do that, quite frankly.

That leads me to my second point, which is that what we're trying to do here is enable or empower the court to find creative applications for this law. It was mentioned by the officials that we're trying to give them a suite of creative powers. We are not trying to lay down in tracks every detail of what they must do. I'm happy to say that in Kitchener some of the most creative judicial solutions have been crafted by judges acting under these kinds of general provisions. I think we should empower the court to do that and then we'll come back and see.

The alternative measures we have now in our Criminal Code and Youth Criminal Justice Act originally were the result of creative judicial work, and after 10 years of practice and working out the details they were codified. Maybe we'll come back and codify some of this, but right now we're just giving judges a little more free rein.

● (1045)

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. McGuinty, Mr. Trudeau, and Mr. Ouellet.

Mr. David McGuinty: Mr. Chair, I don't see this as an all-or-nothing proposition. The fact that judicial activism, as decried by many colleagues of Mr. Woodworth in his own caucus, has been codified and is leading to creative outcomes is a good thing.

Ms. Cosgrove, what other discretionary allocations can judges make now? What choices can they make other than allocating money to scholarships for studies related to the environment?

Ms. Sarah Cosgrove: Your question has a complicated answer, in that it's inconsistent across the statutes. We compiled the comprehensive list in the overview we distributed on the first day of consideration of Bill C-16. It's on page 23 of that document. We can pass that page around in both languages, if that assists the committee.

Mr. David McGuinty: What is the page you pointed out?

Ms. Sarah Cosgrove: It's a list of the suite of creative sentencing tools. I can go down that list, but I could also hand it out as well.

Mr. David McGuinty: Would that list be consistent throughout all these amended statutes?

Ms. Sarah Cosgrove: It's consistent with the proposals between Bill 16...and the government motions would then ensure consistency of all nine statutes and that they reflect this list.

The Vice-Chair (Mr. Francis Scarpaleggia): If it's in both languages. we can get that and distribute it.

Do you have more questions?

Mr. David McGuinty: I'll just wait for the witnesses to be ready.

The Vice-Chair (Mr. Francis Scarpaleggia): I notice, Ms. Cosgrove, that you're consulting quite frequently with the lady at the desk. Would it be easier for you if the person at the desk whom you're consulting with joined you at the table? It's up to you, but she's free to be here.

She needs the table for all her papers. I understand.

● (1050)

Mr. David McGuinty: Yes, I just need a minute to look at this list. I hope all of us do.

The Vice-Chair (Mr. Francis Scarpaleggia): We'll take a couple of seconds for each member to look at the list.

Mr. Warawa.

Mr. Mark Warawa: Mr. Chair, it appears that there's concern with this clause, and we may need to have some sober second thought on this. If we were to defer this and then come back and deal with it again maybe at the end—-

The Vice-Chair (Mr. Francis Scarpaleggia): At the end of the process, do you mean?

Mr. Mark Warawa: Yes, at the end of the process. That would give us a chance to move on.

The Vice-Chair (Mr. Francis Scarpaleggia): Okay. However, I do have some speakers who want to speak on this.

Mr. David McGuinty: I think it would be helpful to elucidate more comments so that the government could make—

The Vice-Chair (Mr. Francis Scarpaleggia): Why don't we get to Mr. Ouellet after you and Mr. Trudeau?

Mr. David McGuinty: I think it would be useful. That way the government can take back some of the elucidated notions and perhaps look to amend or move forward.

Madame Caron, I want to go back to one specific idea. We're desperately trying in this country, at the federal and provincial levels, to enhance apprenticeships and training programs to deal with skills shortages, many of which are not actually executed by colleges or universities; they're done through accredited programs usually overseen by provinces, through labour unions, through trades, organizations for carpenters and plumbers, by accredited associations, and so on and so forth. They would be excluded from this. It's there on the front lines, in my experience, that we need so much more training. We have institutes of the environment and ecological economics springing up in universities in Montreal, Victoria, Ottawa, and right across the county, which are often well resourced. Certainly they were under the previous government.

I'm just trying to get a sense of whether or not you have thought about giving the judge a bit more latitude here to say we'd like to expand this beyond scholarships for colleges and universities.

Mrs. Renée Caron: Mr. Chairman, I think that would be a fair comment.

The Vice-Chair (Mr. Francis Scarpaleggia): Thank you.

Mr. Trudeau.

Mr. Justin Trudeau: My issue is the same

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Ouellet.

[*Translation*]

Mr. Christian Ouellet (Brome—Missisquoi, BQ): Mr. Chairman, if a fine that has to be paid for scholarships at a university still isn't paid after three years, what happens? Does the university have to file suit to get the money that has been awarded to it? Who will do that?

[*English*]

Ms. Sarah Cosgrove: If the order was not carried out, there would be a court procedure to ensure that the amount of money was remitted to the university. So it would be the federal prosecutor who would have to get involved at that point in time, not the university.

[*Translation*]

Mr. Christian Ouellet: Thank you.

I want to raise another point. It seems to me that a lot of pressure is being put on judges to decide where that money will go, whereas they don't all have a pan-Canadian line of thinking with regard to the environment. Will they favour the people they know? Wouldn't it be preferable for that choice to fall to the government, which has an action plan for environmental research and scholarships, etc.?

The government could follow its action plan instead of it being left to chance, without it necessarily involving the most important people. In other words, a fuel oil spill could occur in the St. Lawrence River, for example, and the judge could decide to award money from the scholarships to the oil companies, since they had the misfortune to make the oil. That could be highly irrational. As in the case of foundations that have tax deductions, the government takes away the right to continue its action plan and assigns it to individuals who are not aware of its long-term plans.

The Vice-Chair (Mr. Francis Scarpaleggia): In the case you referred to, one might perhaps want to pay the money to the St. Lawrence Centre, for example.

Mr. McGuinty.

● (1055)

[*English*]

Mr. David McGuinty: I'm sorry, Mr. Chair, but there's something else that I failed to raise a moment ago.

In the list here, Madame Caron and Ms. Cosgrove, there is no discretion for the judge to allocate what could be very considerable fines to any kind of fund that would permit intervenor funding, which is....

You're caucusing, and that's fine. I just want to finish my comment, if I could.

It's very well known internationally in environmental enforcement and prosecutions and causes of action legally that intervenor funding is often made available—at the provincial level in this country, state level in the United States, and federally. I don't know if the government is ideologically opposed to this notion. I think they have been around the funding.

What was that funding called again? It was funding that was drawn on for the Montfort Hospital, for example. Does anyone recall?

The Vice-Chair (Mr. Francis Scarpaleggia): Yes, it was the court challenges program.

Mr. David McGuinty: Right.

With court challenges, it was the notion of funds being made available to either enforce charter rights or refine charter rights. For some, they may believe they're inventing charter rights, I don't know.

There has been a tradition in environmental improvements worldwide to occasionally use these resources, these fines, for the participation of environmental NGOs, for example, or community groups as environmental intervenors in legislative processes. They could be regulatory, they could be legal, they could be court based, they could be causes of action, they could be criminal, they could be civil.

Has there been any thought given to that? Now that we're in the business here of trying to tighten up these discretionary options that we're giving to judges, is that not something we ought to be considering?

Mrs. Renée Caron: Mr. Chairman, I think it would be fair to say that none of the elements of the full suite of sentencing apply in relation to funding for intervenors, so I think that is certainly an accurate point.

To my understanding of how this was pulled together, it was to bring all of the existing types of creative sentencing under the various nine statutes together, which then creates the full suite. Then we look at putting that across those nine, so that they have the full suite.

I would just mention, because I don't want to lead the members into error, that a couple of these are particular to CEPA only and don't go into other statutes. Those are the pollution prevention plans and the environmental emergencies. They were put in only some of the other statutes where they could reasonably apply, but those two were not put across all nine statutes.

Mr. David McGuinty: But the government has opened the door here. In its amendment, it's opening the door to the reconsideration of all the elements of discretion that it wants to allocate to judges.

Now that we've opened the door, and you've confirmed that there is no explicit reference to intervenor funding, it's something that we can countenance if we take this thing forward. At the back end of this clause-by-clause, we could consider, for example, intervenor funding to help push along the judicial, regulatory, and other processes and allow for the fuller participation of community groups and other parties. Am I right?

Mrs. Renée Caron: I'm sorry, Mr. Chairman, my conferring with my colleagues has interrupted my train of thought.

Could you please repeat the last part of your question?

Mr. David McGuinty: The government has opened the door, in proposed paragraph 21(1)(g.1), to the whole notion of trying to correct and get better the discretion amongst these nine statutes being amended. Am I correct? That's what we're talking about here?

As Mr. Woodworth indicated, we're trying to not perfect but to improve, to bring uniformity across these statutes. Now that we've opened the door and we're examining this, then this is an interesting opportunity for this committee to examine other forms of discretion that might be indicated to the judiciary through these amendments. Correct?

We can get this much better, can't we?

● (1100)

Mrs. Renée Caron: It certainly is in the hands of this committee to determine what the content would be, as to the motions it decides to pass.

Mr. David McGuinty: Thank you, madame.

The Vice-Chair (Mr. Francis Scarpaleggia): We barely have a minute left.

Ms. Duncan, please.

Ms. Linda Duncan: We're talking apples and oranges here. First of all, I note that there is a very minor change, from “environmental studies” to “studies on the environment”. The bill was put forward to make them uniform, and it is troubling that the government didn't take the time to do what Mr. McGuinty is alluding to, which is.... Why were not all of these innovations and sentencing applied to all the statutes across the board?

Frankly, what troubles me most is that consideration is not being given to the Fisheries Act, the dilatory substance of which provisions are enforced by Environment Canada and are also very broad. One of the points I wanted to make, in the vein that Mr. McGuinty is raising, is civil proceedings. You don't intervene in a criminal prosecution. In some cases, there are private prosecutors. Indeed, that is exactly the amendment that I have put forward and to which I will be speaking shortly, and that is making all of Environment Canada's statutes—the statutes that they enforce—uniform, and uniform to what is provided for in the federal Fisheries Act. That deals with giving the courts the opportunity to apportion a portion of the penalty to the private prosecutor.

I think that's probably what you're trying to delve into. The enforcement statute is not where you deal with intervenor costs. That would be dealt with in another...or even intervening in a civil action or judicial review. It would not occur in a criminal court. But if I'm correct, I think you're alluding to the fact that in some cases there are private investigators who file the charges and then the government takes over the prosecutions. In some cases, private prosecutors actually prosecute. Under the Fisheries Act, there has been a very laudable provision where, if they conduct that prosecution, they have the potential to get half the fine. I will be speaking to that, because that is precisely my provision.

The one thing I do object to is that I do not want the scope narrowed to colleges and universities. In my province, we have technical institutes that do a lot of the training in the area of environmental reclamation, spill response, and so forth. I am quite content with keeping it broad, on the basis that the department will continue its process and embellish its process of having the investigators make recommendations to the crown, in turn making recommendations to the judge.

The Vice-Chair (Mr. Francis Scarpaleggia): I have Mr. Bigras, Mr. Trudeau, and Mr. Warawa.

Can we do this quickly, because it's already 11 o'clock.

[*Translation*]

Mr. Bernard Bigras: It's 11 o'clock and I believe we are coming to the end. However, at the outset, Ms. Duncan was in favour of the amendment. From what I understand, she would like it to be expanded.

Going back to the question Ms. Duncan asked about 15 minutes ago, has the department produced a list of institutions considered as educational institutions? If the judge's decision concerns an educational institution, there should be a list of such institutions. That was Ms. Duncan's question at the outset.

The Vice-Chair (Mr. Francis Scarpaleggia): Please be brief, Ms. Caron.

Mrs. Renée Caron: Mr. Chairman, we don't have a list in hand corresponding to the definition of the term educational institution. However, we can provide examples from a case study or existing precedents. However, even though there is no definition, the term is open enough for a judge to be able to determine whether one institution fits the concept.

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Bigras.

Mr. Bernard Bigras: An example can be provided; that's always highly relevant. However, if we agree to this amendment, the judge will nevertheless have to be guided. That's what's important. We want to do some research to determine what is considered to be an educational institution, particularly in Quebec. You're no doubt able to do that kind of research as well.

The Vice-Chair (Mr. Francis Scarpaleggia): That's a good point.

Mr. Trudeau.

Mr. Justin Trudeau: I'll speak next time.

The Vice-Chair (Mr. Francis Scarpaleggia): Mr. Warawa.

[*English*]

Mr. Mark Warawa: I have only a closing comment, Mr. Chair.

I'm okay with the amendment that's being proposed. It broadens it. I think we're at the point now where we either vote on this or, if there are still concerns that need to be dealt with, I think we need to defer it to the end, so we can move on.

● (1105)

The Vice-Chair (Mr. Francis Scarpaleggia): Let's defer it.

Yes, Mr. McGuinty.

Mr. David McGuinty: I think we'd probably agree that it would be.... We've agreed to defer this.

The Vice-Chair (Mr. Francis Scarpaleggia): Yes.

Mr. David McGuinty: I do want to make the point that we cannot rush through this bill. We're going to have to take the time we need to go through this bill clause-by-clause. It's our job.

As Mr. Woodworth knows, we can't necessarily rush through this. If we're going to come across some of these, we may have to punt these to the back end and come back to them in due course.

The Vice-Chair (Mr. Francis Scarpaleggia): Yes, Mr. Bigras.

[*Translation*]

Mr. Bernard Bigras: Mr. Chairman, I want to assure the government that these are not dilatory manoeuvres on our part. We are engaged in conducting this consideration as quickly as possible, but when we need explanations, it's essential that we get them. It should not be forgotten that we have carried 11 clauses thus far. Things are going relatively quickly.

The Vice-Chair (Mr. Francis Scarpaleggia): There is an adjournment motion. So, if you agree, we will see each other on Thursday at 9:00 a.m.

The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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