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Monday, June 15, 2009

Chair

Mr. Ed Fast

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call the meeting to order.

This is the thirty-first meeting of the Standing Committee on Justice and Human Rights. Today is Monday, June 15, 2009.

You have before you the agenda for today. In the first hour, we'll hear one witness on our study on declaring certain groups criminal organizations. During the second hour, we'll begin our review of Bill C-232, An Act to amend the Supreme Court Act (understanding the official languages).

I'm hoping that at the end of our meeting we will leave 10 minutes for a brief in camera discussion on our study plan, because there is an issue that has come up about perhaps bringing in a witness early for next meeting. I'd like to leave 10 minutes for that.

First of all, I'm pleased to welcome Paul Burstein, a lawyer with the firm of Burstein, Unger—from Winnipeg, I believe—who will be assisting us with our study on declaring certain groups criminal organizations.

You're actually from Toronto. That's where your firm is based.

Mr. Paul Burstein (Barrister and Solicitor, Burstein & Unger, As an Individual): Yes, exactly. Like everyone else from Winnipeg, apparently, I left and moved to Ontario.

The Chair: You understand the process. You have 10 minutes to present and then we'll open the floor to questions from our committee members.

Mr. Paul Burstein: Thank you very much, Mr. Chair. I hope not to use my 10 minutes, because I appreciate that the committee prefers to engage in the dialogue—and I quite agree—and tends to get more out of the questions and answers.

I do want to thank you for inviting me. I always enjoy coming to the Hill and participating in this committee's work. I'm certainly proud to be able to participate in the legislative process.

I feel somewhat prouder today. As I was telling Mr. Chair, I have the distinct pleasure of exhibiting the process to my eldest daughter, Courtney, who has come with me.

Just to give you a bit of background about why I might know something about the issues you're considering, I've been a defence lawyer for almost 20 years. For probably the last 15 years, I've done nothing but mega-trials consisting of many gang cases.

Indeed, I was counsel for one of the two accused in the Lindsay and Bonner case, the Hells Angels prosecution that I know has come up quite a bit in discussion before this committee. I also represented one of the leaders of the first street gang prosecution in Ontario. That started about five years ago, I guess. I have represented one of the terrorists charged in Brampton. Obviously, some of the parallels have been drawn before you by some of your witnesses.

I've been a professor at two of Ontario's law schools for over 10 years and I've published some articles dealing with the prosecution and defence of gang cases. I've spoken to Ontario Superior Court judges on the topic.

Just as a couple of other points of interest in terms of my background, I also sit on the Legal Aid Ontario exceptions committee, which is relevant because it is the committee that manages defence funding for all mega-trials and major gang cases in Ontario. So even for those that I'm not involved with as a lawyer, I'm involved in the oversight committee in terms of what goes on in those cases.

Finally, as a director of the Ontario Criminal Lawyers' Association, I was their representative involved in dealing with and responding to the LeSage-Code report, which I know has been mentioned a number of times in evidence before this committee. As I say, I was involved in drafting the recommendations, so I know quite a bit about that.

Just to sum up in terms of my background, I think I do have a somewhat unique perspective. I've been on the inside of these cases looking out, on the outside looking in, and from the top looking down, so I really have had the opportunity to consider from different perspectives the issue that you are looking at.

I don't have much new to tell you. I'm sorry to say that. I've read the evidence of all the witnesses who've testified before you on this issue. You've already heard the evidence from the federal prosecutors and the Department of Justice officials, who have told you that listing, or creating a list of criminal organizations, is both unnecessary and unhelpful for what they need in court. Their evidence, it seems, was supported by the likes of Professor Kent Roach in terms of the constitutional problems and the lack of benefit, as well as Professor Gordon from Simon Fraser University.

I'll just leave you with this in terms of my opening remarks. My 95-year-old grandfather always used to tell me, “Don't fix it if it ain't broke.” I have a slightly modified version of that. I always prefer to say, “Before you fix it, make sure it's really broke”, because you might do more harm by trying to fix a problem that's not such a big problem.

I'll just say to you that to the extent that the police make a very convincing case that gang violence and gangs are a problem in this country—and I don't dispute any of that—having read their evidence, there just doesn't seem to be a connection between whatever problem gangs may present and creating a list of criminal organizations. It's not going to solve any of the issues they've addressed. If anything, it's likely to exacerbate them.

The only thing that listing can really do is create trial efficiencies, and the prosecutors—and I endorse their view wholeheartedly—tell you that it's not going to achieve much of anything on that front. Also, the collateral effects of listing are not worth the effort.

I'll just say one last thing. There are better ways to achieve what you want to achieve by creating a list without having to go through all the problems of creating a list. I'm happy to outline those, if you're interested.

Those are my remarks.

The Chair: Thank you, Mr. Burstein.

I believe, Mr. Murphy, that you're going to go first. You have seven minutes.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Mr. Chair.

I want to thank you, Mr. Burstein, and I want to welcome your daughter Courtney here as well. It's nice to have young interested people here. I assume she's here under her own volition—don't answer that.

It's nice to have you here. Obviously you have a breadth of experience in criminal matters and in writing reports. However, I want to drill down on a couple of things you said. They go to the listing.

You will know that we created such a list under the terms of the ATA, the Anti-terrorism Act; it's in amendments to the Criminal Code. It takes some 26 pages of the code. We've spent about four pages, I think, of the code with respect to organized crime and the designation thereof.

We've had what I would say is some pretty compelling evidence from, yes, policemen and municipal leaders that the designation of a criminal organization is sucking the life and the resources out of the court system and their court officers and disclosure clerks. One police department said quite categorically that they're having trouble getting experts designated—because it requires an expert designation with respect to what is a criminal organization.

So your characterization of reading the evidence differs from mine in hearing the evidence, and I guess that goes to the empathy you have for witnesses as opposed to reading it in black and white, for they say that Nixon actually won the Kennedy-Nixon debate, which is unbelievable if you saw it on tape. Maybe this goes to that.

Maybe, however, Mr. Burstein, you were looking for an answer that keeps alive the designation of criminal organization through expert testimony. It's truly a more advocacy-driven vehicle; there's no question about that. You'd agree with me. I just can't see how it wouldn't help to have one of two things: either the list, fine, or some way—people use the term “judicial notice”, but that's not really what it is—of having cases like Lindsay as precedent. It's very difficult if it's evidence-based.

That's where we sort of hit the road with the Department of Justice and say, well, look, these are fact-by-fact situations, so for the declaration of a group like the Hells Angels motorcycle club as a criminal organization, it's impossible to have it apply to the next case, even though it's the same organization. I wish there were a way to make that happen. Maybe with your opening remarks about your open-mindedness, you could help us in that way.

Do you think there is a way to shorten, if you were on Lindsay, the Lindsay result?

● (1540)

Mr. Paul Burstein: Let me just say briefly, in addressing one of your points, sir, that the concerns the police have about disclosure in these mega-trials will in no way, or in a very minor way, be assisted by this list. The disclosure concerns they have in terms of the resources required are still going to be there. Just recently in Toronto, I think it was this weekend, they arrested a hundred people on a street gang prosecution. It's that that causes the disclosure problem. The part of the disclosure dealing with the expert evidence dealing with gangs is a very small piece.

More importantly, as you heard from...I think it was Mr. Bartlett, who is one of the senior Justice officials, all that “expert” evidence dealing with the structure of the gang, etc., will still be germane to a case, irrespective of whether you list a criminal organization, because you still have to prove membership by all the participants. In other words, as you heard Mr. Bartlett say, in most of these cases—and I'm going to tell you in 99.9% of these cases—the evidence the crown will use to establish the “criminal organization” is the same evidence as they're going to lead to establish the individual accused knowing membership in that organization. In other words, it's not going to save anything.

The reason I say it's actually just going to waste time is much for the reason Professor Roach gave: it's just going to open up the door to defence lawyers—I'll say like me, but hopefully not like me—raising collateral issues, chasing down a judicial review of the listing process, when really the issue is whether the people before the court were part of whatever listed organization there is. You had this in Lindsay and Bonner. I just want to say at the outset that I wasn't on the case for the trial; I was there for the constitutional challenge. So when you hear that the case took 8, 9, 10, 11 months, that was through no doing of mine—before you pillory me for that. But I know a lot about it.

In the Lindsay and Bonner case the crown took six months to prove that Hells Angels International was a criminal organization, and the defence never really contested that. It didn't stop the crown from putting on the public spectacle and adducing all the evidence to get that evidence before the court to get the finding. The real issue was whether the chapter or the group that Lindsay and Bonner were part of, the Hells Angels in Woodbridge, were part of that organization that the crown had spent six months to prove. In other words, part of the reason for all the delay and the needless court resources could have easily been avoided if the crown had gone back to what the definition of the offence is.

This is, I guess, where I come to answer your main concern, sir, which is that we're losing sight of what Parliament criminalized. It didn't criminalize gangs, it didn't criminalize outlaw biker gangs; it criminalized criminal organizations with a very simple and, I think everybody contends, a very wide definition: three people engaged for essentially the same purpose for material benefit of the gang where the main purpose is going to be criminal activity. You don't have to prove that they have a name. You don't have to prove that they have membership rituals. But in most of these cases the crown seeks to do it because it helps with the public spectacle. I'm not saying there's not a valid purpose to that. There's no doubt the public feel safer when the police are taking street gangs off the street. But it's not necessary for the trial is all I'm saying.

So when the police say that listing will help with trial efficiency, it's not necessary. That's my point. If you want an answer to whether or not you should criminalize being a member in a gang, that's a separate issue, and I'm happy to address that, but in terms of trial efficiencies it's overkill.

● (1545)

Mr. Brian Murphy: The reason for the organized crime designation is to ratchet up the penalty. You didn't say that.

Mr. Paul Burstein: But the crown can prove the offence without ever having to say they're Hells Angels or they're Bandidos. In other words, it's an unnecessary label. That's the part that takes the six months, because then the crown needs to go into the history of the Hells Angels, and it's just completely unnecessary to get all the enhanced penalties, like the parole ineligibility. Everything you say could still be achieved without labelling it.

The Chair: Thank you.

We'll go to Mr. Ménard. You have seven minutes.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Welcome. I know that you have many years of experience, but I am a little surprised by your testimony. You have practised in this area. You have been asked in your capacity as a professional to defend members of criminal organizations. Of course, I am not holding that against you, but we must all remain aware of the fact that this is the point of view from which you are testifying here today.

Further, I think that you should carefully reread the brief which was presented by Mr. Randall Richmond from the Bureau de lutte au crime of the Department of Justice of Quebec, and the brief presented by the RCMP. On this committee, we don't feel it is normal, as far as criminal organizations are concerned, that if a trial takes place in Manitoba, Saskatchewan or New Brunswick, it must be proven in every case that the individuals involved are indeed members of a criminal organization. If it was possible to avoid this, the Crown would save a lot of time and resources. In short, that is our objective.

You did not mention the second objective at all, which concerns intimidation. In the course of the trial held in Ontario, the judge pointed out that a member of the Hells Angels had left his wallet on a bike which he had ridden during a rally, and that because the Hells Angels are so intimidating, he did not even need to fear that his wallet would be stolen.

By declaring that these groups are outlaws, we want to ensure that they become less intimidating and less terrorizing to society. Of course, I believe that modalities will be applied. There will have to be a certain number of trials and the list will have to be established based on modalities which respect certain principles. I believe that in establishing such a list, you are dealing rather quickly with the committee's objectives. I imagine that your professional background explains that to some extent.

I will give you the opportunity to reply. I will then have other questions for you. In fact, I would ask you to say hello to your daughter for me.

Mr. Paul Burstein: Thank you.

[*English*]

I'm sorry, you're quite right. Mr. Murphy had raised that question. There were a lot of things in his question and I was trying to address as many as I could.

You have a mechanism right now and—I guess this is the one thing that I should have put in my opening remarks—there's no need to create a list. There's no need to create a special judicial notice provision or an evidentiary presumption, which is really what has been discussed here, whether or not it has been labelled as such.

Right now there is a provision in the Criminal Code, section 657.3, that allows either party, certainly the crown, to have an expert prepare an affidavit, and as I'm sure most, if not all, members of this committee know, an affidavit can have exhibits. You can take the testimony, the evidence, that was given in the Hells Angels case in Barrie in the Lindsay and Bonner case, and you can have the same expert or another expert who is going to testify in Manitoba or the other Ontario case, have read the testimony, attach it as an exhibit to his affidavit, and it becomes evidence in the next case. Unless the defence has something that is going to challenge that or that's going to be a different challenge than was raised in the previous case, I would have thought that the good sense of most judges is going to apply in the same way as this committee is saying, which is, why would the finding in one court not apply to the next?

● (1550)

[*Translation*]

Mr. Réal Ménard: In the course of the testimony we heard, some witnesses explained that, with regard to the three trials involving the Hells Angels, the judges were not satisfied with affidavits only, and had asked for evidence linking the individuals to the organization. You said that affidavits are sufficient, but based on what we were told affidavits alone did not satisfy the judges. If that had been an option, it certainly would have been used. However, the decisions we were quoted do not correspond to what you are telling this committee.

[*English*]

Mr. Paul Burstein: I don't know if that's entirely correct, and I beg to differ in this respect. The judgments say they won't rely on the other judgment as the basis for the finding in their case. I'm reasonably confident I'm correct in this: for the crowns in Ciarniello—that's the second Ontario case, Justice McMahon's decision—and then there was the Kirton case, the one in the Manitoba Court of Appeal, the issue was whether or not in the Kirton case in Manitoba they could rely on Justice Fuerst's finding in the Lindsay and Bonner case. There was no suggestion that the crown in Kirton had done the right thing, which the Criminal Code allows. The crown does this all the time for other expert opinion evidence.

It doesn't mean that the defence isn't allowed to cross-examine, but the judge has the discretion as to whether or not to permit that kind of cross-examination, and the judge can demand from the defence this: what's the reason you're insisting that I drag the crown's expert on gangs all the way to my court when they were cross-examined? You can read it in the transcript that has been provided to me, counsel. Why would I allow you to ask the same questions again?

It's very rare that an expert's credibility is the issue. It's always the credibility of the science. So it just hasn't been used.

I'll say one last thing. It's because the crown thinks it's their duty to present the evidence again, and they haven't tried doing this. I'm sorry, but I beg to differ with your characterization.

[*Translation*]

Mr. Réal Ménard: Do I have enough time left to ask a brief question?

Let's talk about compatibility with the charter. This is in fact the type of information we were hoping to get from you. You said that it is not necessary to reach the objectives, but do you anticipate any problems with regard to compatibility with the charter?

I would be interested in hearing your views on this matter.

[*English*]

The Chair: A very brief answer, please.

Mr. Paul Burstein: The difference is that if you do it the way I'm suggesting, almost all of your charter concerns evaporate, because now if there is new evidence in the second case—let's say it's the second Hells Angels case, for ease of reference—that wasn't presented in the first Hells Angels case that I say may effect the judge's decision as to whether the Hells Angels Manitoba are a criminal organization, I'm not precluded from presenting that to the decision-maker. If you make it a listing process, you have a whole host of problems in terms of whether I'm getting full disclosure of whatever the decision-maker, the judicial body or the cabinet body, is using to make the listing decisions. You're going to have delays because you're going to have collateral attacks. In my method, it's the same decision-maker making one decision. There will be virtually no viable charter claims if you just use the normal evidentiary process to decide the issue. Eventually, it will become so commonplace that the crown will have a standard affidavit that they'll just send around the country. Like the prosecutor from Alberta—I think that was his name—told you, in many of these cases the defence doesn't have anything to say; they just don't have instructions from their clients to admit it.

It's the perfect scenario. The crown tenders the affidavit. I don't have the authority to admit it on behalf of my client, but I have nothing to say in answer, so there's only one side of the story. The judge has to make the finding that it's a criminal organization, and you have no problems, no collateral judicial attack, no wasted time, no charter challenges going to the Supreme Court of Canada. It's simple, nice, and clean.

● (1555)

The Chair: Mr. Comartin, you have another seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Like some of the other members of the committee, I'm a bit taken aback with your concept of this overkill, doing it repeatedly. Have any of the judges, I guess maybe in Manitoba or Ontario, made any comment on the role that the crown played here in terms of it being overkill?

Mr. Paul Burstein: When I say “overkill”, first of all, a judge would rarely say that, for a lot of reasons. Number one—

Mr. Joe Comartin: Excuse me, I have to interrupt because of time. So nothing in the cases?

Mr. Paul Burstein: No.

Mr. Joe Comartin: What about any judge who commented on this on the panels, the continuing—

Mr. Paul Burstein: Absolutely. When I spoke to the Ontario Superior Court of Justice about two years ago, it was a major concern of the entire group—there were about 150 there—that the crowns were engaging in overkill in these prosecutions, and especially because the terms of the code don't need it. But it certainly helps with the public spectacle. I'm not saying that's not a valid purpose, but you can't have your cake and eat it too. If you want to over-prosecute and prove that the Hells Angels, or the Malvern Crew, or whatever other street gang is a criminal organization, you can't then complain that it's taking too long when it's the crown who's actually introducing the evidence.

Mr. Joe Comartin: In terms of the methodology or the process of using the affidavit and filing it, is the determination of whether the defence is going to be allowed to cross-examine on it in subsequent hearings done at pretrial or during the course of the trial?

Mr. Paul Burstein: That's a good question, Mr. Comartin.

I think efficient lawyers would have that issue determined before trial. Certainly now in Ontario, in the aftermath of the Code-LeSage report, it is something that would have to be addressed before trial to promote trial efficiency.

Mr. Joe Comartin: In terms of Code-LeSage, is it Code-LeSage or LeSage-Code?

Mr. Paul Burstein: That's a good point.

It's Chief Justice LeSage. I think we all call it Code-LeSage, but it should properly be called LeSage-Code.

Mr. Joe Comartin: In terms of that report, are you seeing any signs of its being implemented?

Mr. Paul Burstein: Absolutely. There's a committee or task force in the Ontario Attorney General's office that's tasked to engage in the implementation. There's a judicial committee. There are liaison committees between the judiciary, the crown, and the defence bar. Legal Aid is taking it very seriously. Obviously they control the purse strings, and that has influence.

Mr. Joe Comartin: Is that only in Ontario, or are you seeing it adopted elsewhere?

Mr. Paul Burstein: I couldn't speak to other provinces, but much of the LeSage-Code report was modelled on what they're already doing in B.C. I think Quebec has a similar situation. Ontario was the most inefficient. That's all I can speak to.

Mr. Joe Comartin: That's all, Mr. Chair.

Thank you.

The Chair: Thank you.

We'll move on to Mr. Rathgeber, for seven minutes.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair.

Thank you to the witness for his attendance today.

Similar to some other members of the committee, I'm slightly troubled by some of your comments, and I thought I should get a little more detail.

We heard from federal prosecutors. If I heard your evidence correctly, you indicated that prosecutors were not asking for this type of legislation. That is not my recollection. I heard prosecutors tell me that they take weeks, sometimes months, with complicated expert testimony to establish the existence of a criminal organization. My recollection of the evidence from the crown's side is certainly different from your reading of it. I think that might have been mentioned on the other side.

In any event, today you're regarding this as not being necessary. That may or may not be true, and there may be other ways of doing it with respect to affidavit evidence. But what is the downside in doing what law enforcement and the crown prosecutors are asking, which is to take what is seen as the big hurdle in these mega-trials, the establishment of the criminal organization?

● (1600)

Mr. Paul Burstein: First of all, the only prosecutors I saw testify before you were Christopher Mainella, the senior crown counsel from the Public Prosecution Service of Canada, PPSC—I thought his bailiwick was in Alberta, but I might be wrong—and Mr. Bartlett and his colleague, whose name escapes me right now. You're quite right, Mr. Mainella testified that in some cases, as I think he described it, he'd say to the police, "If you don't have an expert on gangs, then forget it, I'm not going to bother prosecuting." Both of them were quite clear that it's not the main hurdle.

The big hurdle is still proving knowledge of each particular individual that the criminal organization exists, which listing has nothing to assist with, but an expert still does, and then proving actual membership in the organization. Again, you can't list individuals. You can create a list of organizations. It's not going to get over the main hurdle. Both of those prosecutors agreed that the evidence they call to support the experts' testimony isn't going to disappear by listing. They still have to call all the evidence of symbols, what the significance is, and the structure of the organization in order to prove knowledge and association of each individual.

Listing isn't going to accomplish much of anything. Even if you establish that, and you list the Crips, well, great, how does that help the crown in my case, where they're alleging that these five urban youth who are calling themselves the Crips are actually part of the Crips that are listed in the Criminal Code? Just because I put the word Crips on my back doesn't mean.... Judges will not simply accept that just because you have a shirt with a name on it and that name is found on the back of the Criminal Code, it means you're part of that criminal organization. They're still going to have to call an expert. That's my point. In other words, there's not going to be a lot of saving.

There's one last thing. Even if you don't think the affidavit method is perfect, approach it in the same way as the many mechanisms in the code, where proof of that kind of expert fact is done by way of certificate or affidavit—for instance, breathalyzers and drug analysis. Whether you use the provisions that are already there is irrelevant. You can create a new process designed specifically for criminal organizations that allows for certification by an expert, who can still be subject to cross-examination in the individual case. That's another way to approach it.

Mr. Brent Rathgeber: One of your proposed solutions, speaking of affidavits, is the affidavit method, where an affidavit from one jurisdiction and one trial could be used in another. And you indicated, at least hypothetically, that often defence counsel will not have instructions to admit, but they won't take issue. But if the client is sophisticated enough to tell his defence counsel to object to either the admissibility of the affidavit or to cross-examine on the affidavit, aren't we right back to where we are right now?

Mr. Paul Burstein: No, because they can't object to the admissibility of it. The code provides for it. The only thing they can do is seek leave to cross-examine. They can't just insist on it as a right. Parliament took care of that a long time ago.

My point is that to be granted leave to cross-examine an affiant under section 657.3—no different from cross-examining a drug analyst or a breath technician—you have to be able to establish to the judge that there is some purpose to the cross-examination. All I'm saying is that a judge is going to say to defence counsel, "Why should I permit you to waste this court's time in cross-examining the expert? What questions are you going to ask? In what areas do you think this opinion is weak?" If the defence can only say, "Well, I want to ask all of the questions that the lawyer in the other case asked, as in the transcript in front of you," no judge is going to let them eat up court time to do it again—not a chance.

Mr. Brent Rathgeber: The Manitoba Court of Appeal, I believe in Kirton, said that a trier of fact cannot take judicial notice of the existence of a criminal organization. If we were to make legislative amendments to the code to allow that to happen, would you support that, as opposed to what this motion ultimately is looking at, and that's the listing of criminal organizations? Would you support an amendment to allow judicial notice?

● (1605)

Mr. Paul Burstein: Taking judicial notice isn't much different from what I am saying now. The only thing is it's going to be less clear. You're still going to end up with litigation because the defence will be able to say, "Well, you can't take judicial notice of it. What are you basing that on?" As a defence lawyer in a case, I would say it's not that the Hells Angels being a criminal organization is not a fact well known to the public—one of the tests for judicial notice. I'm saying that rather than reinventing the wheel and creating more problems, more litigation, which I'm not in favour of.... Look, I know there are some defence lawyers out there who litigate for the sake of litigating. That has never been my style, but it's going to happen. What I'm saying is that to avoid inefficient trials, you need to simplify it. On the face of it, you may think listing is going to simplify it, but it's not; it's going to create parallel collateral proceedings that don't need to exist if you just let the crown prove it.

You heard from the prosecutors. They're telling you they're getting better at it. It's still new to them in terms of how they can prove it. They are getting more efficient at it. And really, that's what this issue is: how can we help them get better at it and more efficient at it faster? Changing the law isn't going to make them better; it's going to make it new and they're going to have to start from scratch.

Mr. Brent Rathgeber: Thank you.

The Chair: Thank you.

We'll go back to Mr. Murphy for five minutes.

Mr. Brian Murphy: Thank you.

In your statement, or perhaps in answer to me, you talked about how the crown wanted to bring forward a lot of evidence about the gang or the organization in question. I inferred, after thinking about it, that you were suggesting that they wanted the public spectacle of the bad guys, and they did this for the purpose of that, and not really towards furthering the case necessarily. That's one thing that I inferred from your comments, and I wonder why you think that. That's number one.

Number two, let's distinguish between the gang that consists of three people, and they get their name from someone else and they have leather jackets that they put their own mark on. Let's say it's the Hells Angels Motor Club, which is a very sophisticated financial organization that permeates every part of society in parts of this country. Let's just talk about them. What really would be the harm in saying, "You're a Hells Angels member; this will expedite the trial." They will not deny.... I'm going to ask you that, because you've had clients, I suppose, who might have been.... Are they going to deny being members of the Hells Angels Motor Club, or one of the top three organizations like that? Are they going to morph into something and become the Réal Ménard Club? No. They're always going to be the Hells Angels Motor Club. They're proud of being what they are.

So what is it that they're going to shirk from? Like a terrorist organization, they're not going to deny who they are, so why isn't this a shortcut? Forget about the gang of three there.

Mr. Paul Burstein: Okay, but remember that the Criminal Code doesn't require proof of a well-structured organization. I'll go back to that again. I'm not alleging any *mala fides* on the part of the crown in the Lindsay case. It was the first major criminal organization prosecution, at least in Ontario; I don't want to say in the country. They were figuring it out, and when I say "as they go along", I mean for the first time, right?

But in the end, the issue in the Lindsay and Bonner case, after we heard the six months of evidence about Hells Angels International, was whether this group of people were part of the international group. So I ask you to ask yourself, what was the point of proving that Hells Angels International was a well-structured, well-financed, intricate organization when they could have just focused on whether or not these 10 were part of a bigger or a criminal organization? Maybe you call them Hells Angels International, or maybe you just call them Hells Angels.

In other words, who cares? The offence was as the B.C. Court of Appeal said in the Terezakis case. It's very simple. It's whether or not they're part of a group with at least two others and they know that one of the main purposes is the facilitation of a criminal offence for material gain—plain and simple. They get all the enhanced punishments and everything else.

So I'm not saying the crown did it for a bad reason, but like it or not, trials are public spectacles, and so they should be. Whether or not they should or shouldn't have gone for six months to prove the Hells Angels were a criminal organization is beyond my pay grade—in other words, I'm not footing the bill—but they didn't have to.

In terms of your question about "Why shouldn't we? It's just a shortcut", it's because you're not going to make a law that says the Hells Angels are a criminal organization. You're going to make a law that says somebody, whether it's cabinet, a group of judges, or whatever group is going to make the decision, can decide on application by a minister, the police, or whoever it is, whether to list someone as a criminal organization.

In other words, the Hells Angels is an easy case, if I can put it that way. My concern is for the cases on the margin.

For some of the police witnesses who testified before you, some of their testimony really concerns me, because they're talking about street gangs, about groups of kids. I'm not saying that they're not engaged in crimes and they're not criminals and not in "gangs", but to suggest that you could create a list of these gangs without making the net too wide.... You'd end up criminalizing the girlfriends or the mothers who might be wearing their boyfriend's jacket or living in the same house. That's the problem with listing and opening it up.

● (1610)

Mr. Brian Murphy: Is it too wide in the ATA context?

Mr. Paul Burstein: No, because the difference is that you have to think about.... Well, maybe it is and maybe it isn't; I shouldn't throw that away. But it's totally different. That's all I'm saying. I don't know what the word would be, but there's a gangsta culture, and if you ask most teenagers—fortunately, not my daughter—they say they listen to gangsta rap. They like to dress like they're gangstas.

So the concern I have is that you're touching upon something where there is a very thin line between a youth subculture and criminalization. For terrorists, there is no parallel, if you follow what I'm saying. In other words, no one is acting like a terrorist because they think it's cool—unless they're really demented.

Do you understand? I'm not sure if I'm articulating it right, but that's why the parallel or the analogy doesn't work.

The Chair: We'll go to Monsieur Ménard for five minutes.

[*Translation*]

Mr. Réal Ménard: Mr. Burstein, I understand some of your concerns. To some extent, you are answering our question when you say that the Crown needed six months in order to demonstrate that individuals had ties to organized crime during the trial you mentioned. The prosecutors came here to tell us the same thing. Law enforcement agencies are concerned about these delays.

The committee could make a proposal. It could suggest, for example, that there be a list of criminal organizations, because I believe that there needs to be a framework. A criminal organization could be put on the list if three different courts have ruled that it is a criminal organization under sections 467.11, 467.12 and 467.13, and the list would be submitted to parliamentarians for their consideration and it could be subject to a review. Would those guidelines reassure you? This would prevent mistakes from occurring if, for example, three young people were found in a park, but did not belong to a criminal organization, and they were eventually taken to court.

I share your opinion: we need to make a distinction between very organized criminal organizations and groups that would not correspond to the definition set out in section 467.1 of the Criminal Code.

Could this not be done by distinguishing between serious and non-serious offences? I would propose, in particular, that a court of justice hand down three decisions, or that a decision be handed down by three different courts of justice. In the case of the Hells Angels, there were four trials. If the Minister of Justice puts together a list, which is then reviewed by parliamentarians, would that not be something that would satisfy you as a lawyer?

[*English*]

Mr. Paul Burstein: It may satisfy me, but it's not going to stop the individually accused Hells Angels member from delaying the trial process by challenging the listing process you've created. That challenge wouldn't be open to him or her if you just left it alone or created that kind of evidentiary presumption—some kind of certificate process.

In other words, it's a collateral challenge that will delay the real issue, which isn't whether or not the Hells Angels is a criminal organization. The real issue is whether or not these alleged Hells Angels members are part of a criminal organization and should be sent to jail for a longer period of time because of being in a criminal organization. You would be allowing defence obfuscation. I don't want to suggest I haven't made a living from that in the past, but I'm trying to tell you here as a witness—being more neutral minded—that you don't need it.

I just want to say one thing. I'm sorry, but to the extent that all of you are saying that the prosecutors are saying it's necessary, if you look at Mr. Bartlett's testimony on May 12, he told you: "On the views of the prosecutors, we have discussed the issue of the evidentiary burden with various"—

● (1615)

[*Translation*]

Mr. Réal Ménard: You should read Randall Richmond's testimony. You cannot limit yourself to testimony that supports your opinion.

We should not forget that, in 1997, when the government adopted anti-gang legislation, many constitutionalists said that it was illegal. Today, anti-gang legislation is part of the Canadian legal framework, and this has allowed us to put an end to biker gang wars in Montreal.

Your testimony is interesting, but I think there is a way to achieve consensus. I think that you are underestimating the objective in wanting to declare various organizations as criminal. I am not criticizing you for having earned your living from these trials. You are certainly a formidable lawyer, but we are parliamentarians and we need to find a way to ensure public safety, given the real threat that criminal organizations pose.

I would like to convince you of this before you leave.

[*English*]

The Chair: Just as a reminder, Monsieur Ménard, Mr. Randall Richmond didn't appear on this study.

[*Translation*]

Mr. Réal Ménard: That was Bill C-14.

[*English*]

The Chair: He appeared on the larger organized crime study, and that transcript was not provided to Mr. Burstein. So I don't know if Mr. Burstein is familiar with that piece of evidence.

Mr. Paul Burstein: In fairness, I'm not. You're quite right.

I was relying on the testimony of the senior Justice officials who have canvassed the views of other prosecutors. Could you find one, two, or ten prosecutors who think their lives might be made easier by the listing process? I'm sure you could, but I think there should be a dispassionate look at it by Justice prosecutors, who are always looking at ways to save money in prosecutions. That is an area of the government's budget on which no one enjoys spending money because it doesn't really produce anything, other than maybe public safety. Prosecutions are a big sinkhole in a big way, so they're always looking to save money.

On your point about why I would say it was constitutionally suspect despite the fact that I was involved in the constitutional challenge to the criminal organization provisions—the new offences—I never thought they would succeed. The courts have been very clear, certainly the Supreme Court, that Parliament can criminalize virtually anything it wants.

I was on the constitutional challenge to the criminalization of marijuana. The case went to the Supreme Court of Canada. The court in that case made it quite clear that it was up to Parliament to decide what should be criminal; however, courts take a much different view about procedural rights. They jealously guard procedural rights. Parliament can make anything into a criminal act, but you can't shortcut how you're going to prove someone committed a criminal act. That's when the courts get very cautious, and that's what you would be doing with this.

I'm just saying you'll be giving the people for whom you want to expedite prosecution the very thing they need to further delay the prosecution. That's what I'm trying to get you to understand.

The Chair: Thank you.

Are there any other questions that you'd like ask the witness? No.

Thank you, Mr. Burstein, for appearing. Your testimony has been very helpful.

We'll take a short break.

● _____ (Pause) _____ ●

● (1625)

The Chair: We'll reconvene the meeting.

We're pleased to welcome a number of witnesses to assist us with our review of Bill C-232. First of all, I want to welcome our colleague, Monsieur Yvon Godin. Also, we have with us the Fédération des associations de juristes d'expression française de common law inc., represented by Louise Aucoin, who is the president, as well as by Rénald Rémillard, who is the executive director. Then we have two individuals appearing: Michel Doucet, who is a lawyer and full professor at the faculty of law at the University of Moncton, as well as Christian Michaud, a constitutional language rights lawyer with Cox & Palmer.

Welcome to all of you.

Each of you will have five minutes to present, except for Monsieur Godin. Because it's his bill, we're going to give him 10 minutes. Then we'll open the floor up for questions.

Monsieur Godin, would you like to start?

[*Translation*]

Mr. Yvon Godin (Acadie—Bathurst, NDP): Thank you, Mr. Chair.

Ladies and gentlemen,

[*English*]

members of the Standing Committee on Justice, *bonjour*.

[*Translation*]

If I am here today, it is because the legislation contains a loophole that threatens individual rights in our country. I believe that we have the responsibility as parliamentarians to fix it.

I would like to welcome the witnesses who are here today.

[*English*]

Dear colleagues, you may one day have to appear before the Supreme Court of Canada, or experience the consequences of a decision made by that level if you have not already done so.

[*Translation*]

Imagine what it means to be a victim of an injustice because you have not been properly understood. Imagine that a judge who is deciding on your fate is unable to get clarifications in a timely manner because the translation or the interpretation has prevented this from happening.

[*English*]

Imagine what happens when judges discuss your future between themselves outside the room, where translation and interpretation services aren't available. Imagine the consequences.

[*Translation*]

This year is the 40th anniversary of the Official Languages Act and I want, along with you, to protect a fundamental right of all Canadians: the right to a just and fair trial.

[*English*]

In pursuit of that goal, I propose to you Bill C-232, the purpose of which is to ensure that future judges appointed to the Supreme Court understand English and French without the help of an interpreter. The measure will not apply to the present incumbents.

● (1630)

[*Translation*]

I want to explain to you the reasons for this bill.

First, Canadian laws are not written in one language and then translated: they are written simultaneously in both official languages. No one version takes precedence over the other. In short, this means that the English act and the French act together constitute Canadian legislation, and they cannot be separated.

[*English*]

The Official Languages Act and the Canadian Charter of Rights and Freedoms are designed to preserve the historic achievement. Consequently, in order to understand the subtleties.... I hope I say it right.

The Chair: Subtleties.

Mr. Yvon Godin: Imagine the interpreter trying to interpret me.

Some hon. members: Oh, oh!

Mr. Yvon Godin: In order to understand the subtleties of the law and apply them in full, one must at least understand both official languages.

[*Translation*]

Thus, it is now clear that language proficiency is essential in order to serve as a judge. We must therefore see to it.

My bill will do nothing to eliminate competent candidates: the contrary is true, since in order to be competent, candidates must be familiar with the law as it stands. If statutes are written without translation, why should we allow a unilingual judge to use a translation in order to understand the law written in a language he or she does not understand?

[*English*]

Who would tolerate having a judge at the highest level whose unilingualism means that he or she is familiar with only half the law and is thus partial?

[*Translation*]

Judges must be able without the help of an interpreter to understand correctly the parties in the case before them, in order to make decisions that are as impartial and objective as possible. Otherwise, the parties run the risk of suffering significant harm. No one wants their future decided by an ill-informed judge.

[*English*]

It is therefore crucial for Supreme Court judges to understand the law as it stands in its duality in order to protect our rights.

[*Translation*]

Simultaneous interpretation or translation is not enough: they leave room for interpretation which often tends to stray from the initial meaning.

[*English*]

Moreover, interpretation will not necessarily make it possible to understand all of the content of discussions that took place before the case came before the Supreme Court.

As the Commissioner of Official Languages has so rightly pointed out:

> ...it seems to me that knowledge of both official languages should be one of the qualifications sought for judges of Canada's highest court. Setting such a standard would prove to all Canadians that the Government of Canada is committed to linguistic duality.

[*Translation*]

> I find it essential that an institution as important as the Supreme Court of Canada not only be composed of judges with exceptional legal skills, but also reflect our values and our Canadian identity as a bijural and bilingual country.

[*English*]

In another connection, under the Official Languages Act, every federal court is required to ensure that the language chosen by the parties in its proceedings is understood by the judge or other officer who hears those proceedings without the assistance of an interpreter. There is one exception: the Supreme Court.

[*Translation*]

It is not fair that the act applies to such bodies as the Federal Court, the Federal Court of Appeal and the Tax Court of Canada, but not to the Supreme Court.

Why should the Supreme Court be an exception? The law should be the same for everyone. On February 5, 2009, in the CALDECH case, the Supreme Court made a decision stating, among other things, that the federal government has a constitutional obligation to provide the public with services of equal quality in both official languages.

[*English*]

The Commissioner of Official Languages has said it is an important principle that clarifies the scope of the Official Languages Act.

[*Translation*]

According to this judgment, equality is not to be interpreted narrowly: the government, rather, should consider the nature of the service in question and its purpose when defining its linguistic obligations.

[*English*]

In light of this judgment, Bill C-232 acquires its full meaning and becomes all the more relevant and legitimate.

[*Translation*]

In Canada, French enjoys equality of status and use with English. No party, therefore, whether francophone or anglophone, should be heard through interpretation or any other means before the highest court in the land.

● (1635)

[*English*]

Let us acknowledge, once and for all, the importance of being understood without the help of interpretation or other means.

The current process for appointing federal judges, including Supreme Court justices, fails to give sufficient consideration to language rights.

[*Translation*]

The lack of any mechanism for assessing the language proficiency of candidates demonstrates the scant importance attached to this fact when judges are appointed. The right to use a language before a court also includes the right to be understood directly in that language. What is the purpose of the right to express oneself in one's own language, if those addressed do not understand it?

It is important for every party to be heard under conditions that do not place it at a disadvantage in relation to any other party.

[*English*]

In order for Supreme Court decisions to be made in full knowledge of all the facts, and for all Canadians to be entitled to a fair trial, join me in an historic act and show your support for Bill C-232. Let us all work to support this cause.

[*Translation*]

Without disrupting the existing system, my bill will make it possible in the long term to avoid appointments that are against the spirit of the act and the charter. We shall thus be able to do more to ensure respect for the right to equal status, and the vitality of linguistic communities.

[*English*]

How many seconds do I have left?

The Chair: You have two minutes left.

Mr. Yvon Godin: The other thing I wanted to add just before we start, Mr. Chair, is to point out that you said it would be nice if I had my document to give to the interpreter. I said I didn't have it. And you said you hoped I went slowly so they could understand. Well, that takes away....

[*Translation*]

At the heart of a debate, when lawyers go before the courts, this type of thing could incapacitate them, cut off their roots. Lawyers are like trees. In this sense, I give them a great deal of credit when they go before the courts.

[*English*]

Many of you here are lawyers, and when you present your case before a court, you want to present your case and argument, and everything else, from your heart. And I don't know how you feel about somebody else interpreting for you. And I don't know how much of my presentation today—with all due respect for our interpreters, who I thank for all the work they do for us.... But we're talking about the highest court of our country, and there's no second chance. You cannot go the UN and ask them to change a decision of the Supreme Court; it's the end, it's over. And it is not a place where we should be able to accept....

So I ask for your support for this bill that I have put together.

[*Translation*]

This is why I call on your support for this bill.

Thank you.

[*English*]

The Chair: Thank you.

We'll move over to Madame Aucoin. Louise, you have five minutes.

[*Translation*]

Mrs. Louise Aucoin (President, Fédération des associations de juristes d'expression française de common law inc.): Thank you. The Fédération des associations de juristes d'expression française de common law is pleased to be here today.

Allow me to briefly introduce our association. Seven francophone lawyer's associations comprise the FAJEF. Its mandate is to promote and defend the language rights of francophones in minority situations, particularly, but not exclusively, with regard to the administration of justice.

For those who may be wondering whether there are many bilingual or francophone lawyers in Canada, I'd like to point out that there are French-speaking jurists' associations in the four western provinces, in Ontario, in New Brunswick and in Nova Scotia. The seven francophone jurists' associations represent approximately 1,350 francophone jurists.

The FAJEF is also a member of the Fédération des communautés francophones et acadienne du Canada, the FCFA, and it works in close cooperation with the FCFA. In fact, Ms. Diane Côté, responsible for government relations for the FCFA, is here today.

To begin, I would like to state unequivocally that the FAJEF, strongly supports Bill C-232, as does the FCFA, because we believe Supreme Court justices should all be functionally bilingual, for two main reasons.

First, as Mr. Godin stated, as the highest court in the land, the Supreme Court is frequently called upon to interpret French and English-language versions of federal legislation as well as that of a number of provinces and territories in order to determine which version of an act best reflects the legislator's intent. In this context, we believe that bilingualism should not be simply considered an asset but rather an essential skill and mandatory criterion for an appointment to the Supreme Court of Canada.

Second, if the French language is to truly have equal status to English at the Supreme Court of Canada, as it should, in fact, francophone individuals subject to trial should be heard and understood without interpretation, as is the case for anglophones today. We should have no double standards, especially not before the highest court in Canada.

We certainly do not believe it is unrealistic to demand that only bilingual justices sit on the Supreme Court of Canada, especially given that there currently are already eight bilingual judges out of nine. Not much would be required for all nine justices to be bilingual.

We believe this to be realistic, because even in provinces that are largely anglophone, for instance in western Canada and the Territories, more and more judges' panels have the capacity to hear French cases, without interpretation, at the appeal court level.

Over the last two years, a number of cases were heard without interpretation: the Halotier case, before the Yukon Court of Appeal; the Rémillard case before the Manitoba Court of Appeal; FFT versus NWT; the Caron case. These are all French cases which proceeded without interpretation.

So, if francophones can be heard in French without interpretation before courts of appeal in mainly anglophone provinces and territories like in Alberta, Manitoba, the Yukon and the Northwest Territories, why would that not be possible before the Supreme Court of Canada?

In closing, in Canada, regional representation is viewed as an essential criterion—regional representation is considered important—in the appointment of justices to the Supreme Court of Canada. So, we have three justices from Quebec, three from Ontario, one from the Maritime provinces and two from the western provinces.

● (1640)

No one is calling this criterion into question. It is a limitation, in a way. However, we believe that when it comes to language rights and the status of French and English within the Canadian legal system, the criterion of mandatory bilingualism for justices on the Supreme Court of Canada is just as important if not more so than that of regional representation. In essence, they are the very cornerstones of the Canadian federal pact.

I believe we can say that the world has changed a great deal since the Official Languages Act was drafted. Over the last 40 years, we've seen significant progress in the area of language rights. I believe the next step would be to support Mr. Godin's bill to make bilingualism a mandatory requirement for Supreme Court justices.

Thank you.

The Chair: Thank you.

[*English*]

We'll move on to Monsieur Doucet for five minutes.

[*Translation*]

Mr. Michel Doucet (Full Professor and Lawyer , Faculty of Law, University of Moncton, As an Individual): Thank you, Mr. Chairman.

I'd like to start by thanking you for having invited me to testify before your committee. I've had an opportunity to appear before the Standing Committee on Official Languages on a number of occasions. In fact, I attended approximately one year ago, when the issue of bilingualism for Supreme Court justices was addressed and when Mr. Godin's idea to introduce a bill first took shape. At that point, the issue was discussed in depth before the committee.

I appear today as an individual. I am not a member of any organization and represent none. I have been a professor of law for the last 26 years. I've taught language rights for a number of years and I've written a great deal on the matter. Moreover, I have a very busy law practice. I have had the opportunity to appear before the Supreme Court on at least seven occasions. I've also gone before a number of tribunals. I believe that my specific experience in the courts has enabled me to see to what extent it is important for judges to be able to directly understand the submissions made by the various parties.

Mr. Godin referred to the work of interpreters, and I would say that I have the greatest of respect for interpreters. Within a difficult context, namely the Canadian Parliament, this essential work gives members not only the ability to express themselves in the official language of their choice, but also to be understood. However, I would be remiss not to add that I have reservations when it comes to the courts. Except under exceptional circumstances, simultaneous or consecutive interpretation should not take place, regardless of how skilled the interpreters may be. I have been a practising litigator for 30 years, and over this period, I've had an opportunity to appear before courts at all levels, sometimes with interpreters. I must admit it has always been very difficult for counsel to argue cases when judges do not understand them directly in their own language.

In fact the federal legislator and the New Brunswick legislator have understood the problem posed by interpretation in a legal context. Both amended their legislation on official languages to compel judges on courts and quasi-judicial tribunals to hear directly, without interpretation, the proceedings they presided over. Earlier on, Mr. Godin referred to federal courts. In New Brunswick judicial and quasi-judicial courts and tribunals must have a direct understanding of the individual's language. At the federal level the only exception is the Supreme Court. As I stated earlier, I've had to appear on a number of occasions before this court. Each time, my submissions were in French, and each time, a number of judges were unable to understand my submissions without interpretation.

As I've explained, and the interpreter will certainly remind me of this today, I tend to speak quickly. In the week after I had argued a case before the Supreme Court, I had an opportunity to hear the English version of my arguments on CPAC, and I understood why I had lost the case five to four. The translation did not allow me to understand my own words. I wonder how justices can fully understand the matter at hand when they have to go through translation in which significant aspects of a submission are missing. When you win 9:0, there is no problem, but when you lose 5 to 4, you automatically wonder whether you should not have argued in English.

If all unilingual anglophone lawyers in Canada had to argue their cases before one or two unilingual francophone justices on the Supreme Court and therefore have to go through interpretation, I am sure that Mr. Godin's amendment would have been passed long ago.

I support this amendment for a number of reasons. In Canada, where legislation is in English and in French, the Supreme Court itself as always found that in order to interpret a federal legislative provision, both versions of an act had to be considered.

● (1645)

How can both versions, French and English, be taken into account by someone who is not able to understand one of the two versions? Besides, you can refer to the *R. v. Mac* decision in 2002. Also, you can consult the book by Pierre-André Côté, *Interprétation des lois*, where he tells us that in order to interpret bilingual legislation, the meaning that is common to both versions must be found in the first place. Thus, being bilingual is an issue of competence in Supreme Court. It is not a superfluous issue. It is a part of the qualifications inherently required from anyone who seeks access to the highest court in the land.

In conclusion, when we were studying Mr. Godin's amendment, some of us might have wondered whether we should also amend section 16 of the Official Languages Act, which makes an exception for the Supreme Court.

I must say that I have thought this over. My answer is no, I see no contradiction between Mr. Godin's proposal and section 16 of the Official Languages Act.

Thank you.

● (1650)

[*English*]

The Chair: Thank you.

We'll move on to Christian Michaud. You have five minutes.

Mr. Christian E. Michaud (Constitutional Language Rights Lawyer, Partner, Cox & Palmer , As an Individual): Thank you, Mr. Chair.

[*Translation*]

I thank the honourable members of the committee for inviting me here today.

I am a lawyer in private practice with the Cox & Palmer law firm. I have practised law for 12 years. I personally had an opportunity to plead a case in the Supreme Court of Canada, in the Arsenault-Cameron affair in 1998.

I fully share the impressions and the testimony from Mr. Doucet regarding translation and especially regarding the defects that can arise in translation and simultaneous interpretation at the Supreme Court of Canada, particularly in cases that seek to interpret constitutional and quasi-constitutional principles in legal documents, in legislative documents or even more so, constitutional legislation as such, namely the Canadian Charter of Rights and Freedoms.

As for a judge's capability to properly carry out his duties in this position, I entirely agree with Mr. Doucet inasmuch as the issue of a judge's bilingualism, in these conditions, is not a merely political issue that only deserves lip service, but it is an issue of capability and competence so that a judge can fully carry out the duties of his position.

[*English*]

I have prepared a text, and I'm switching over to English because I want everyone present to be able to ask me questions in whatever official language they choose.

That brings me to the next topic, official languages.

[*Translation*]

The issue we are faced with today, of ensuring that all the justices of Canada's Supreme Court can understand the people who are under the court's jurisdiction, without any help from an interpreter, in either of the two official languages, is in fact a constitutional commitment made by this government and by this Parliament along with the other Canadian provinces. It was made when these provisions were included in section 16 of the Canadian Charter of Rights and Freedoms in 1982, making both official languages equal in status and equal in law.

This has to do with the equality of both official languages but, moreover, it also has to do with the equality between both official language communities that use these official languages.

I will not present the entirety of the text that was submitted, because it is fairly technical. However, as you read it, you will see that language rights have evolved to some extent. During the initial years, some adaptations had to be made. Naturally, the legislator, who had made a constitutional commitment,

[*English*]

that had taken formal undertakings to protect the two languages in this country, that there was a necessity to have a certain evolution over time in order to ensure true equality.... That, obviously, spilled over to the Supreme Court of Canada, starting with one of the cases, the SANB case in 1986. There were a number of cases at that time that interpreted language rights, and at that point in time, unfortunately, language rights were interpreted differently from other fundamental rights stemming from the charter. That time of having a limited interpretation of language right, or what the court called the restrictive interpretation, was based on the fact that the court felt that language rights were a political compromise; therefore, the same type of beneficial interpretation that could come out from the courts should not apply to language rights. The court said it's basically up to Parliament, it's up to the legislator, to take the necessary steps to protect those rights by formal means.

So when the Supreme Court of Canada was faced with a situation back in 1986—in that case it was subsection 19(2) of the charter, which applied to New Brunswick, on whether or not that encompassed the obligation for the judges to be able not only to have parties appear in front of them in their official language of choice, but also to be able to comprehend without the aid of an interpreter—the issue, unfortunately, was interpreted very restrictively. You will note that in that decision, which is referenced in my text, there is a strong dissidence coming from two judges, Justice Dickson and Justice Wilson. I submit that the interpretations stemming from those judges are now the case law today, starting with the *Renvoi relatif à la sécession du Québec*, the Quebec secession case, in 1998, supported by Beaulac back in 1999, and then the Arsenault-Cameron case, which I had the pleasure of arguing in 2000, which confirmed that language rights are no different from other types of rights. They're different in nature, but they don't have any different application, and therefore the courts would give it a very wide, generous interpretation, with the ultimate objective of protecting the communities that are related to such official languages.

That is the ultimate objective here: making sure that in Canada the two official linguistic communities are able to be treated equally by the institution of this Parliament, by the institution, namely, in the federal court system. That is the ultimate objective.

So I'm looking forward to answering your questions.

● (1655)

The Chair: Thank you so much.

Thank you to all of you for staying within your time. It's much appreciated.

We'll start with Mr. Murphy. You have seven minutes.

[*Translation*]

Mr. Brian Murphy: Thank you, Mr. Chair.

First, I want to thank all the witnesses: Mr. Michaud, Mr. Doucet, Mr. Godin, MP, Ms. Aucoin and Mr. Rémillard.

Congratulations, Mr. Godin! This is a good step forward. I support this bill. However, in Canada, it remains a legal issue, an issue of human rights and language rights.

I would like to explain to the people who are not yet convinced of this that it is an issue of human rights,

[*English*]

how important it is to look at this in this way. Would you accept that a judge of music could be deaf? Would you accept that a judge in a painting exhibit could be blind? This is the opposition to this bill. The opposition to this bill are saying that there may be some judges from some parts of Canada who don't have the same background of being trained bilingually, knowing the languages well, who may be excluded in the process of selection from becoming Supreme Court judges. That is where this opposition is coming from. And that's not the right way to look at this. The way to look at it is this.

[*Translation*]

As Mr. Michaud already said, when he was a lawyer pleading before Canada's Supreme Court, one or two of the judges did not understand him—it all depends.

[*English*]

I went to the Supreme Court of Canada for a client—and every case at the Supreme Court of Canada is important, let's not kid ourselves—and I was not understood. I was not understood by a judge or two judges. We have to put our parochial beliefs that some judges will be excluded behind the idea that the right to be understood has to be protected.

With that in mind,

[*Translation*]

the only question I have for the lawyers is this: is it perfectly clear, after the three cases that Mr. Michaud mentioned, that according to Canadian law, in court, before a judge or when dealing with legal cases, we have the right to be understood, and not only to be heard?

[*English*]

Do we have the right before judges to be understood and not just heard?

I'll start in any order you want.

[*Translation*]

Time is running short.

[*English*]

We know your points of view very well.

[*Translation*]

Mr. Michel Doucet: The Supreme Court of Canada, in the case of the Société des Acadiens et Acadiennes du Nouveau-Brunswick, had decided that a party could use the language of its choice, but that the judge was not obliged to hear it in that language. This decision has never been overturned. The interpretation principles underlying this decision were overturned in the Beaulac affair, but the issue of bilingualism for justices never came back before a court since then, and this was for a very simple reason: the Official Languages Act at the federal level and the Official Languages Act in New Brunswick were amended to recognize the right to be heard directly by a judge who understands without help from interpretation.

According to the new principles governing interpretation, if this issue was raised again before the Supreme Court, I would be ready to bet my shirt and my tie that the Supreme Court would overturn the decision made in the case of the Société des Acadiens et Acadiennes du Nouveau-Brunswick.

● (1700)

Mr. Christian E. Michaud: I fully support what Mr. Doucet just said. Let me add that the problem with the SAANB decision had to do with the reasons for the decision that made a restrictive interpretation of subsection 19(2) of the Canadian Charter of Rights and Freedoms. When we look at this more closely, it truly seems to be devoid of any sense, because the Supreme Court, at the time, seemed to be saying that official languages basically had the same value as other languages. Here, we must note that the right to be heard—not necessarily the right to be understood—is a right that also exists in section 14 of the Canadian Charter of Rights and Freedoms when dealing with certain court procedures. Thus, the legislator, or Parliament, saw it fitting to give, for principles of what we call natural justice or fundamental justice, to every person under the court's jurisdiction the right to be heard. Therefore, this applies to all languages. However, when we are dealing with official languages, it is more than an issue of fundamental justice. Besides, this is what I wanted to say earlier, with regard to different kinds of rights.

[*English*]

There is a fundamental difference between official language rights and other fundamental rights that exist. So to answer Mr. Murphy's question as to whether or not today the right enshrined in the charter that anyone appearing in front of the Supreme Court, or any court for that matter, has the right to be heard in his or her official language of choice encompasses the right to be understood, I would submit that in fact it does include the right to be understood; otherwise, there is no value whatsoever to section 19 of the charter, because you already have section 14, and the charter cannot contradict itself and cannot speak for no reason. That, in my mind, is the state of law if it should appear in front of the court again.

The Chair: Monsieur D'Amours, you have one minute.

[*Translation*]

Mr. Jean-Claude D'Amours (Madawaska—Restigouche, Lib.): Thank you, Mr. Chair.

I will make a brief comment and you will have the opportunity to reply. I want to discuss what was discussed earlier today regarding the so-called lower courts, like the Tax Court of Canada and others. Let us face the facts, is it not ironic that lower courts are under the obligation of extending the service in our language, whereas the Supreme Court, the court that will make the final decision and decide on the individual's future, is not under this obligation? This is somewhat ironic. The reverse situation would perhaps make more sense. Do you not find that the current situation is ironic?

Mr. Christian E. Michaud: This is one of the themes I deal with in my presentation.

[*English*]

In fact, there is no question in my mind that the highest court of this country should lead by example. I'm not putting the blame on the highest court; I'm simply saying that the way the law is drafted is sort of contradictory, especially in light of the concept of institutional bilingualism,

[*Translation*]

what is called in French "le bilinguisme institutionnel".

[*English*]

It's a concept that the Supreme Court itself developed in Beaulac in 1999 to confirm that the institutions, namely the administration of justice—the courts—have the onus of making sure they are institutionally bilingual to protect the rights of the constituents, to protect the rights of the people appearing in front of them, and not the other way around. We're not the ones who should support that burden; it is the court's burden.

To answer your question, I do agree that it is, in a sense, sort of contradictory that the current laws that apply at the Supreme Court of Canada do not allow that court to lead by example by making sure that it is also purely constitutionally bilingual, institutionally bilingual, as the Supreme Court enunciated in Beaulac.

The Chair: Thank you.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Thank you, Mr. Chair.

First I want to say to you, Mr. Godin and all of you here today, that you can count on unwavering support from the Bloc Québécois in this battle that you are so honourably waging.

Language is a question of identity. The reason why I think that your bill must be supported and that it should have seen the light of day two or three decades ago, or even when the Supreme Court was established, is that it is not true that one can learn a language late in life. A justice in the Supreme Court is under extraordinary pressure, you can imagine that.

I do not think that if we do not send out a signal very soon saying that all those who aspire to careers as judges, right up to the highest echelons, must know French...

I was present at that committee—Mr. Comartin was there too as well as other members from the party in power, I believe—when we questioned Mr. Rothstein, whose expertise in the legal matters cannot be challenged. He did not know French. I asked him a question as a francophone who is interested in these issues. Even if the Supreme Court does not hear as many civil law causes as it hears common law cases, it seemed inconceivable to me that someone could be a Supreme Court justice and not know French. Therefore, I asked him if he would take on the obligation of learning French. He said that he would. Without questioning his good faith and without dragging him before the Supreme Court for perjury or for misleading information, I would be curious to know, at this time, how far he has gotten with carrying out this obligation to be fluent in French.

The merit of Mr. Godin's bill is that we must—and I hope that all the parties in the House will support it—in law faculties next year, let it be known that anyone who wants to become a justice in the higher courts, must be fluent in both languages, and know French.

It is an absolute illusion to think that if this obligation is not enshrined in law, large numbers of legal professionals will recognize that they have such an obligation.

You have our unflinching support. In life, there are times when we need to convince and there are times when we need to constrain. Your bill must be a constraining bill? I would be very disappointed if the House did not support you unanimously, for as a francophone, you have a right to expect that.

And let me ask, Mr. Godin or any other person who would like to answer, what are the arguments of those who oppose your bill. I cannot imagine that this House will not be unanimous on a bill like this one.

● (1705)

Mr. Yvon Godin: Among other arguments that we hear, there is the fact that some people get eliminated. This means that a unilingual person could not be appointed to the Supreme Court. I do not think that we can find a single unilingual francophone appointed to the Supreme Court of Canada since it began to exist.

This is my argument: the Supreme Court, which is a court of justice, was not created so that judges can be appointed, it was created for the purpose of rendering justice to citizens.

Thirty-three million people live in Canada, how many lawyers and judges have we in Canada? Can we not find among them nine judges who speak both official languages? If our government is sincere with regard to respecting both official languages and recognizing them in every part of our country, how could it fail to find nine persons who are capable of functioning in both languages?

And I would like to add the following:

[*English*]

At the official languages committee, the University of Toronto said they support it, and as soon as it passes, they will tell lawyers who want to be judges and start training them in the other language. But they say they don't have to do it because they don't have to have it.

[*Translation*]

This shows that society is already preparing for that. Academic institutions say that they will be ready, as soon as the legislation comes into force, to offer language training. The next appointment will be made in some four or five years. Just think of all the time that we have to get prepared! My bill clearly shows that this is not a thing of the past; it has to do with the future and with future appointments.

Moreover, the Supreme Court was established in order to provide justice to Canadians, and not simply for appointing judges.

Mr. Réal Ménard: Do I have time to put a brief question, Mr. Chair?

The Chair: Yes.

Mr. Réal Ménard: Could one of you who pleaded before the Supreme Court, perhaps tell us, with all due respect for Justice Rothstein, if we have any information saying that he has learned French? Does anyone know?

Mr. Michel Doucet: I would not want to judge Justice Rothstein in any way, but I believe that he is still using translation. I do not know whether he has learned French. Learning French for use in a social setting is one thing, but learning French so as to be able to hear court cases is something else.

I speak a little bit of Spanish, but I could not hear a court case in Spanish. However, if I wanted to be appointed to the Court of Appeals in Madrid, I would make sure that I could speak Spanish. We are told that court appointments are often made on the basis of competence. In my opinion, in a Canadian setting, with the legislation that we have and with our interpretation of bilingual legislation, to be competent to sit as a justice of the Supreme Court one must understand both languages.

If we tell the people that those are the requirements, I am confident that my colleagues, the anglophone lawyers who practise in various Canadian provinces will get organized, if they have an ambition to be appointed to the Supreme Court, so that they learn both languages. I am sure that Julie Payette, before becoming an astronaut, had decided to use all the means that would help her to get there. The same applies to anyone who wants to be appointed to the Supreme Court.

● (1710)

Mr. Christian E. Michaud: Mr. Chair, let me raise a brief point of information which, I think, is relevant and is in agreement with what Mr. Ménard was saying.

I am not speaking on behalf of the Canadian Bar Association, but this is just a point of information. Last year we succeeded in adopting a provision at the Canadian Bar Association, which is the association that all lawyers belong to across Canada. We succeeded in including in our professional code of ethics a provision whereby from here on in, lawyers, even in private practice—we are not talking about government institutions—are obliged to respect the official language of their client, especially if the client has rights that he can exercise before the court. Therefore, things have evolved enormously at the private level. I think that the message is out and that henceforth both official languages are equal in status and in law, as regards future justices or lawyers who want to become judges. By including this provision in its code, the CBA has recognized the need and the importance of respecting the language of choice of those under the court's jurisdiction.

[*English*]

The Chair: Thank you. Maybe in a follow-up response to another question....

Mr. Comartin.

[*Translation*]

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

I thank our witnesses, but more specifically Mr. Godin, who is my party's whip.

An hon. member: It is in your interest to support him!

Some hon. members: Oh oh!

Mr. Joe Comartin: Ms. Aucoin, can the organizations that train lawyers and young judges in all provinces give them the opportunity to learn the other official language?

Mrs. Louise Aucoin: I would like to make a comment on the facility that judges have for learning French. Afterward, I will come back to your question. I think that this will help find an answer to your question.

In the west of Canada, there are about 15 bilingual judges who have heard cases entirely in French. I think that most of these judges learned French after becoming judges. Thus, when judges are at lower levels such as Superior Court or the Court of Appeals, they have the opportunity to take French courses. Many of them are very intelligent and learn other languages very easily. We know that quite a few lawyers are very gifted in this regard. These people learned French after becoming judges. Therefore, possibilities certainly exist.

How about the situation in our schools? Together with Mr. Doucet, I teach at the University of Moncton, in the Faculty of Law. We have many young anglophones who went through the immersion system and who are very competent in both official languages. I think that our bilingualism has become an important Canadian value. Ambitious people who want to succeed believe that it is crucial for them or for their children to learn both languages.

Thus we see that there are services and that things are getting easier as compared to 40 years ago for those who want to obtain services and learn both official languages.

Mr. Joe Comartin: Michel.

Mr. Michel Doucet: I just finished a two-week long trial in Edmonton, Alberta, before Madam Justice Eidsvik from Calgary, with an anglophone crown prosecutor also from Edmonton. Everything was done in French for two weeks. The Caron case was a very technical trial and there was no problem. Things worked out very well. I think that we could not have done the same thing in Edmonton 10 or 15 years ago.

● (1715)

Mr. Joe Comartin: Ms. Aucoin and professor Doucet, judges are not responsible for such services. They already exist.

Mrs. Louise Aucoin: They can ask for them quite easily.

Mr. Rénald Rémillard (Executive Director, Fédération des associations de juristes d'expression française de common law inc.): Exactly. Some judges decide to take French courses. I know some who constantly listen to their radio when they commute between work and home, so as to practise their French. Training is available, but some very highly-motivated unilingual judges have become sufficiently bilingual.

Besides, I put a question on the training of judges to a chief justice whom I will not mention by name. He told me that he knew judges who had been unilingual at the outset and that can now hear trials without using interpretation. We see that more and more judges are doing this. It needs determination and effort, but the system is working.

If we look a bit lower down in the system, toward the future... In associations of legal professionals, especially in the west of Canada, we note that there are more and more anglophone members who have learned French, who have attended immersion courses and who absolutely want to maintain their level of French. The same thing with law faculties. About two years ago, the University of Manitoba told us that it was intending to offer law courses in French because the students want to take part in contests like the Laskin Moot and because some of them who had gone to immersion courses wanted to maintain their French. Law faculties are beginning to think in these terms. This was not the case 20 or 25 years ago, but it is coming along very quickly. We can see the change.

We mentioned some cases that were heard in French by courts of appeal and by panels of judges in the west of Canada during the two or three past years. Most of these judges were anglophone, but bilingual. Twenty-five years ago, no one believed that this could be done. Things have evolved a great deal and we must now go on to the next phase.

[*English*]

The Chair: Monsieur Petit.

Mr. Joe Comartin: Mr. Chair, Madam Aucoin wanted to add one more point.

The Chair: Unfortunately, we're really running out of time, because we have 10 minutes yet for in camera.

Monsieur Petit, you'll only have a short question.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you, Mr. Chair.

I thank you all for being here.

This is a problem that concerns me. I am a lawyer in Quebec and I studied at Laval University. Our attention has been drawn to the matter of the appointment of bilingual judges to the Supreme Court. We are discussing the matter and following the situation closely.

I also sit with Mr. Godin and Mr. D'Amours on the Official Languages Committee where these problems are discussed every day. Mr. Doucet has long experience with our committee; I have already questioned him several times. Mr. Michaud, this is the first time I see you. Ms. Aucoin, this is not the first time that I meet with you.

My comments are addressed to Ms. Aucoin and Mr. Michaud. You read the bill. It is very brief, consisting of only about three lines. The new subsection 5(2) concludes as follows: "who understands French and English without the assistance of an interpreter". Are we talking about oral expression, oral comprehension or written comprehension? Given that they are judges, they receive written procedures, pleas and briefs. They have the right to hear witnesses, as well as the lawyers who come before them. After having read this bill, do you think that it has to do with oral comprehension or written comprehension?

How would you describe this degree of bilingualism? This is the first time that something like this has appeared in this kind of legislation. I am affected by this, as are my colleagues. This is a very important matter for us.

● (1720)

Mrs. Louise Aucoin: I think that we are clearly not ready to hold tests to evaluate the language skills of the justices of the Supreme Court of Canada. On the other hand, I believe that naturally, when a person understands French and English without help from an interpreter, it is a case of functional bilingualism. This involves both oral and written comprehension.

Mr. Daniel Petit: Have I any time left, Mr. Chair?

[*English*]

The Chair: Yes, one more minute, very quickly.

I think you had another answer, Monsieur Michaud.

[*Translation*]

Mr. Christian E. Michaud: I just wanted to stress this point. Regarding functional bilingualism, I agree. I believe that we must keep in mind the principles enshrined in section 19 of the Canadian Charter of Rights and Freedoms, especially all the rights that have to do with official languages and that are meant to ensure full institutional bilingualism, especially in the administration of justice, so that no one under a court's jurisdiction is disadvantaged as compared to someone else.

Therefore, if a person in court uses an official language, your question should be formulated as follows: how can we guarantee that the criteria for selecting judges, once they have been chosen and appointed, will ensure that the needs of the clients of the courts be met without creating an unjust situation? In my opinion, these things should be interpreted in this light.

Thank you very much.

[*English*]

The Chair: Thank you so much.

Unfortunately, we're out of time. Certainly your information has been very helpful to the committee, and who knows, we may want to call you back, because I think there's much more you would have wanted to share with our committee.

Thank you to all of you.

We're going to suspend for just a moment, and then we're going in camera.

[*Proceedings continue in camera*]

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