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Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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•(1140)

[English]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): I'll call the meeting to order.

Due to the votes, obviously it's later than this meeting was scheduled to begin, this being meeting 37 of the Standing Committee on Justice and Human Rights.

Pursuant to the order of reference of Wednesday, February 29, 2012, we are considering Bill C-299, An Act to amend the Criminal Code (kidnapping of young person).

We had scheduled Mr. Wilks, sponsor of the bill, for 11 o'clock. Due to the time, it's agreed that we will have forty minutes for each session as opposed to one hour.

Mr. Wilks, if you have an opening address, go ahead and give it to us. I think in general it's five to seven minutes. We'll let you know when you're getting close to the end of the time.

Mr. David Wilks (Kootenay—Columbia, CPC): Thank you, Mr. Chair.

I would like to thank the committee for having me here today as discussion begins on my private member's bill, Bill C-299, which would invoke a minimum mandatory penalty for the kidnapping of a child under the age of 16 by a stranger.

I would like to call the committee's attention to paragraph 279(1) (a) of the Criminal Code, which says:

- (1) Every person commits an offence who kidnaps a person with intent
 - (a) to cause the person to be confined or imprisoned against the person's will;

Further, paragraph 279(1.1)(a) says:

- (1.1) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable
 - (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of
 - (i) in the case of a first offence, five years, and
 - (ii) in the case of a second or subsequent offence, seven years;

The committee should know that most kidnappings involving children do not involve a firearm, nor do they involve a criminal organization. The child is either lured or physically manhandled. Unfortunately, the act of kidnapping is the forgotten crime under normal circumstances.

Kidnapping of a child in Canada is a rare occurrence; however, each incident tends to shock the nation. When a child is kidnapped and it is reported by the media, it is usually a report of the most severe kind—a child is taken from their home, yard, or bed and kept for ransom and/or sexual exploitation, and sometimes murder.

As most of the committee will know, I am retired from the RCMP and served between the years 1980 and 2000. During that time, I can speak to two child kidnappings, and a third while a member of Parliament.

Michael Dunahee, who was born on May 12, 1986, disappeared from the Blanshard Street playground in Victoria, British Columbia, on March 24, 1991. He was four years old. He has never been found. His parents were mere metres away when Michael was taken. His mother, Crystal, was instrumental in getting the amber alert program implemented in British Columbia. She also serves as the president of Child Find for British Columbia.

Police officers from across Canada were kept on alert for months and years after Michael's disappearance. It moved so many people from across Canada to volunteer their time to search for Michael. I can still close my eyes today and see the posters of young Michael Dunahee.

Mindy Tran was kidnapped and murdered in Kelowna in 1994. As a member of the RCMP stationed in Penticton at the time, I was part of an enormous search team assembled to search for her. The fear that gripped the city of Kelowna was very noticeable. For a young child at the tender age of eight years old to be riding her bike on her street and to vanish without a trace is something that no parent should be subject to. Mindy was found six weeks later, not far from her home, in a shallow grave.

The third and final child I would like to speak of is Kienan Hebert. Taken from his home in Sparwood, British Columbia, Kienan was three years old. It was the middle of the night, and he was taken from his bedroom while the rest of his family slept. For four days, the people of the Elk Valley, the country, and international community were focused on the safe return of Kienan to his parents and family. Through the efforts of so many—and, may I add, some very good police work—Kienan was returned and his alleged kidnapper arrested.

You may wonder why this is so passionate to me. In my 20 years as a police officer, I have dealt with over 200 deaths. I have done four next-of-kin notifications, and two of them were for young children. Unless you have done one, you have no idea what it is like to tell a parent their child is dead. I would not wish that responsibility on anyone in this room.

We as politicians have the obligation to ensure that we protect our children at all costs and to ensure that a crime involving a child, in this case kidnapping, reflects the severity of the crime.

• (1145)

Surely if we as politicians see fit to give a mandatory minimum sentence to a person who kidnaps another person with a firearm or is connected to a criminal organization, we ought to see that kidnapping a defenceless child is, in my opinion, far graver than the aforementioned.

Thank you for letting me speak this morning, Mr. Chair.

The Chair: Thank you, Mr. Wilks.

Madam Boivin.

[*Translation*]

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

Thank you, Mr. Wilks. You are very passionate, and we understand why it's important to you. However, it is also our role, as legislators, to ensure that what you are seeking will become a reality with the amendment.

Of the cases you dealt with during your career as an RCMP officer, was it the case of Kienan Hebert in particular that pushed you to table Bill C-299? Was that the catalyst?

[*English*]

Mr. David Wilks: Thank you for your question.

It certainly was, because with the Kienan Hebert case a unique charge came about because the child was returned safely. Very rarely does that happen. Normally we culminate the charge with a murder charge and/or a sexual assault charge, and then the kidnapping charge is either stayed or not proceeded with.

[*Translation*]

Ms. Françoise Boivin: When you prepared Bill C-299, did you go through the Criminal Code to see the different provisions that apply in a case like the one you are trying to address through this bill? Are you familiar with, for example, all the principles of sentencing? I am thinking of section 718 and the following ones, among others, of the Criminal Code.

• (1150)

[*English*]

Mr. David Wilks: Yes, I am. I certainly looked at section 281 of the Criminal Code, which already exists, with regard to abduction, with a maximum sentence of 10 years but no minimum. It befuddles me why we created section 281 when section 279 already existed.

[*Translation*]

Ms. Françoise Boivin: You talk about children of 16 and under, but why not those of 17 and under? Why start by focusing on children of 16 and under? A 17-year-old is still considered a minor, not an adult under the law. First, why focus on children of 16 and under? Second, does your bill apply to everyone, whether it is the father or the mother? Is this aimed at strangers, particularly? Who are you targeting exactly?

[*English*]

Mr. David Wilks: To answer the second part of your question first, about strangers only, certainly abduction under sections 282 and 283, which recognize parents, guardians, and/or those who are legally looking over a child, is already covered. I'm not looking at that, just at strangers.

Ms. Françoise Boivin: It could be construed as being part of it, the way your bill is written.

Mr. David Wilks: I agree with that.

What was your first question again? I'm sorry, Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: I was asking you why you were focusing on children age 16 and under rather than those 17 and under.

[*English*]

Mr. David Wilks: Thank you.

Predominantly within the Criminal Code, as we see it now, everything is based on 16 years or 14 years. I based it on the specifics that everything following in the Criminal Code normally is under the age of 16 or under the age of 14.

[*Translation*]

Ms. Françoise Boivin: You know that in section 718, and even in other parts of the Criminal Code, it is considered an aggravating factor when a child is kidnapped or confined, etc. Is that not enough for you?

To determine my position on this, I read a huge amount of case law, and I did not see sentences of less than five years, except in very exceptional cases. I wonder how useful your bill is, because sentences tend to be eight or nine years, if not longer in other circumstances. Judges are already not sympathetic to this type of case. So I have a hard time understanding the reason for introducing a minimum sentence that would practically never be applied.

[*English*]

Mr. David Wilks: Certainly under paragraph 279(1.1)(a) right now there is a recognition that if you use a firearm or you're aligned with a criminal organization there's a five-year minimum. But we don't recognize the fact that a child is normally not taken with a firearm, because you don't need one. Second, they're normally not aligned with a criminal organization. There's absolutely nothing.

We have to recognize that children are the most important thing in our society. If we want to go beyond that and say that the firearm and/or the criminal organization must be part of the affiliation of the conviction, we have to relook at what we've done.

If I may add, with regard to the laws that already exist, I'll give you a good example of where I'm going. In the Hebert case, which is coming for sentencing in two weeks, there has been an agreement between—

Ms. Françoise Boivin: The crown dropped one of the charges, which is the one—

Mr. David Wilks: The crown dropped the kidnapping charge to go with the abduction charge.

Ms. Françoise Boivin: You're not afraid that would happen even more if there is a minimum sentence—that there will be more deals between the crown and the defence?

Mr. David Wilks: I would suggest getting rid of section 281 of the code, and then you solve that.

Ms. Françoise Boivin: That's not the point of what is in front of us right now.

The Chair: I'm sorry, we're out of time.

Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much, Mr. Chair.

Thank you, Mr. Wilks, for attending with us today. I know you have a keen interest in the matters this committee deals with and often have volunteered your time to sit and observe and learn, and I appreciate your willingness to do that. I was going to begin by asking what inspired you to make this proposal, but your opening remarks were pretty illuminating on that point, in particular when as a member of the force you have to inform parents about their child's death or disappearance. I can understand that would be moving and difficult and a motivational experience, if I can put it that way, in the context of this bill.

Beyond that, I would expect that you probably drew some inspiration from the effect on your community and your constituents of the Hebert kidnapping. Since your constituents have experienced first-hand and close up the kind of problem your bill attempts to address, could you describe for us the impact of that incident on your community, and how your constituents are looking to your bill to deal with the impact of that offence?

• (1155)

Mr. David Wilks: Thank you very much for your question.

The district of Sparwood, where Kienan was taken from, is a community of 3,800 people who for the most part, like members of most small communities in Canada, understand who is in their neighbourhood and leave their doors and vehicles, etc., unlocked.

Since that event in September 2011, that community has changed. They are much more aware of the circumstances around them on a daily basis. People now drive their kids to school more than they did before. They are much more attuned to locking their doors at night, whether it be their vehicles and/or their residences. They are much more attuned to those who are not familiar to the community, and the police have found that many more calls are being brought to their attention about strangers to the community.

From that perspective, the community has lived in fear to some degree. To bring it one step further, the alleged kidnapper in this case is from the community. We never thought someone from within would do that, and as a result when that did happen, it brought another obstacle to the community—what do we do when it is someone from within whom we know very well, who was born and raised in the community, and who will come back to the community? What do we tell our children about that person?

Mr. Stephen Woodworth: How have your constituents reacted to the bill you've tabled? How has the scuttlebutt affected the situation?

Mr. David Wilks: Certainly people are happy to know, with regard to this bill specifically, if a person is charged and convicted of kidnapping a child under the age of 16, there would be a minimum jail sentence.

I'll be the first to concede that incarcerating a person for a lengthy period of time doesn't necessarily make them a better person, but it provides confidence to the community that the person is not in their community for that period of time.

Mr. Stephen Woodworth: The second thing I wanted to ask you about I'll just preface by saying that, of course, the government has been addressing the issue of missing children in a number of ways. One of them is the RCMP's Canadian Police Centre for Missing and Exploited Children, which also houses the National Missing Children Services and the National Child Exploitation Coordination Centre.

The government has also supported the recently launched MissingKids.ca website run by the Canadian Centre for Child Protection, a non-profit organization, and these measures are both preventive and seeking effective enforcement.

The Chair: Thank you, Mr. Woodworth. We're out of time.

Go ahead, Mr. Cotler.

Hon. Irwin Cotler (Mount Royal, Lib.): Thank you, Mr. Chairman. I also want to welcome Mr. Wilks here. I appreciate your being here to lend your experience to us, on occasion, as a member of the committee. So it's a delight to have you here as a witness.

If I heard you correctly in responding to a question of Madam Boivin, you suggested getting rid of section 281. If that is the case, why would that not have been part of your own original proposal? If the opposition were to offer that as an amendment, would you support such an amendment with respect to your particular bill?

• (1200)

Mr. David Wilks: Thank you.

To me kidnapping is kidnapping. We seem to muddy the waters from time to time. What I recognize, as a police officer, is that we ended up finding new things in the Criminal Code all the time, and we could never figure out why they were going in there. But we were the enforcers of the law, not the creators of law.

So section 281 was created at some point in time, for whatever reason I don't know. It was created and the wording is quite specific, "not being the parent, guardian or person having the lawful care or charge of a person". Well to me that just muddied the waters with regard to kidnapping. Kidnapping is quite clear—a person is taken against their will. So why section 281 was brought in and when it was brought in is probably something that someone in this room can answer better than I.

Kidnapping is kidnapping.

Hon. Irwin Cotler: This is a not-unrelated issue, but it has to do with the differences between kidnapping and abduction.

Would the differences between kidnapping and abduction justify a mandatory minimum of five years in the case of kidnapping under the age of 16 years, and a maximum term of imprisonment of five years, with no mandatory minimum, in the case of an abduction of a person under the age of 16?

Mr. David Wilks: Clearly, in my humble opinion, abduction was created to recognize the problems we have when couples separate and a child is taken by either parent and/or legal guardian against a court order that recognizes that one parent or the other has custody whether it be sole or joint. As a result of that, we need to be able to deal with that from the perspective of the Criminal Code.

What I don't understand is where section 281 came from, as I said before, because it seems to have just mirrored section 279 of the Criminal Code, except we don't want to call a spade a spade. When young children are taken by someone other than their parent, guardian, or the person who has legal authority over them, that is kidnapping. That is strictly what it is. It's not abduction; it's kidnapping.

Hon. Irwin Cotler: If the purpose of your private member's bill is one of prevention, how would your measure, which is focused on punishment, achieve this, particularly in light of the evidence we have that mandatory minimums do not deter? I'm wondering what is the value-added dimension of your initiative in that regard. Is there any evidence that kidnapping sentences in the cases of underage victims have been light or otherwise inappropriate?

Mr. David Wilks: Certainly what I have seen in my career as a police officer is that these are very rare occurrences, as we have seen with the Hebert trial dropped down to an abduction charge.

There are certain crimes within the Criminal Code and within our society that are just not acceptable, period. One would be murder. One, in my opinion, would be the kidnapping of a child. It's not acceptable, period. It's not about trying to make the person better, it's about sending a message to that person that what they've done is wrong and our society will not accept that.

I can only speak for myself. Whether it be my children or my grandchildren, certainly if someone were to take one of my grandchildren and it was a stranger, I would suggest to you that I wouldn't be looking to that person to get better. There has to be something wrong with a person who takes a child they do not know, against the child's will. But for the luck of God in the Hebert case, the child was returned, but historically that does not happen.

• (1205)

The Chair: Thank you.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Thank you, Mr. Chair.

Mr. Wilks, thank you for being here today, and bringing this forward.

I wonder if, in your research, you had determined what other like-minded countries impose for kidnapping of children. Do you have some awareness of that?

Mr. David Wilks: I do. Certainly the United States has a minimum mandatory for kidnapping of a child. Their definition of

child is different from ours. Their minimum mandatory is 20 years. They have had very good success with that conviction.

Most other countries that I am aware of have a maximum of whatever that may be. I didn't delve into what the average conviction is.

Ms. Kerry-Lynne D. Findlay: I think that in the United States they have a history going back to the Lindbergh baby, which was when the laws changed there.

Mr. David Wilks: That is correct.

Ms. Kerry-Lynne D. Findlay: That baby did not get home.

In your career as an RCMP officer, before you became a member of Parliament, I believe you had occasion to deal with several families in the unfortunate position of being victims of Clifford Olson, Robert Pickton, and others. Unfortunately, I have to say that you and I, both being from B.C., we seem to have more than our share of these criminals in our midst.

Can you talk a bit about the impact on those families when you had to deal with them when they first realized their child was gone, and then the time trying to figure out what had happened or if they might be returned, and then finding out that in fact they weren't, I believe, in any of those cases?

Mr. David Wilks: Certainly with respect to Robert Pickton, I can speak specifically about one of his victims, Angela Jardine. Angela was from Sparwood. Angela was a young girl who found her way to Vancouver and unfortunately found her way to the east side of Vancouver, and struggled for a number of years.

Her parents tried to do a lot of things for her, and tried to get her back. But I think most people in this room know that when you're struggling in life, sometimes you don't tend to listen to those who maybe you should be listening to, for whatever reason.

Angela went missing from the east side of Vancouver. Her parents were frantic to try to find her. No one seemed to know where she had gone and as a result of the investigation from the Pickton farm, she was found to be one of the victims of Robert Pickton.

I've had many dealings with the family with regard to that. To this day her mum and her sister are still very troubled with the fact that, even though Angela went down a road that a lot of us would probably not go down, they tried their best to try to bring her back but the fact of the matter is that they cannot bring her back now, even if they wanted to.

That's what I found with a lot of families, whether it was the Olson murders, or whether it was Pickton—you watch it certainly with Bernardo as well—for the people involved there is nothing left. As we speak this morning, the Tori Stafford case is going on and all those families have a victim impact statement to the offender saying, "What do we do? We're lost. What do we do?"

Ms. Kerry-Lynne D. Findlay: I was struck by your comment about the Hebert case, being that it was in your community and that, of course, the person involved is from your community as well, so there perhaps will be a time when he will be back in that community. There's at least some comfort to the affected family and community in that they know that at least for a certain amount of time he will not be out on the streets. Do you see value in that?

•(1210)

Mr. David Wilks: It certainly gives value to a community to know that the person convicted of that crime will not be returning to the community for some period of time. It gives the community some time to start determining how they are going to react when that person returns, because I can guarantee you that in this case that this person will return. It's all he knows. He knows nothing else. He can't survive out of that area.

It will be interesting to see how the community reacts when he returns, because it's troublesome for a lot of parents. They don't understand.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): Thank you, Mr. Chair.

Thank you, Mr. Wilks, for coming today and also for sharing with us some of your own experiences.

I have to thank you for your years of service. I think it's impossible to underestimate the impact of what you see during the course of your career. It's clear that the impact it must have on you is part of what motivates you here today.

I have what I hope are two relatively quick questions, and then I'd like to share my time, if I may, with Monsieur Jacob.

First, I'll start from the perspective of having a little difficulty with piecemeal amendments to the Criminal Code, so I'm wondering whether or not you had an opportunity or tried to propose this for inclusion in Bill C-10 as part of a broader scheme. If not, or if so, why did the government not include this at the time?

Mr. David Wilks: No, I did not.

Mr. Craig Scott: Okay. It didn't come up on your radar screen with the government as something to discuss at the time and try to build into that project?

Mr. David Wilks: No, it didn't. Bill C-10 had gone down the road far enough that the inclusion of this would have just muddied the waters, in my opinion. This was something that happened in September, and certainly Bill C-10 was well on its way at that point in time.

Mr. Craig Scott: September 2011, right? Okay. Thank you.

My second question is that I think partly in response to Mr. Cotler's question about the value-added and about, I think, asking you to articulate for us a bit more your principles of sentencing, or let's say, the key principle of sentencing that you embrace. You spoke about sending a message and then you also said that you would not be "looking to that person to get better".

Do I understand by this that you mean it would be inappropriate in the kind of situation you're talking about—kidnapping of a minor under 16—for a rehabilitation element to creep into sentencing, and that because of the severity of the crime, it's part of what you want to make sure is not there?

Mr. David Wilks: Certainly, rehabilitation is available to any offender, whether it be through the provincial or the federal jail

system. Whether people choose to take their rehabilitation is one thing or another.... In the provincial system, it can be forced upon them. In the federal jails, it cannot.

But what I do recognize from my years of police work is that there's a propensity for people in that type of criminal activity to start increasing the severity of their criminal activity. Also, when you get to the point of kidnapping, I believe that you're at the point where.... What form of rehabilitation are we going to provide for someone who kidnaps a three-year-old child?

Because it's beyond the kidnapping, it's "what's the problem?" The kidnapping itself is something that I do not believe can be fixed. If you've gone to the point where you're going to take a two-year-old or three-year-old child with the intent of doing something more, I would suggest that you have some severe problems.

Mr. Craig Scott: Thank you, Mr. Wilks.

Do we have more time?

The Chair: You have a minute and a half.

Mr. Craig Scott: Monsieur Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Thank you, Mr. Chair.

Thank you, Mr. Scott.

How does the mandatory minimum sentence of five years for kidnapping a person under age 16 compare to other mandatory minimum sentences in the Criminal Code, especially some sexual offences against children?

What other offences have a mandatory minimum sentence of five years?

In your opinion, do the lengths of these mandatory minimum sentences reflect the seriousness of each of these offences?

•(1215)

[*English*]

Mr. David Wilks: Certainly for the conviction of kidnapping of a young child under the age of 16, the five-year minimum is something that recognizes the severity of the crime.

With regard to sexual offences, whether it be sexual assault, sexual exploitation, pornographic material, etc., those minimum mandatories were deemed by other parliaments that were before me. I can't speak to them; I won't speak to them. From a police officer's perspective, sometimes I strongly suggest that we don't go far enough because I've seen things that most people in this room have not seen. I can tell you that there are certain offences that would sicken your stomach. Because we have the latitude in this country to recognize that the offenders are treatable, and in some cases they may be, but in some cases they aren't, and when they're not we need to send the message.

The Chair: Thank you, Mr. Wilks.

Thank you, panel.

I think we've run out of time. We ended up having to split the time.

Thank you, Mr. Wilks. The time has elapsed.

We'll take a short break to switch over to have our video conference and we'll be prepared to start over.

• (1215) _____ (Pause) _____

• (1220)

The Chair: We'll resume the meeting with the video conference with the Honourable John Major.

I understand from the clerk that you do not have an opening address and that you'd prefer that we go right to the panel and ask some questions.

Hon. John Major (C.C., Q.C, Puisne Judge of the Supreme Court of Canada, Retired, As an Individual): That's correct.

The Chair: Thank you for being with us today.

Madam Boivin.

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

[Translation]

Judge Major, it is an honour to be able to speak to you today.

As always, the Supreme Court catches us with our pants down, if you'll excuse the expression. I had my mouth full and I thought you would start by making your presentation.

I will get right to the heart of the matter. You know we are here to study Bill C-299, An Act to amend the Criminal Code (kidnapping of young person),

[English]

Hon. John Major: Yes.

Ms. Françoise Boivin: The main amendment is to introduce a five-year minimum sentence for a person under 16 years of age.

That being said, if I recall correctly, and I will try to find the quote because I wouldn't want to put words in the judge's mouth, although, as a lawyer, I've done that all my life—quoting the Supreme Court as if I understood what you said.

In an interview on CBC Radio's *The Current*, in December 2010, when asked about mandatory minimum sentences—and I hope I'm quoting you perfectly—you said no, you were not in favour. “No two crimes are the same...and you can't put the square peg in a round hole”. Minimum sentences are “an attempt to get one sentence that fits all crimes”. The goal to “rehabilitate...[and] protect society, it's not easy”. It is important to “treat the individual” case, and that section 718 of the Criminal Code sets out the reasons for sentencing and there are seven conditions.

Sometime I feel, through the committee, we've been hearing one new *projet de loi* after new *projet de loi*, and it's always the introduction of new minimum sentences. I feel we're doing it piecemeal.

I would like to get you to maybe reflect on that quote that you made at that time and how it would apply to this case, and actually, on the rebound, force you to give us some type of statement.

Hon. John Major: The difficulty with minimum sentencing is that it could conflict with the Charter of Rights as being cruel and

unusual punishment. It will only be saved if it qualifies under section 1 of the charter. That being said, this would explain why you have minimum sentences for murder that are constitutional—because section 1 saves them.

You might recall that several years ago the Supreme Court reviewed a case of smuggling narcotics into Canada, at which time there was a seven-year minimum sentence. That minimum sentence was struck down on the basis that it was unconstitutional. So, leaving aside the merits of a minimum sentence, you have the hurdle of whether or not the Charter of Rights is offended by virtue of it being cruel and unusual.

You can envisage a 16-year-old, in the particular statute that we're talking about, varying in comprehension, varying in a number of ways for which it would be desirable for the court to have some discretion.

I don't know that I can say much more on the problems with minimum sentencing, the hurdle that has to be overcome.

• (1225)

Ms. Françoise Boivin: Thank you for that answer.

The other aspect that troubles me sometimes with some of those private member's bills, when we're touching a piece of legislation such as the Criminal Code, is that we tend to pinpoint one aspect of the code, but there are sometimes other sections that seem to cover the situation. I'm also wondering whether we are not lacking in.... How can I say this?

[Translation]

I am wondering if we could not adopt a more comprehensive approach to the situation. I am thinking in particular of section 279, which they want to amend.

[English]

If you look at section 281, which seems to cover part of it, isn't there a risk of contradiction, if we start doing these piecemeal types of amendment to the Criminal Code, piece by piece?

Hon. John Major: I agree with you, and the Criminal Code has suffered because of this. The Criminal Code is not unlike our Income Tax Act. When, for lack of a better word, a loophole is discovered in the Income Tax Act, it's patched by an amendment. We have an Income Tax Act that I defy any genius to read and by doing so understand the tax system in Canada. It's impossible. You have to go section by section, and it's laborious.

We're falling into the same trap, in my view, with the Criminal Code—applying ad hoc amendments to cover one section the effect of which may be felt in other sections. So I agree with what you're saying on that. It's a big job, of course, to revise the Criminal Code. It has been some time since it has been done, but I think the time is getting close. For instance, the section you're talking about, section 279, has a number of subsections that go on and on. It just lends itself to uncertainty, and I don't think you accomplish what you hope to accomplish.

Ms. Françoise Boivin: Thank you.

The Chair: Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you, Mr. Chair.

Thank you, Mr. Judge. Thank you for your testimony and providing your insight.

You talked about mandatory minimum sentences perhaps infringing the Charter of Rights by virtue of being a cruel and unusual punishment. You then commented on how perhaps the mandatory minimum sentence for murder would survive because it was justified in a free and democratic society. Of course, we all know that murder is amongst the most heinous crimes, and I'm wondering whether the abduction of a child against its own will—you know, a vulnerable person—wouldn't fall into that category. Wouldn't that be something that perhaps could survive the criteria of what is reasonable in a free and democratic society, given the vulnerability of the victim?

Hon. John Major: I think it could. There are a number of offences that offend the public conscience, and kidnapping of children would be one. A minimum sentence might well survive section 1.

Similarly, legislation with respect to, say, child pornography or other crimes that attract public disgust might well pass the rigours of the charter. It depends on the extent to which you apply the minimum. Is five years adequate; is it proper; is two more likely?

But I agree with you that kidnapping a child has a good chance of being saved by section 1. Not all minimum sentences will fall because of the concerns over "cruel and unusual". There are crimes that I think society is prepared to accept as deserving of a minimum sentence.

• (1230)

Mr. Robert Goguen: Thank you.

During the second reading of this private member's bill, Mr. Harris, who is a former justice critic, had an interesting comment. I'd like to share it with you. It colours how, basically, an abduction doesn't exist in isolation.

He said: It is very rare to have kidnapping cases that are simply about kidnapping. Sadly, they are often in connection with other crimes, whether they be of sexual assault or, in the most horrific of cases, murder.

Of course, we had Mr. Wilks testify, and his experience as a 20-year RCMP officer was relating things that went along the lines of Stephen King movies.

Again, say that this colours the whole issue of kidnapping with regard to surviving the "cruel and unusual punishment" test, do you feel that, given the circumstances surrounding abductions, this further bolsters the notion that an attack on the charter would be sustained, in the sense that this would be reasonable in a free and democratic society?

Hon. John Major: One difficulty in dealing with people under the age of 16, and the minimum sentence for them.... I don't know how common it is for people of that age to be involved in kidnapping, but let us drop the age from 16 to 14 or to 13. Does that change the mosaic, if that's the right word? It's hard to imagine a 12-year-old being involved in a kidnapping, but it's possible; we have

seen strange things happen. Then the question arises of should a 12-year-old involved in a kidnapping be required to serve a minimum sentence of five years? Is his degree of guilt comparable to that of someone approaching adulthood at age 16? I don't know the answer to that, but for me talking about "under 16" raises a question: how far under 16?

Mr. Robert Goguen: I appreciate the comments, but if I'm not mistaken, this would not apply to young offenders; it would apply to Criminal Code offences, and so it was more in the context of an adult being subject to the full force of the Criminal Code. That is where I was directing my comments, certainly, not to a 15-year-old abducting someone.

Hon. John Major: I was looking at the proposed amendment, where it speaks, as I read it, of those under 16 being imprisoned for a minimum term of five years. That section is a little awkwardly written for purposes of reading.

Mr. Robert Goguen: What I believe it means, I might respectfully submit, is abduction of a child 16 and under, not being abducted by a child 16 and under. I understand the confusion.

Hon. John Major: Oh, I see. I wasn't clear in my own mind on that. If we're talking about the victim, that's completely different.

Mr. Robert Goguen: Yes, it's the victim.

Thank you, sir.

The Chair: Thank you, Mr. Goguen.

Mr. Cotler.

Hon. Irwin Cotler: Thank you, Mr. Chairman.

I want to welcome Justice Major. It's a pleasure to have you with us, Justice.

You mentioned the prospective constitutional hurdle of cruel and unusual punishment, though it might be safe under section 1. Now, if this were a government bill, it would be subject to the requirement of vetting under section 4 of the Department of Justice Act, whereby the Minister of Justice would have to undertake to show that such legislation is not inconsistent with the Charter of Rights and Freedoms. But as this is a private member's bill, it's not subject to that kind of vetting.

We are witnessing an increasing pattern of private members' bills being taken over by the government—becoming government bills, but without the obligation in cases of prospectively suspect provisions of the responsibility for vetting those provisions.

Hon. John Major: Well, Mr. Cotler, let me ask you, because I don't know the answer to this. What about the provisions of section 33? Let us suppose the minimum sentence was found to be unconstitutional. Couldn't the overriding provisions apply and the government pass it in any event?

• (1235)

Hon. Irwin Cotler: I would hope that the notwithstanding clause would not be the kind of option that either the federal or provincial governments would consider. This is a much more widespread pattern here.

Hon. John Major: I agree, but we can't lose sight of the fact that the section exists.

Hon. Irwin Cotler: Correct.

Hon. John Major: I agree with you that it's unlikely to be used in this circumstance, but it's there. Depending on the determination of the government in power at any one time, who knows whether they'd be so intent that they'd go to section 33. Frankly, I doubt it, but nonetheless it's there.

Hon. Irwin Cotler: Leaving aside the constitutional issues for the moment, there is a policy concern. In the matter of mandatory minimums, you remove discretion from the judges and transfer it to the police or the crown. When you transfer it from judicial discretion in open court with the possibility of appeal to a more private type of plea bargaining and the like, you can have one of two outcomes.

You can have an outcome whereby the accused pleads to a lesser charge, so the objective of denunciation, which was held to be the principal purpose of the bill, gets diminished or lost. Or there's the alternative, where the accused goes to trial and thereby the courts become clogged up because of these mandatory minimums.

It seems to me that there are some policy concerns here that we ought to consider as well.

Hon. John Major: You can draw from the California experience where they have the three strikes and you're out. I don't know whether you could call it evidence, but there is a growing belief that when facing an accused charged with stealing a piece of pizza off a plate—it's his third offence and the judge knows if he convicts he's going to jail for life—the judge finds some way of seeing a reasonable doubt. Or if the judge doesn't agree with the mandatory sentence, he can rationalize, perhaps on the evidence, a little more favourably to the accused to find some way, procedural or something else, not to find him guilty.

That's another hurdle. Not all judges will see the evidence the same way. I think they're human and mindful of a minimum sentence, and they don't believe the minimum sentence should apply. The next thing you know you might have an acquittal, which is one other consideration along with the ones you mentioned about laying the charge in the first place or pleading guilty to a lesser charge.

So the path is strewn with problems.

Hon. Irwin Cotler: I'm done.

The Chair: Thank you.

Mr. Jean.

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

Thank you, Justice Major.

I'm Brian Jean, from Fort McMurray, Alberta, where I practised criminal law and divorce law for many years.

Looking at statistics, I note that in 1985, for instance, there were somewhere around 1,327 reported kidnappings, of which 21% had charges laid. There were 168 males, 80 females, and 9 juveniles that were ultimately charged. There was about a 21% charge rate, which in my mind means that 79% of people are getting away with it.

During the time I practised divorce law, I recognized of course that the Divorce Act has children as a primary concern, as does the

Hague Convention on international child abduction, which all of Canada's jurisdictions are a signatory to.

I have two questions for you in relation to this, particularly relating to the children. I'd like you to keep in mind the primary concern, which I think should be children, even in relation to these particular charges.

The first is a parent exemption and how you would word a parent exemption to ensure that it was left more to a civil court, except in particular cases that are nefarious and very difficult to deal with. The second is the chance of return, especially relating to a mandatory minimum sentence of some 10 years, for instance, or five years, as the case may be, depending on what the committee ultimately decides.

What is the chance of returning a child, if indeed somebody is faced with serious time in jail? Do you think that would be part of the equation, or should it be?

•(1240)

Hon. John Major: You raise an interesting question on the number of kidnappings. The majority of those, as I think you inferred, would arise out of domestic relations. But in some cases they're rather benign—if you can use that word on a kidnapping—where the parent takes the child from Alberta to Ontario and goes into hiding. There are the other cases where—and I think there's a couple current on this—the child is taken to Iran and the Iranian government is not part of the Hague Convention and there's no way that you can legally get the child back. I don't know if there's any solution to that.

On cases where the Hague Convention does apply, you raise another interesting question that the country dealing with possession of the child looks to see the 10-year minimum that this person faces—and let us suppose it's a mother who is well-meaning but misdirected on taking the child out of the jurisdiction—and I think a judge might have difficulty. In our jurisprudence we've taken the position, on returning criminals charged with murder to the United States, that we will not extradite unless we get assurance that there will not be an execution. What you raise is a very difficult question. When the child is in a non-Hague recognized state, I don't know what you can do.

On the second question, the severity of the sentence would, I think, play a part in the possession state deciding whether or not to return the child.

Mr. Brian Jean: Would it be possible to encourage, in the sentencing, some form of direct consideration if the child is returned unharmed?

Also, I just wanted to point out that in 2010—the stats I quoted were 1985—the actual total amount of kidnappings and abductions based on the new stats, which are, quite frankly, much better than the old 1985 stats, are almost 4,900 compared to somewhere in the neighbourhood of 1,327 in 1985. The amount has substantially increased. But I would like to hear your comments relating to the other issue, specifically relating to whether or not you could see some amendment in there, in sentencing, to encourage the return of the child unharmed and whether or not that should be a consideration.

Hon. John Major: I think it merits consideration because family kidnapping and kidnapping for ransom are two different things. In kidnapping for ransom, if the child is returned unharmed it could be a mitigating factor. In a family situation, it's unlikely that the parent would harm the child after kidnapping them. He or she is kidnapping, ostensibly, for love and affection or for revenge against the other spouse. In the case of—let's call it a commercial kidnapping—the return of the child unharmed is a very useful suggestion. It's an inducement to someone who may regret what he's done, and not wanting to cover his tracks by murdering the child, will return the child.

Mr. Brian Jean: That's of course what every parent wants. Thank you very much, sir.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott: Thank you, Mr. Chair, and thank you, Justice Major, for joining us at a distance.

I just wanted to clarify one thing just to make sure that I understood.

You spoke, Mr. Justice Major, about criminal law principles as one reason to be wary of mandatory minimums and you also spoke separately of charter thresholds. Would I be correct in understanding you as saying they are two different things? Something could pass muster under the charter and still not be the best thing from a criminal law principles perspective?

Hon. John Major: Yes, I think so. I think that there are a number of provisions in the Criminal Code that would pass muster but when the code is revised, I think the revisionist would say, "That section is badly written. I don't like this, it passes muster, but we can improve it." They are two separate considerations.

• (1245)

Mr. Craig Scott: Madam Boivin referred to your comments on the Arcand decision coming out of Alberta, where the Alberta Court of Appeal had what I think you called a dissertation or essay—I can't remember which—on the principles of sentencing. Part of it was starting point sentencing, coming jurisprudentially from the higher court to the lower courts.

Is there anything you haven't had a chance to mention about the relevance of principled judicial discretion within sentencing? Is this something that we need to take more note of when these minimum sentence proposals come before us? Is there anything you've not told us that you think we should know?

Hon. John Major: The experience with minimum sentences has not been very good, particularly in the United States. There have

been cases, one in particular, where a federally appointed judge felt the independence of the judiciary was compromised by the minimum sentence. He resigned and campaigned against minimum sentences at various bar conventions in the United States.

The trouble in the minds of the legislators and the public at large is, "Can we trust the judges?" That's a question that comes up from time to time on a number of things. If the judge is law-and-order, he'll perhaps lean to a tougher sentence. If he's more rehabilitative-minded, he'll go the other way. But we have great confidence, and should have, in our judges. As a citizen, I feel more comfortable with them having some jurisdiction on the severity or leniency of sentence.

Remember, if he doesn't follow the principles of sentencing, the court of appeal is there. My comments with respect to the Alberta Court of Appeal came about in part because I was a member of that court. Being retired, I have full constitutional rights of freedom of speech, and it is very tempting to comment on their decisions from time to time.

Mr. Craig Scott: You can get in trouble commenting on courts, as I found out on the day I arrived in this House.

Hon. John Major: But age will take you out of that.

Voices: Oh, oh!

Mr. Craig Scott: One last thing then, would it be from your perspective consistent with Mr. Wilks motivation if...?

We already have section 718.2, which talks about other sentencing principles, including aggravating circumstances, which still leaves the judge to make the final determination. But what if we were to consider the idea that kidnapping somebody under the age of 16 would be presented as an aggravating circumstance within sentencing? Would that be preferable from your point of view to a hard-and-fast minimum?

Hon. John Major: I think so. There's no magic bullet, as the expression goes. But aggravating circumstances moves the charge to a different level, and the judge has to consider it.

In Alberta, they developed a minimum starting point for serious sexual assault, and the court of appeal told the trial judges that they had to start at three years. That was subject to comment and back and forth, but it was something similar to what you're speaking of. An aggravating circumstance alerts the judge, if he needs alerting, to consider the upper end of sentencing, so it's a useful suggestion.

The Chair: Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: Thank you, Mr. Chair.

Thank you for being here today, Justice Major.

My name is Kerry-Lynne Findlay, and I'm a member of Parliament from British Columbia.

When Mr. Wilks, who proposed this private member's bill, gave a speech in second reading, he stated that it was always his intention that this would apply to kidnapping by a stranger. In that there was some discussion here on this issue of parental or familial abduction, or I should say, kidnapping. I wanted to bring to your attention to the fact that we, as government, have an amendment we are bringing forward to exempt parents, guardians, and persons having the lawful care or charge of the child from the application of this mandatory minimum sentence. We're suggesting this precisely for the reasons you have talked about, in that those circumstances are quite different from those of a stranger taking a child.

Would that amendment make sense to you?

• (1250)

Hon. John Major: It would make sense to me, but it would not address the question of minimum sentence for, let's call it, commercial kidnapping. With a minimum sentence you're boxing in the judiciary, but you're also providing a motive for the kidnapper to perhaps act very viciously and do something to the child, so that he won't be identified. Then the minimum sentence becomes academic, because he doesn't think he's going to be caught.

I'm still a little concerned about a minimum sentence that's absolute. Cases are not all the same, as you know, and the minimum sentence may be inadequate in a number of circumstances of commercial kidnapping, but in other cases it may not be proper.

Ms. Kerry-Lynne D. Findlay: Unfortunately, as my colleague quoted Mr. Harris, who is the former justice critic for the NDP, in these very difficult cases, which thankfully are rare, it is very unusual for a child to be returned. There often is other criminality along with the kidnapping.

Would you agree with that?

Hon. John Major: Yes. That's true.

A highly publicized case recently in Ontario is an example of that.

Ms. Kerry-Lynne D. Findlay: Yes. I think you're referring to the Stafford case, which was very unfortunate.

You would agree with me as well, I'm sure, that of course Parliament has the jurisdiction to make changes to the Criminal Code. That is what we as legislators are tasked with doing. Is that correct?

Hon. John Major: So long as you observe the requirements of the Charter, that's right.

Ms. Kerry-Lynne D. Findlay: In that respect, often legislators will bring in, for instance, maximum sentences, and within the parameters of judicial discretion a judge still has to take that maximum into account.

Minimum sentences are not new in the code. This is not a new thing. There have been mandatory minimums for many years. Isn't that right?

Hon. John Major: I'm not aware of many minimum sentences, but I haven't studied the question, so I don't know. I'm more familiar with the importing of drugs and the jurisprudence that was discussed in that case.

Nobody gets very excited about a minimum sentence of seven days for, say, drunken driving, because seven days goes by rather quickly. When you get into five years or in that area, it's a little more significant, and you know I'm sure from your own experience that not all criminals are the same. Not all kidnappings are the same. It would be an unusual case in which you would think of a suspended sentence for a stranger performing a kidnapping.

You have to think of someone with diminished responsibility. Should that person be treated exactly the same as a hardened criminal who's operating solely for cash? It's just the variation in people that pushed me towards the view that a minimum sentence is something that I find has a lot of flaws.

• (1255)

The Chair: Thank you, Madam Findlay.

Mr. Jacob.

[*Translation*]

Mr. Pierre Jacob: Thank you, Mr. Chair.

Thank you, Your Honour John Major, for coming to share your experience. You spoke very well about the importance of trusting the judge, in other words of allowing the judge to exercise discretion.

Will imposing mandatory minimum sentences lead to other negative or unintended effects, which will create an imbalance?

[*English*]

Hon. John Major: No, I think your general statement covers it.

I'm getting off the point a little, but in some states in the United States, the jury determines the sentence. For instance, when it comes to capital punishment, the question will go to the jury as to whether or not it should be life imprisonment or execution, and it's the jury that makes the decision. That complicates the system and it backlogs very quickly, because juries have to be instructed and selected and so forth, and they may act more emotionally than a judge. But that's an alternative that the Americans in some states have adopted.

It's an important question, and I'm not attempting to tell you that what I'm saying is the only solution or the right one. It's simply the expression of my own view from having observed the situation over years.

[*Translation*]

Mr. Pierre Jacob: Thank you, Mr. Justice.

I will share my speaking time with Mr. Côté.

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

Thank you, Mr. Justice, for making yourself available to answer our questions. I have to say I really liked the parallel you drew with the Income Tax Act. I found it to be very relevant. It showed the dangers of making the Criminal Code unnecessarily complex.

Mr. Justice, one aspect of law fascinates me, and it is that a law, as an instrument, must have a purpose. Bill C-299 must also have a purpose. I wasn't able to put the following question to my colleague Mr. Wilks, who presented this bill, because we ran out of time.

If we suppose that the purpose of imposing a minimum sentence is to deter people from committing a crime, can we hope that goal will be attained?

[*English*]

Hon. John Major: That would be the hope, but experience shows that the severity of the crime seldom acts as a deterrent, because there's a philosophy that says the criminal doesn't believe he'll be caught.

It's interesting to look at the range of sentences for kidnapping in our judicial history where there's no minimum. The sentences, nonetheless, have been severe. By severe, I mean lengthy. The courts, to my knowledge, have always treated commercial kidnapping as a very serious offence, and in my experience the sentences have been 10 years and 15 years, so that the five years is not extreme. I think you'd have to look hard to find a case where a serious kidnapper was sentenced to less than that.

The Chair: Thank you, Mr. Côté.

We've now run out of time.

[*Translation*]

Mr. Raymond Côté: Very well. Thank you, Mr. Chair.

Thank you, Mr. Justice.

[*English*]

The Chair: Thank you, Mr. Justice Major, for spending your time with us. We appreciate it, it's been very informative. Thank you very much.

• (1300)

Hon. John Major: Thank you.

The Chair: Before I adjourn the meeting, we have witnesses scheduled for the 29th. I haven't heard from anybody about witnesses beyond that, so we've tentatively scheduled clause by clause on the 31st. Then we have four to six meetings, but perhaps

more like four meetings after that. So I need some direction from the committee. I don't think there's any legislation—

Ms. Françoise Boivin: Bill C-36 is coming.

Mr. Robert Goguen: It's coming and I think by the time we have to make that decision, I believe it will be to the committee.

Ms. Françoise Boivin: We'll be in committee.

Mr. Robert Goguen: If you could just hold off for a little bit, I mean, we'll certainly find something to—

Ms. Françoise Boivin: That's what I foresee, too.

The Chair: That's fine, but if you have witnesses for Bill C-36, please get their names to the clerk.

Ms. Françoise Boivin: We're already thinking about them.

The Chair: Get them to the clerk.

[*Translation*]

Ms. Françoise Boivin: That's good.

[*English*]

The Chair: It's no good for the clerk to get the names of your witnesses on Tuesday, and we need them for Thursday.

[*Translation*]

Ms. Françoise Boivin: That's excellent.

[*English*]

Mr. Robert Goguen: I believe Bill C-36 will come before the victim surcharge, so I think we'll focus on that.

[*Translation*]

Ms. Françoise Boivin: Debate is already quite advanced.

[*English*]

The Chair: Is everybody satisfied with the 29th and 31st?

Some hon. members: Agreed.

The Chair: The meeting is adjourned.

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