# Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

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The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-394, An Act to amend the Criminal code and the National Defence Act (criminal organization recruitment), met this day, at 10:31 a.m., to give consideration to the bill.

**Senator Bob Runciman** (*Chair*) in the chair.

[*English*]

**The Chair:** Good day. Welcome colleagues, invited guests and members of the general public who are following today's proceedings of the Standing Senate Committee on Legal and Constitutional Affairs.

Today we are continuing our study on Bill C-394, An Act to amend the Criminal Code and the National Defence Act (criminal organization recruitment). This bill amends the Criminal Code to make it an offence to recruit, solicit, encourage, coerce or invite a person to join a criminal organization. It establishes penalties for that offence and more severe penalties for the recruitment of persons under 18 years of age. This is our third meeting on the legislation.

Our first witness is appearing from video conference from Niagara Falls, Ontario. He is a witness who appeared on a number of other occasions. Please welcome Tom Stamatakis, President Canadian Police Association.

Mr. Stamatakis, I believe you have an opening statement. Please proceed.

**Tom Stamatakis, President, Canadian Police Association:** Good morning, honourable senators. It's my pleasure to be joining you again today regarding Bill C-394, the proposed criminal organization recruitment act. I know most of you are quite familiar with our organization by now, but, for the record, the Canadian Police Association is the voice for over 54,000 front-line civilian and sworn police personnel across Canadian, and I'm joining you this morning on their behalf.

The CPA endorses Bill C-394 and congratulates the honourable member from Brampton—Springdale for originally introducing the bill as well as Senator Plett, who, as I understand it, has been shepherding this legislation through the Senate process. It's important for me to note that the original sponsor of the legislation, as I mentioned, the member for Brampton—Springdale, engaged in extensive consultation with the law enforcement community before drafting this bill, including the members of Peel Regional Police Association and the Winnipeg Police Association. Our members appreciate the opportunity to help craft legislation that seeks to provide the tools necessary for front-line police personnel.

With respect to the bill itself, as the law enforcement community knows well, gangs have an extremely vested interest in recruiting young members. There are two principal reasons for that: First, as I'm sure you are all aware, these criminals know well that the penalties imposed by the courts on young offenders are remarkably more lenient than adults will receive; and, second, gangs only work when there is a constant stream of new recruits to replace those whom law enforcement has managed to incarcerate or who have fallen victim to the realities of gang violence prevalent on the streets of our cities.

Ask any police officer across the country and they can provide heartbreaking stories of children 14 years and younger who are being coerced by a variety of means, from addiction to violence, to those who simply prey on that very teenage need to fit in; and who are now facing or have been convicted on charges as serious as assault or murder. Just dealing with those recruitment methods would be challenging enough for law enforcement today, but that does not begin to address a factor that seems to be on the increase now across the country, namely, multigenerational gang recruitment. Fathers and uncles recruiting sons and nephews to carry on this new style of family business is another example of why we need every tool possible at our disposal.

That being said, no single legislative tool will fully address the problem of youth involvement in criminal organizations, but I will take a moment to toot our own horn and shed light on some of the pioneering work done by law enforcement. This shows that our approach is far more sophisticated than to lock them up and throw away the key.

For example, in 2012, the Children's Hospital of Eastern Ontario recognized the efforts of Ottawa police, who have established the Police Athletic League which provides competitive sports leagues and tournaments for 800 children and youth from ages 6 to 16 who could not otherwise afford competitive sports. The program fosters skills and leadership development and comes with the traditional expectations of an organized sports league such as an awards night, uniforms and trained officials. Police provide mentorship at awards banquets, games and practices. Our officers recognize the need for us to provide alternatives to the promises made by gang recruiters. Law enforcement agencies from across the country are going above and beyond to meet this challenge.

Of course, we cannot comprehensively discuss this issue without recognizing that the efforts made by law enforcement to combat youth involvement in organized crime require investment and additional resources. Programs such as the one I mentioned often rely on the volunteers, who are found — our officers are always ready to answer the call — but there are only so many hours in the day and only so many bodies available to provide the manpower necessary.

We can't simply rely on volunteers and goodwill to take on organized crime in Canada. We need to ensure our parliamentarians recognize that when new legislation is introduced and passed, even legislation that is wholeheartedly supported by politicians across the political spectrum, these new provisions don't exist in a vacuum. Investments and law enforcement are necessary to see the proliferation of programs such as the Ottawa police athletic league and others like it across Canada.

Honourable senators, I want to keep my opening remarks brief this morning to allow as much time for questions as possible. I conclude with this: The key word to focus on with organized crime is "organized." The leadership of these organizations is often quite sophisticated, often to our collective surprise. They know the laws and, more importantly, they know and exploit the loopholes. Bill C-394, which you are considering today, helps to close, or at least tighten, one of those loopholes.

I understand that some honourable senators, as did some members in the House of Commons, had a philosophical opposition to the concept of mandatory minimum sentences included in this bill, but I urge you all to consider this legislation more through the prism of the number of youth we lose annually to these criminal gangs and how we can provide law enforcement the tools necessary to stop that flow.

**Senator Plett:** Welcome, Tom. It's nice to see you here again and taking part in this.

I'm sure you're aware that we had your colleague and our good friend George VanMackelbergh here yesterday testifying. One of the comments he made was that gangs recruiting children are predatory in nature. Would you agree and would you maybe elaborate on that a bit?

**Mr. Stamatakis:** Absolutely, that's a very apt description of the activity. They isolate kids who are vulnerable, kids that don't have support, whether it's peer support in the schools or whether it's support in the home because of the family situation. They seek them out and entice them into organized crime activity with the lure of sometimes money, sometimes drugs, sometimes just attention. These are kids who are often craving attention and will get it from wherever it comes.

**Senator Plett:** In your closing comments you alluded to the opposition that some people have toward mandatory minimums. We hear that over and over again and we will hear that again later today.

But mandatory minimums, of course, are not exclusive to this government. It is a long-standing tradition to have mandatory minimums for crimes that are particularly heinous and offensive. I can't imagine a crime more heinous or offensive than recruiting a 10-, 11- or 12-year-old boy or girl into a gang to do the crime for adults because they will not receive any punishment. Of course, this bill does not seek to punish children; it seeks to punish those who are recruiting them.

Would you agree that this has to be one of the most heinous and offensive crimes that we have when we recruit these young people in to do our dirty work for us?

**Mr. Stamatakis:** I absolutely agree with you. I don't have any empathy at all for people who are engaged in that activity. There are so many reasons why it's appropriate to have significant and serious consequences for people who are recruiting young kids into crime. Even in some of my other appearances where we were talking about the cost of policing, these are kids who are recruited into crime; they become people we deal with all the time. It not only victimizes the child who can't make an informed decision but it also victimizes their families. The child often goes on to become a pretty prolific offender so we're generating victims all across our society and in the communities that we serve.

When you talk about crime prevention and trying to get ahead of some of the issues that drive cost, the best way to engage in preventive proactive activities is to stop this ability for these people to recruit new people into their criminal organizations.

**Senator Jaffer:** Thank you very much once again for your presentation. We always look forward to hearing from you. When I was a young lawyer, the first thing that I was taught was that you don't put a person in jail and throw the keys away, and I was really pleased that you spoke about that. We know that young people who are vulnerable and looking for attention and looking for a place are the easiest people to be recruited. You did talk about prevention. I do understand your members' time is limited so I don't expect your members to be doing it, but how are you encouraging all of us to look at prevention programs?

**Mr. Stamatakis:** From a policing perspective, I think police organizations across the country, as I alluded to in my comments, have recognized the need to engage with youth. I used one example, the Ottawa Police Athletic League. Those kinds of organizations, athletic leagues organized by the police, are now prevalent across the country from coast to coast. These are opportunities for police officers to engage with these vulnerable youth in a more positive environment so we're not dealing with them after they've committed the crime; we're trying to engage with them before they enter into that lifestyle.

There are many other organizations and communities where the police participate but where other community members participate. They are peer-based. The research now tells us that peer-based programs work a lot better than having an older person lecturing a kid about what they should or shouldn't do. I sit on the board of an organization in Vancouver called the Odd Squad, which is made up of police officers and other people in the community who try to educate youth around the risks of crime through the use of peer-based video.

Police organizations across the country have officers embedded in schools so they are working with the education system to create programs that provide support to the most vulnerable kids. We will typically identify in collaboration with the school system who those kids are and then try to provide them with positive support so that they make better choices and are not as vulnerable to attack.

**Senator Jaffer:** Senator Dallaire is the critic of this bill and I will quote him: "We also see that a disproportionate number of gang recruits are Aboriginal youth. Many of them have spent their lives fighting a losing battle against the social systems that hold them back from achieving their goals. Aboriginal youth are disproportionately affected by these factors."

Do you agree with this statement and do we need to do more? We know for a fact that there is an overrepresentation of Aboriginal people in the prisons. I was in Winnipeg and I saw what was happening there, so there certainly is an issue of protecting our young Aboriginal youth. May I have your comment on that?

**Mr. Stamatakis:** I agree. With respect to the specific bill, Bill C-394, we are not targeting the vulnerable kids that we're talking about. This is about creating a consequence for those who will prey on those kids and creating a measure of accountability in our society when people engage in those activities. I

couldn't agree more, we need to do more to support kids, particularly kids from vulnerable groups — the Aboriginal community, our newcomer populations, and especially in the larger cities across the country — but at the same time this is another tool that will help particularly the police prevent those vulnerable kids from being targeted.

**Senator Jaffer:** With the greatest of respect, I read the bill; I know who we are looking at; but my challenge is that we are not targeting the bad gang leader members. It could be the small recruiters, the young people who are forced into recruiting that we will be sending to the university of crime. My concern is that that's what this bill will trap. That's my concern; who are we looking at? It won't bring in the seasoned recruiter or gang member. The evidence we've heard is that it's the young person who is recruiting another young person.

**Mr. Stamatakis:** I guess I would have a different perspective. We are creating a piece of legislation; there will still be an onus on the police to establish beyond a reasonable doubt that a person is engaged in these activities. Sometimes the best way to interrupt behaviour that we know is damaging to our community is to intervene and in appropriate circumstances pursue a criminal charge. We have other mechanisms in our criminal justice system to deal with youth who perhaps themselves were vulnerable and where there is a possibility to intervene and do something different.

Those are the kinds of decisions that police officers make every day with respect to how they apply their discretion around enforcing Canada's laws.

**Senator Jaffer:** I imagine you are talking about the diversion programs. I agree you and the Crown use those, but with mandatory minimums that's not possible. That's the challenge.

**Senator McIntyre:** Critics of the bill have already told us that it is not necessary, the reason being that the legislation is already covered under other sections such as 467.11, 467.12 and 467.13. I'm sure you're very familiar with those sections. Currently, the Code covers the criminal organization part, but it does not cover the recruitment part. Therefore, as I understand it, the reason for creating a separate offence is to bring clarity to the legislation. To me, that's what it's all about. Are you in agreement with this?

**Mr. Stamatakis:** I agree with you completely. It makes it clearer, and this is a more narrowly focused provision that I think will be a useful tool for frontline police officers.

To speak to the earlier concern, police officers use their discretion every day. My background is as a frontline police officer. Say I came across a vulnerable child who was lured into some kind of activity where they are now recruiting; police officers in this country apply their discretion every day to deal with those situations. I think this bill is still an effective tool to deal with those other predators who are wreaking havoc in communities across this country.

**Senator McIntyre:** Yesterday, we heard witnesses tell us that the bill should not only apply to criminalized recruitment of youth into gangs but also to threats and coercion used to keep young people in gangs, the reason being, of course, that youth fear reprisals against them, their families and friends. What are your thoughts on this?

**Mr. Stamatakis:** These organized gang or crime groups thrive because of how they use threats and intimidation as a tool to coerce people into doing what they want them to do. I'm in favour of any legislative tool that will provide us with the ability to take some good action against those kinds of behaviours and be able to respond swiftly.

**Senator Joyal:** Welcome, Mr. Stamatakis. Yesterday, your colleague, Mr. VanMackelbergh, mentioned, in his brief, that he would like to see greater sentences if recruitment occurs in areas where youth should feel secure, i.e., schools, community centres, playgrounds or anywhere youth congregate. Do you share this preoccupation of your colleague that, if the recruitment takes place in an area where we usually find youth, it should be an aggravating factor for sentencing?

**Mr. Stamatakis:** I would certainly agree that it should be an aggravating factor. We create these spaces and tell kids to go to those spaces, presumably because they are going to be safe and secure there. It is an aggravating factor if people engage in recruitment activities in those places, for sure.

**Senator Joyal:** The other preoccupation I had — and I mentioned it yesterday — is that recruitment today should not be seen only the traditional way, which is a predator coming close to a school fence and trying to engage in conversation with the youth. To me, the use of Twitter and all of the electronic networks that most of the youth now have in their hands, which experts call cyber-banging, is a phenomenon that exists much more than one might think to be real. I'm quoting from a Public Safety Canada information sheet, brief number 13, and I read it to you because I want to get your opinion on how that would change our approach to fighting recruitment of youth into organized crime: "Organized criminals use these networks" — i.e. Twitter and all of the other networks I referred to — "for various reasons, ranging from the showcasing of their images and exploits to allegedly recruiting members. This phenomenon is sometimes referred to as `cyberbanging'."

As I said, it's the organized crime research brief number 13, published by Public Safety Canada.

I'm tempted to give weight to that conclusion because it's visible. You can see that the youth on the street all have their iPad or their cellphone, and they are all punching. I have looked quickly to other works that have been done by the University of Montreal's criminology faculty, whereby this is a phenomenon that, today, spreads like fire in the wheat field. That is, it is very easy to interconnect with thousands of youth at the same time and especially to exploit the images of organized crime. They are heroes, and they adopt the characters or the kind of images that youth find in videogames and whatnot. To be part of organized crime is like being part of knight groups and fighting and whatever.

We know that those games are very popular. I wonder if what we are doing will really meet its objective, taking into account that we seem to rule but not really to be improving our capacity to lead investigations and to come to the criminals we want to get. I'm really puzzled by the fact that the Minister of Justice of Manitoba yesterday mentioned to us that section 467.11 of the Criminal Code was intended to address gang recruitment. However, this provision is rarely used to address this issue, and, when I read section 467.11, it clearly refers to anyone who participates in or contributes to any activity of the criminal organizations. It's very widespread, so recruitment is certainly part of the phrase "contribute to any activity" of the criminal organization. It's certainly a contribution to recruit youth or anyone to commit a crime. I wonder whether the priority of police forces is to really zero in on the recruitment or whether they are not focusing more on other aspects of criminal organization, especially in the context of cyber-banging that I'm describing now.

**Mr. Stamatakis:** As a front-line police officer, whenever you're entering into an investigation, when the provision that you're relying on is quite broad, to be blunt about it, we have lots of issues trying to put together the brief in a manner that is sufficient for the Crown to proceed with the criminal investigation. So, as a police officer on the street, I always prefer when the Criminal Code provisions are quite clear and more narrow in terms of their scope.

That's what I would say in response to your question about 467 versus this proposed Bill C-394. This very much narrows and targets the specific activity. In terms of the social media piece, there is no question that people engaged in gang crime, particularly younger people, use social media in a very significant way. They are posting images that promote the lifestyle and try to make it more attractive — the flashy jewellery, the money, the cars, the guns. I have seen many images like that, and they are certainly communicating, using social media, about events that they are hoping to get kids to attend. Those are also

areas where we can gather a lot of evidence to establish that someone is engaging in activities in an effort to try to recruit someone into a different lifestyle. It's changing the landscape. There is no question that technology has had a significant impact on policing — how we police, how we investigate crimes now, all crimes, not just crimes related to organized crime or gang crime. Police organizations across the country are adapting to that.

[*Translation*]

**Senator Dagenais:** It is always nice to see you, Mr. Stamatakis. I know you a background in street policing and you made your career in Vancouver where, like in many major Canadian cities, street gang recruitment is high.

Yesterday, I told our colleague from Winnipeg — and you will tell me what you think — that criminal organizations that recruit youth are well aware that those young people can commit violent crimes and their sentences will be less harsh because they are under 14, 16 or 18 years of age or even younger. Do you not think that recruitment is linked to the fact that recruiting minors benefits criminal organizations, knowing full well that those young people will be able to get the job done and receive lighter sentences?

[*English*]

**Mr. Stamatakis:** Absolutely. You're right. My policing background is in Vancouver. We've had prolific gang crime issues not only in the city of Vancouver but in the Vancouver region for many years, probably starting in a big way in the early 1990s. I can give you many examples of organized gang groups who have specifically targeted youth and have used those youth to commit certain crimes, knowing that there would be fewer consequences for youth than for an adult committing the same crime.

[*Translation*]

**Senator Dagenais:** Thank you, Mr. Stamatakis, and let me pass on the regards of your predecessor as I met with him yesterday.

[*English*]

**Senator McInnis:** Mr. Stamatakis, as President of the Canadian Police Association, I'll give you a bit of background and then I'll ask you a question as to whether you think the government is getting there with respect to making our communities safer.

There were three criminal organization offences prior to this bill: the commission of an offence for a criminal organization; participation in the activities of a criminal organization; instructing the commission of an offence for a criminal organization; and now, recruitment of members by a criminal organization to facilitate or commit an indictable offence.

Then, of course, we've had the Safe Streets and Communities Act, the Tackling Violent Crime Act, stiffening of penalties, serving consecutive sentences and so on. There are many others.

Do you feel the government is getting there in making our communities safer? If you agree, are there other areas that we should be contemplating?

**Mr. Stamatakis:** What I would say is this: I think the legislation you are referring to is a step in the right direction. In my view, a big part of making communities safer is our messaging around crime and what we say about crime as a society.

I think for a long time in this country, frankly, we've dropped the ball. As a society, I think we've created this environment where it's no big deal if you get engaged in these activities that have a real consequence for the victims, and they have a real consequence for communities in terms of quality of life and impact on the economic activity in the community. I think the legislation is a step in the right direction.

Where I think we still have a long ways to go is, in my view, again from a front-line policing perspective, the police have lots of tools in the toolbox; where we're constantly frustrated is once we get into the criminal justice system in terms of the prosecutorial piece, as I alluded to in my comments, these are sophisticated groups in many ways. Technology has had a huge impact. The investigations are quite difficult and complex. We have decisions like *Stinchcombe*, which create these extremely onerous disclosure obligations. We end up then being in these criminal prosecutions where it becomes all about the disclosure as opposed to the evidence you have that these criminal offences have occurred.

I think on the legislative front, I support this government's approach. I think we have a long ways to go in terms of getting to the outcomes.

The other piece I alluded to in my comments is that there needs to be an investment that goes along with creating the legislative tools, and there also has to be a balance. I also believe that, along with good legislation that gives the police the tools to enforce Canada's laws, there has to be an emphasis on how we prevent people from becoming involved in lifestyles where they're committing some pretty serious and horrendous criminal offences. So it's a balance.

In my opinion, as a front-line police officer for about 25 years, the pendulum has swung way too far one way, where it was almost like a free-for-all in our communities across this country, to now coming back a bit, but we have to get that balance right moving forward.

**Senator Batters:** Mr. Stamatakis, thanks very much for participating in our committee hearing today. It's nice to see you again.

First of all, I want to confirm with you, it sounds like from what you're saying that it's your experience — which is a considerable amount of experience — that the current section that is in place today is not being used; is that correct?

**Mr. Stamatakis:** I don't know that it's not being used. In my view, it's quite broad, and it becomes very challenging then, as a police officer, to utilize that provision to then make the argument or satisfy the elements that are necessary to be satisfied in order to prove that the offence occurred; whereas a bill like Bill C-394 very much narrows the definition of the activity, which then makes it easier to build the case to satisfy the elements that you need to satisfy in order to prove that the offence occurred.

**Senator Batters:** Right. One of your colleagues from Manitoba, George VanMackelbergh, was before our committee yesterday, and he indicated that, in his experience, he could only remember a handful of charges dealing with that particular section that currently exists, and that's in Winnipeg, where they have a considerable problem.

You wouldn't say that your experience, seeing these issues from a pan-Canadian perspective, has been different from that, would you?

**Mr. Stamatakis:** No. It's not a widely used provision. Maybe I'm not being clear.

The problem with many Criminal Code provisions, not just that one, is because they're difficult and police officers have capacity issues, particularly in Winnipeg with lots of crime, you're going to go where you think you're going to be most likely to succeed. If you're starting to try to build the evidence to support a charge on a provision in the Criminal Code that's very broad and difficult to prove and there's going to be lots of resistance from the Crown, you're not going to commit the resources to that. I agree with my colleague that it's not a widely used provision across the country.

**Senator Batters:** Okay. You were being clear; I just wanted to probe that a little bit.

Also, I noticed earlier Senator Joyal was speaking about the issue of cyberbullying. I hope that with his comments today, we may look forward to his support when our government brings forward that particular piece of legislation to our committee. Thank you very much.

[*Translation*]

**Senator Rivest:** In terms of street gangs, under the provisions of the Criminal Code, there is no doubt that the traditional activities of police officers are absolutely necessary.

An experiment was done in the north end of Montreal, in the Saint-Michel neighbourhood, where there were actually some very serious problems with street gangs and youth recruitment. However, the borough mayor, Ms. Samson, with the help of police authorities, changed the traditional work of police officers — their suppression and law enforcement work — and got them involved more in community and social action. You also talked about the need for more balanced efforts from police and community groups.

As a police officer with first-hand experience in these issues, what is your general observation of these activities and the effectiveness of community action, and what is the proportion, so to speak, in terms of public safety effectiveness, between legal or law enforcement suppression action and community action? What is effective?

[*English*]

**Mr. Stamatakis:** You're talking about one type of activity. Let me just say at the outset that I completely support that kind of approach. I think there has to be a balance. There has to be a blending of both approaches. I don't think it can just be about enforcement.

On the other hand, it can't just be about focusing on crime prevention. You're talking about two different types of activities; one is very proactive and the other is reactive. You're reacting to the offence that occurred, and we have a legal, moral and ethical obligation to respond when those serious offences occur.

On the other hand, it's as important to engage in these proactive activities, which are based on social interventions, positive activities. But those are critically important activities that are longer term commitments in terms of affecting outcomes. I don't think you're ever going to see one or the other.

Police will always have to enforce the law and take strong enforcement action, but at the same time, we need to engage with our community in a much different environment where it's not about enforcing the law and arresting people. It's a more positive interaction. I think it's a blend of both. I don't think the proactive activities can be successful without making sure that you have the right tools in place so that when there is a criminal offence, there's a strong enforcement response as well.

**The Chair:** A question about how you catch someone recruiting. What does the investigation look like? This bill amends section 196 of the Criminal Code with respect to notification of the subject of a wiretap, and it will now allow a judge to extend the period for up to three years if he's satisfied the investigation is in relation to listed offences in the code that involve a criminal organization.

I'm curious: Is there sort of a standard template for this kind of investigation, and how important are wiretaps? Are they a big part of a prosecution?

**Mr. Stamatakis:** It depends on what kind of criminal organization you're dealing with. The more sophisticated and organized the wiretaps become, the bigger part of the investigative technique that you're going to use.

We use a lot of communications through social media, Facebook. That has been a new opportunity that has become available to the police as it has become more prolific in terms of utilization. There are a variety of means.

Often the person who has been recruited will initiate an investigation, because they will make disclosures about how they got involved in the gang lifestyle. We get a lot of information from people who get involved and have a change of heart. Usually they lose a friend or loved one and it causes them to reflect on the kinds of activities in which they're involved.

I couldn't tell you there's a template that we use every single time. I think police officers in this country are quite creative. They take advantage of whatever opportunity comes their way in any particular investigation. Now, with technology, we have lots of new sources of evidence that we can rely on when we're trying to prove these criminal offences.

**Senator Plett:** Tom, you mentioned in your remarks — George did yesterday, and others have — that one of the ways of recruiting is parents are recruiting their own children into gangs; uncles are recruiting nephews and nieces into gangs. Can you talk a little more about that and tell us how big of an issue that is versus the regular type of recruitment, where somebody is recruiting strangers? How much of this is parental?

**Mr. Stamatakis:** I couldn't give you a specific number, but it's extensive. I'm not sure I would focus just on parental, but certainly family-based recruitment is quite common. It's common in our outlaw motorcycle gang groups. It's very common in some of our gang crime groups that involve a particular ethnic group, where it's not only like an organized crime family, but it's a family that's involved in the organized crime group, where you have cousins and uncles and even female and male. It's quite prevalent in terms of gang crime activity, in particular, organized crime groups for sure.

**Senator Baker:** Just a quick question relating to a question from the chair concerning 196 of the Criminal Code and tapping someone's telephone. If you're investigating a normal criminal offence, say murder, say any serious trafficking offence, say drugs, you couldn't get a wiretap unless you had exhausted other means of investigation. There's a requirement in the code. All of a sudden, for this particular offence we're talking about, it says you need not conduct sufficient other investigative methods. You get the wiretap almost automatically under this section of the Criminal Code.

Do you think that's necessary in the investigation of the offences that we're talking about here today?

**Mr. Stamatakis:** I think the issue with this particular offence is around the urgency of it. Why I think it is appropriate to create provisions that would allow for those kinds of investigative tools to be acquired quickly is there's some urgency around this. We have to engage in a six-month or year-long investigation

to establish that there's some recruiting activity occurring. By that time, that kid is recruited, he's well on his way to committing offences, and particularly because of the kinds of activities that a lot of these gangs are engaged in, a lot of these kids get killed. They're shot; they're executed by rival gang members, by their own gang members at different times. I think there will still be a requirement to establish to a judge that it's appropriate for him or her to authorize the activity, and as long as there's that measure in place, I think it's totally appropriate.

**The Chair:** Thank you, Mr. Stamatakis. We always appreciate your contribution to our deliberations.

Members, we'll recess briefly before hearing from our next witnesses.

Our second panel of witnesses today is composed of representatives from the RCMP. We have Guy Pilon, Chief Superintendent, Criminal Intelligence Service Canada; and Ken Lamontagne, Director, Strategic Intelligence Analysis, Criminal Intelligence Service Canada.

Chief Superintendent, I believe you have an opening statement. Please proceed.

**Guy Pilon, Chief Superintendent, Criminal Intelligence Service Canada, Royal Canadian Mounted Police:** Good morning, Mr. Chair. Thank you for allowing me this opportunity to provide you with an overview of Criminal Intelligence Service Canada and the role it plays within the greater Canadian law enforcement community. I will also take this opportunity to provide you with a brief overview of organized crime in Canada, which I hope will be helpful in your discussions.

Although I'm sitting in front of you wearing an RCMP uniform, I would like to mention that, in my role as the Director General, I represent the larger law enforcement community and not solely the RCMP.

I would like to start by explaining the CISC structure and the role it plays in support of law enforcement efforts against organized crime. CISC was established in 1970 as one of the National Police Services to improve the sharing and distribution of criminal intelligence to police services in Canada. Today, it is composed of nearly 400 law enforcement agencies from across Canada, and it is responsible for the production of criminal intelligence and the sharing of criminal information among its member agencies. Its structure is composed of a central bureau located in Ottawa and provincial bureaus in 10 of our provinces.

Although the RCMP is the steward of CISC, it is governed by a national executive committee composed of senior law enforcement officials from municipal, provincial and federal law enforcement agencies.

Sharing information is crucial to our success in combatting the multi-jurisdictional nature of organized crime. As you are more than aware, organized crime groups are not confined by boundaries. CISC shares intelligence mainly through our two flagship documents, the *CISC's National Threat Assessment on Organized and Serious Crime in Canada*, which provides the law enforcement community with analysis of the network of organized crime groups operating in Canada, and the *National Criminal Intelligence Estimate on Organized and Serious Crime*, which focuses on providing a thorough understanding of how organized crime groups operate in each criminal market within Canada and the enabling factors that allow them to be successful.

The information used in these assessments is obtained from our provincial bureaus through an integrated threat assessment process. Since 2012, all of our bureaus have contributed to the process, allowing us to produce the most accurate and comprehensive analysis of current and future criminal marketplace developments.

Similarly, in partnership with our bureaus, we established in 2013 new common threat measurement criteria and business rules, which all bureaus are implementing. This will enable better intelligence gathering when planning for and assessing threats related to Canadian organized crime, ensure a consistent approach, nationally, to assessing organized crime and also facilitate comparisons between provinces.

Eight threat criteria — violence, corruption, scope, criminal links, business ties, cohesion, sophistication and involvement in criminal markets — are used to rank organized crime groups. The distinct weighting of each criterion to rank the groups is applied to reflect local, provincial or national disparities and client need.

In 2011, the CISC National Executive Committee adopted the Canadian Law Enforcement Strategy, which embodies the partnership between the functions of intelligence and operations across all law enforcement jurisdictions. To support the strategy, *CISC's National Threat Assessment on Organized and Serious Crime in Canada* is used by police services across Canada to prioritize investigations and operations into organized crime, which has real operational and financial benefit, ensures that efforts are focused on the highest priorities and that this focus is consistent and understood across the country.

Unity of effort through this integrated approach achieves an effective and proactive response to organized crime and threats to public safety in Canada. Effectively, this approach operationalized provincial and national threat assessments, making them instrumental to operational decision-making and prioritization processes at all levels of policing.

In short, these products improve the integration of information and intelligence, which serves to enhance our understanding and targeting of organized crime and allows us to make more informed decisions.

I would like to discuss some noteworthy trends with respect to organized crime in Canada. At the outset, I should note that there has been some variation in how we calculate the number of organized crime groups. Of greatest importance, I think, is that police forces across Canada have broadened their approach to organized crime to include not only tightly knit groups but also more loosely associated, ethnically diverse, integrated criminal networks.

A total of 672 organized crime groups were reported in 2013. Fourteen groups were assessed at high level. They are predominantly located in the Lower Mainland, B.C., the Greater Toronto Area and Montreal. These groups likely gravitate to major metropolitan areas for ease of access to markets, ports and other criminal networks. Thirty per cent of these groups are involved in multiple types of criminal activity and are increasingly operating on a network-style basis.

The Canadian Hells Angels continue to be the most powerful and interconnected criminal network in the country. Its 36 chapters are linked to hundreds of organized crime groups and several hundred businesses. Overall, Canadian organized crime groups are associated with 917 private sector businesses concentrated in food, transportation, construction, and finance sectors. Canadian-based organized crime groups continue to import illicit drugs from the United States, Mexico, China, India and several South American, Middle Eastern and Southeast Asian countries, and export from Canada notably to the U.S., Australia and Japan. Several international organized crime groups have collaborative links with Canadian organized crime groups. In particular, Mexican cartels have reported links to several high-level threat groups for the purpose of trafficking cocaine.

Although CISC does not specifically address youth recruitment, we have noted the following trends: Gang violence continues to be a feature of the

organized crime landscape in the Lower Mainland of B.C., throughout the Prairies, in the Greater Toronto Area and Montreal and remains a top priority for public safety officials. Gangs in these areas have large pools of young men and increasingly young women to fill their ranks. Aboriginal gangs tend to be more violent in nature than other gangs with typically more shootings and acts of violence. Membership tends to be slightly younger than other groups, and involvement of minors is more common.

Organized crime has evolved into a global threat confronting every country in the world. As the world becomes more interconnected, Canadian organized crime continues to pose a threat to the quality of life in Canada and to expand internationally. In order to adapt, law enforcement and government agencies have developed more collaborative approaches to dealing with those individuals and groups. CISC will remain a united force in this effort.

I thank you again and look forward to answering your questions.

**The Chair:** We will begin with deputy chair of the committee, Senator Baker.

**Senator Baker:** Thank you, for your testimony before the committee.

Senator Dagenais is on our committee. He worked for many years in the police force in the province of Quebec. He's very familiar with the source material police have available to them when they're investigating a crime.

We know there is the Canadian Police Information Centre and we know there are some other sources that a police officer can sit down with when he's doing sworn information to obtain concerning an offence under this bill. When he or she is doing the sworn information to obtain, I notice they do check with CPIC and other provincial sources to spell out in certain paragraphs additional information to support their affidavit.

What would be your department's identification? It's not CPIC but what is called?

**Mr. Pilon:** Our department has a national data bank on organized crime. We are the only national data bank available to all law enforcement facilities in Canada. It is called ASIS and is being used effectively across the country by many law enforcement agencies to support investigative needs.

**Senator Baker:** I've seen the letters many times, and you are operating very effectively.

Having looked at this proposed legislation, do you see anything we can change in any way that would make it of more benefit to you? You didn't make reference specifically to the bill. I presume Senator Plett will ask if you support the bill so I will ask you first. Do you support it and do you see any other things that perhaps we can do?

**Mr. Pilon:** Well, it is not within my purview to support or not support the bill. Definitely I think things are working well with the national strategy in place to combat organized crime. I think we have the structures in place to bring together law enforcement and that it's adequate for us to continue our fight against organized crime.

**Senator Baker:** Thank you.

**Senator Plett:** Let me ask that question in a different way: Do you think this is a good bill?

**Mr. Pilon:** Although I won't comment on the bill, I can say that any tool that is tabled or the government will bring to help us fight organized crime and reduce the number of new members entering organized crime will be welcomed by the law enforcement community.

**Senator Plett:** Thank you, I appreciate that.

You spoke in your statement about 672 organized crime groups, so I will ask a few questions. I know the chair will cut me off if I don't do them all at once. Maybe you can address them.

Of the 672 organized crime groups, how many would be considered gangs? Obviously the mob or Mafia might not be considered a gang. How many would be considered gangs? You spoke about Aboriginal and ethnic groups, how many of these gangs would be ethnic? Do the Hells Angels, in your opinion, recruit young people? I read about them and think it's not the easiest organization to get into. Are they out there recruiting young people?

**Mr. Pilon:** I will start with the last part of your question. I would say that definitely the Hells Angels, like any other organized group, will need to recruit on a regular basis new members for various reasons, whether people are incarcerated or whether they wish to isolate themselves from prosecution.

**Senator Plett:** Would that be children?

**Mr. Pilon:** I don't have specific information that would suggest children, but the Hells Angels have specific rules within their recruitment process. To become a Hells Angel you have to be 21 years old. That would preclude recruitment directly. As you are aware, numerous puppet clubs support organized crime groups that work with these individuals and that would not preclude recruitment within those groups.

What was the first part of your question?

**Senator Plett:** How many of the 672 are gangs and how many are ethnic gangs?

**Mr. Pilon:** With regard to gang and the definition, CISC has chosen not to define "organized crime groups" with that specific designation for various reasons. It becomes complicated to separate organized crime groups from gangs. We also believe that it would have been problematic with the organized crime legislation already in place; so we chose not to define them in such a way. They are basically lumped into one definition of "organized crime."

**Senator Plett:** And ethnic?

**Mr. Pilon:** We don't specify ethnic origins.

**Senator Plett:** But you did Aboriginal.

**Mr. Pilon:** Yes, but we don't have specific statistics on that. We were trying to describe the situation particular to youth. We have no statistics to support that. It basically comes from reports we receive from our law enforcement community. There is a reality prevalent in Manitoba specifically with regard to Aboriginal youth and the problems they have with law enforcement at this time.

[*Translation*]

**Senator Dagenais:** Thank you to our two witnesses. Mr. Pilon, in your presentation, you have often said that your information comes from documents such as the national threat assessment on serious and organized crime. You have also mentioned the national criminal intelligence estimates and the threat assessment criteria.

Have you calculated the number of minors recruited by criminal organizations? If you heard my question to the previous witness, I said that minors are often recruited because they receive lighter sentences, which encourages criminal organizations to make them commit violent crimes. Have you calculated the number of minors who may have been recruited?

**Mr. Pilon:** We do not have those statistics. After reviewing a different approach to crime, we have established eight assessment criteria, which I mentioned in my initial remarks. Some of those criteria pertain to young people. For instance, one of them is violence, which can in fact include aspects related to youth. If we look at group cohesion, the focus is on family ties, ties with various groups within the organization, and so on. We therefore might look at youth at that level. However, we have not made that distinction specifically for youth. Since we are currently assessing groups that pose the most serious threat in Canada at a high level, there are clearly far fewer concerns about young people at this level of crime. If we consider youth, I think we look at groups that support crime in a more significant way than these groups.

**Senator Dagenais:** Thank you, Mr. Pilon.

[*English*]

**Senator McIntyre:** Thank you, gentlemen, for your presentation.

As Senator Plett mentioned in a question to a previous witness this morning, mandatory minimum sentences have a long tradition in Canada. For example, Bill C-2 calls for a mandatory minimum sentence for serious gun crimes involving organized crime; Bill C-14, in 2009, drive-by shootings; and Bill C-10, the Safe Streets and Communities Act, also calls for mandatory minimum sentences for drug crimes committed for the benefit of, at the direction of or in association with a criminal organization.

This bill also calls for a mandatory minimum sentence, mandatory five years, minimum sentence is, I understand, six months. Not everyone in this country agrees with mandatory minimum sentences.

However, bearing in mind the fact that we're dealing with something serious, we're dealing with organized crime, are you in agreement with me that this type of offence really calls for a mandatory minimum sentence?

**Mr. Pilon:** Again, I won't comment specifically on the legislation, but I do agree that crimes that face our youth are the most important to us, and we should look at ensuring that we have every available measure in place to combat that situation.

**Senator McIntyre:** As I understand, Toronto City Council has approved this bill.

**Mr. Pilon:** I'm unaware, sir.

**Senator McIntyre:** Mr. Lamontagne, do you wish to add?

**Ken Lamontagne, Director, Strategic Intelligence Analysis, Criminal Intelligence Service Canada, Royal Canadian Mounted Police:** My comments would mimic those of my colleague.

[*Translation*]

**Senator Rivest:** There was a passage in your text — and I say this with all due respect — that annoyed me a little. I do not like to hear people personalize cases, the way you said that Aboriginal gangs tend to be more violent in nature than other gangs, with typically more shootings and acts of violence. I am sure that police services combat organized crime in the same way for all the groups, be they Aboriginal, white, black or any other groups. I think it is a little imprudent, and certainly inappropriate, to single out Aboriginal people.

**Mr. Pilon:** I appreciate your comment, and I thank you. Yes, it is always tricky. We were trying to highlight a problem specific to this province, knowing that the committee was looking for information on youth participation in criminal activities.

[*English*]

**Senator Frum:** Both you and our previous witness made reference to the growing number of female recruits. Could you tell us more about that and why you see a growth in female participation? Are the recruiting techniques the same? What is the general age range of the desired recruits?

**Mr. Pilon:** We don't have specific information or statistics with regard to the number of females entering criminal activities, but as part of my work I sit on operational committees. We also have 10 different bureaus that we sit with and discuss issues around criminality and that has been observed.

This will also vary in what type of activities female members will enter into. More and more, we see financial crimes. We see that as a venue that is maybe more open, like any other type of profession today that is better represented by both sexes. This has also been seen in the criminal world.

If we look specifically at traditional organized crime, we have seen at times female members taking a leadership role when the husband was being detained. They would take a role that, in the past, we weren't seeing. I think it's nothing more than the evolution and reality of the world today.

**Senator McInnis:** Thank you for coming.

We all know that there are organized groups out there with the prime motive to commit criminal activity. I must say I was quite surprised and shocked at the number of groups there are in the country. Of course they are, as we've been told over the last day or so, very sophisticated and knowledgeable groups.

When bringing them to justice, you have to garner the evidence for conviction, and law enforcement must use every tool available to them to accomplish this. Of course we always hear — as well we should — about the Charter and privacy rights, and they always have to be adhered to.

Could you comment on the value of tools such as electronic surveillance, possible income tax disclosure, witness protection guarantee, DNA samples in bringing criminals to justice?

**Mr. Pilon:** The one comment I could make is that prosecuting cases is becoming more difficult. Obviously, the more tools available to law enforcement to advance the prosecution's case are very useful. When we look at serious organized crime, like most of our membership is investigating, definitely we need those sophisticated tools to ensure we are able to obtain the information and evidence required.

Also, these groups are very insulated from investigation, often, and therefore these types of tools are required to ensure that we have the capacity to obtain the evidence required.

**Senator McInnis:** CISC is an independent group in many respects. You must be out there at times saying, "I wish we had this piece of legislation or law." Do you ever lobby?

**Mr. Pilon:** No, we don't. We are not that independent. Although I independently represent the rest of the community, we are quite integrated within law enforcement. More and more now we work with different prioritization committees in various police forces that are looking at investigations.

We sit on many national committees where we work with law enforcement and a law-application function. I don't see us being isolated.

From my point of view, my responsibility is with regard to criminal intelligence and its sharing. I believe we have the structures in place to do that effectively now. I don't see a need to lobby any more.

**Senator McInnis:** Oh, really?

**The Chair:** I have a question related to what I asked Mr. Stamatakis about investigative techniques. I referenced wiretaps and he indicated that social media has become a big investigative tool in terms of trying to track down recruiters. In response to a question from Senator Plett with respect to ethnicity, you indicated that you don't define these groups by ethnic origin. I'm curious, in terms of investigations, about challenges, aside from the fact that you don't define them in that way. But you have to try and cope with organizations. I know certainly in Toronto we've seen shootings in Chinatown with the gangs, and we know in the marijuana business frequently Vietnamese gangs are active in that area of endeavour.

I know you don't keep statistics, but I am curious about your investigative techniques when dealing with different ethnic groups. If the gangs are composed of that one ethnic community and they speak a language that has to be a challenge for you. How do you cope with those kinds of challenges?

**Mr. Pilon:** That's somewhat out of my realm of responsibility, but I do sit on operational tables and see the challenges that are there. What we see is that there is a quite a partnership happening between many criminal organizations today, so there is a mix of ethnicities when we are investigating these types of crimes or organized crime groups.

We need all the tools, and we are always challenged with finding a person who can speak the language, interpreters who can translate this, and the need for the various investigative tools, such as undercover operators, who will have the proper ethnic background to infiltrate these groups. These are always challenges but where we are succeeding, I think, is by law enforcement coming together and putting all of our resources together, and nationally we do that. I have not seen an investigation where we were not able to find the proper undercover operator or translators required to effectively complete the task.

**The Chair:** With reference to not keeping statistics, along these lines, I know that was always a big issue in Toronto for many years; keeping crime statistics. I'm curious if keeping statistics, with respect to this issue, would help in terms of policy development on how you meet these challenges that you have to face and the limitations on your ability to cope with them. And also the government and other areas where policies could be impacted by having facts on the table rather than an indication that, yes, we're dealing with this effectively.

**Mr. Pilon:** Absolutely, it's always something to be considered within the scope of the assessment. We are using eight criteria now. The advantage of these eight criteria is that they can be applied differently in different venues. The weight that we give to different criteria — we have a national weight obviously — will generally bring very serious organized crime groups at the highest level because nationally we want to focus on these groups. But municipally and provincially, the same tool can be used with different criteria integrated. This will allow law enforcement agencies at various levels, should they feel a need to focus on a specific issue, to modify the tool to fit their needs or the perceived needs of their community at that time.

**The Chair:** We have some time for additional questions.

**Senator Baker:** I have a couple of quick snappers.

I agree with Senator McInnis that the numbers are just staggering, and we appreciate you giving us those numbers. You say there are 672 organized criminal organizations operative in Canada. You also mentioned the number of 947 businesses in Canada that were affected by these. Am I drawing the right conclusion here? We have 672. That's over 60 per province if it were per province, and it would be about 100 businesses involved in each province in Canada in organized crime.

Am I reading correctly what you've just told us?

**Mr. Pilon:** Yes, senator. You are reading this correctly, but let me give some precision to that. The 672 has been a fairly consistent number over the years.

**Senator Baker:** First time I heard it.

**Mr. Pilon:** It has been reported. It fluctuates from year to year, obviously, with different groups being arrested and other groups coming into the market. You also have to be mindful that we're looking at the Criminal Code definition when we look at this, so three individuals who are involved in a criminal activity on a permanent basis basically —

**Senator Baker:** Committing indictable offences and getting a return completes the definition of criminal organization; you know that. So you're saying there are 672 of those organizations in Canada today.

**Mr. Pilon:** That's right, senator. That's the first part of your question. The other one you mentioned was the various businesses that are involved. Maybe I will let Mr. Lamontagne explain that from when he was part of the study that looked at that issue.

**Senator Baker:** How did he come to that conclusion?

**Mr. Lamontagne:** As part of our collection process. So the way it operates now is that with the various provinces we have a common collection process and collate the same type of information. When you see eight threat criteria, one ties to business. We try to identify which businesses are being exploited, abused or misused by organized crime groups. From 2013, we identified 917 of those businesses, so that's essentially how we are operating at this point.

**Senator Baker:** In your computer that the police officers can access at any time in their vehicles or in their offices, they can actually look at names and numbers of conclusions that you've drawn from your analysis across Canada — this business or that business organization is involved in some sort of criminal organization — and that in fact you have 672 organizations and here they are, listed on the computer for police officers to access when swearing information.

**Mr. Pilon:** Technically, that's correct, but in reality it is not a system that provides you a return like CPIC, which would be that precise. It is more a system that has resumés of investigation, so it needs a bit of analysis. The names of those companies are definitely there.

The other precision I would like to make with regard to the names is that we have to remember that if you look at Hells Angels, they might own bars in the province but those are businesses. So it's not necessarily businesses that are not involved in organized crime that we make these links to. It can happen. People could be working in a different type of company and if we feel that link is significant then we would highlight it.

**Senator Baker:** My final question is this: Do you have an agreement with Revenue Canada whereby you have access to Revenue Canada files concerning business operations in order to arrive at your analysis of whether or not there is some suspected criminality?

**Mr. Pilon:** At the present time we don't rely on that type of data and we don't have access for various reasons.

**Senator Baker:** How do you get the material?

**Mr. Pilon:** We don't.

**Senator Baker:** You don't because you're just collecting information, right?

**Senator Plett:** I have one question here.

In your statement you say gang violence continues to be a feature of the organized crime landscape in the Lower Mainland of B.C., throughout the Prairies, greater Toronto and Montreal.

Am I to understand that we don't have serious problems in the rest of the country? That's a small portion of the country, although certainly I know Manitoba is a huge problem. How about Quebec City? How about Atlantic Canada, some of the other areas in Ontario?

**Mr. Pilon:** Senator, you're absolutely right. Unfortunately, the problem is much larger than that. I was trying to highlight that in those specific cities, the problem is greater in scope for us. When we look at the 14 groups we have that we define as the major organized crime groups in this country, they are represented mostly in those cities, and you can understand the reason why. I have a whole list that I could go through today, but you obviously understand that this problem is across the country. The Hells Angels are across this country. They're increasing in numbers. Their public clubs are increasing every year. This is a problem we need to continue to focus on nationally and gather intelligence so that the law enforcement community can counter these types of activities.

**Senator Plett:** The Hells Angels have been designated a criminal organization, correct?

**Mr. Pilon:** They have been in particular cases across the country, but I'm aware of provincial legislation in Manitoba now that has defined them as such.

**The Chair:** Thank you, gentlemen. We appreciate you taking the time out of your busy schedules to join us today and help us in our consideration of this legislation.

For our final panel today on Bill C-394, I'd like to introduce, from the Aboriginal Legal Services of Toronto, Christa Big Canoe, Legal Advocacy Director; and representing the Criminal Lawyers' Association, Michael Spratt.

I believe you both have opening statements.

**Michael Spratt, Representative, Criminal Lawyers' Association:** I'd like to thank the committee for the invitation today. My name is Michael Spratt, and I represent the Criminal Lawyers' Association, which is a non-profit organization founded in 1971. We're currently composed of over 1,000 criminal defence lawyers, many of whom practice in Ontario, but some of whom practice in other jurisdictions across Canada.

I'll try to be brief in my opening comments, but the CLA has been routinely consulted and invited by various parliamentary committees such as this one to share our views on proposed legislation pertaining to issues in criminal and constitutional law. Briefly, the CLA supports legislation that's necessary, modest, fair, constitutional and supported by the evidence.

Part of the reason we're so grateful to be invited to committees such as this is that the detailed study and evaluation that all legislation, but especially criminal legislation, receives in the Senate is an immeasurable benefit to us all, and I thank you for that.

Having said that, the Criminal Lawyers' Association has some concerns with this proposed legislation, concerns that, in our opinion, merit some serious consideration. I'd like to briefly touch on three different aspects.

The first is the necessity of the legislation; the second is some legal issues pertaining to the drafting of this specific legislation; and the third should come as no surprise to the use of mandatory minimum sentences in the legislation.

Quite simply, dealing with necessity, Bill C-394 is not necessary. The conduct captured in this proposed legislation is already captured in other sections of the Criminal Code, specifically section 467.11. It is already an offence to recruit an individual into a criminal organization, and that's already found in the Criminal Code.

This section adds, through Bill C-394, needless complexity to the Criminal Code. As I will point out, it can result in some other legal issues that would merit consideration.

From coast to coast we see this with respect to criminal organizations. Recruitment is a defining feature found in most of the cases that deal with section 467.11. If you look at the case law, if you just search this section, plus recruitment, you will see that recruitment and the consideration of recruitment is a defining feature in the consideration, the conviction and the sentencing of people who are charged and found guilty of being involved in a criminal organization. This measure addresses a problem which doesn't exist, and in doing so, there are some legal nuances or legal issues that arise.

The first issue the committee has already considered, and that is the need to make one additional consequential amendment to the Criminal Code. Section

196.1(5)*(a)* of the Criminal Code, would need to be amended. There are other sections of the code that are amended through this bill, and I think that's one that perhaps has been missed, but it's an amendment that would need to take place as well. The bottom line is this new provision might actually make the offence more difficult to prove than it already is.

You'll note that in section 467.11(2), there's a list of factors that the prosecution need not prove. It's not necessary for the prosecution to prove in order to have someone convicted of that section. That section does, in my opinion, include recruitment.

The current bill lists none of those provisions as being unnecessary to prove, and the courts will ultimately determine if they are or not. As we all know, Parliament and the legislature doesn't speak in vain, and it will be a significant factor that those unnecessary factors are included in one section and are not included in this section.

Moving very briefly to the last point and that is mandatory minimum sentences. I won't repeat the CLA's position with respect to mandatory minimum sentences in detail. It's a submission we've made numerous times at this committee specifically.

It is suffice to say that there is little or no evidence that mandatory minimums deter crime. There is little or no evidence that mandatory minimum sentences are effective in deterring crime or protecting the public. We do know that mandatory minimum sentences limit judicial discretion, which indeed has been an issue that the Supreme Court of Canada has considered recently and affirmed the importance of.

There has been some talk with respect to this bill about the extensive consultations that have occurred. Sadly, it seems that there have been no consultations with respect to the mandatory minimum sentence issue. In fact, the sponsor of the bill, when asked that question, is there any study that can be pointed to, any experience that supports views on mandatory minimum sentences, any experiences in other jurisdictions that support the theory of the sponsor of mandatory minimum sentence, the answer was: I don't have a study; I can't back that up; no, absolutely not.

This is important. There should be study, and there should be evidence that underpins changes to the Criminal Code. This is a problem that's especially acute in this piece of legislation. This mandatory minimum sentence has the potential of disproportionately impacting youthful offenders over the age of 18. Given the broad combination of a criminal organization, that is, three or more people working together to commit a criminal enterprise, there are reasonable hypotheticals that would call into question the constitutionality and utility of mandatory minimum sentences. I will give you a brief example of that before I cede the floor.

Criminal organizations don't just mean Hells Angels; they do not mean gangs as we sometimes hear. It's not just "The Sopranos." Imagine three 18-year-old individuals who are adults in their last year of high school. They are trafficking in pirated software, distributing pirated software, committing theft. By definition, they may be a criminal organization. They recruit, so to speak, a 17-year-old friend, classmate of theirs, to set up a website to help with that. They have now committed an offence, which would be captured under the mandatory minimum sentence in this bill. A judge would have no discretion on how to deal with those offenders, maybe otherwise pro-social, first-time offenders with no criminal background that are engaged in a somewhat minor offence, when we're looking at the grand scheme of offences. This is a hypothetical that's possible; it's a hypothetical that may arise, and it demonstrates the potential constitutional infirmity of this specific mandatory minimum sentences.

Again, without a study into the utility, the cost, the scope of application, it's our submission that it would be unwise to proceed with mandatory minimum sentences in this case.

**Christa Big Canoe, Legal Advocacy Director, Aboriginal Legal Services of Toronto:**

[*The witness spoke in her native language*]

I'm Christa Big Canoe, the Legal Advocacy Director —

[*The witness spoke in her native language*]

— which translates into "All those who seek the truth." I have provided the clerk — I apologize — only today with a brief. We received the invitation with less than a week's notice, so we tried to put together a comprehensive brief for your review. In the brief there are also two appendices. The first appendix is a bibliography, so where there's a citation to either cases or resources in this area, they're included in appendix A. Appendix B actually includes an entire article, because it specifically addresses youthful involvement in gangs as it relates to Aboriginal peoples.

I would like to start with the submission that the bill has an admirable aim in terms of its desire to protect children, but Aboriginal Legal Services of Toronto believes that the bill will not reduce or prevent Aboriginal criminal organizations from recruiting new members and will likely create more environmental opportunities in penal institutions that will foster increased recruitment of gang memberships. Again, this speaks to not necessarily young offenders but youthful adults who would be captured by the legislation if it's passed.

These submissions contained in the package only highlight major concerns. We've noted where we concur with other submissions made by other parties. We also concur largely with what Mr. Spratt has presented orally to you today.

Our major concerns include three main components. The first is the impact mandatory minimum sentences have on Aboriginal offenders and Aboriginal communities. The second is the impact consecutive custody treatment and delay of parole will have on Aboriginal offenders in communities. The third, similar to what Mr. Spratt was just discussing, is that meaningful prevention strategies and the harm that passing the bill will create has a connection to resources and good research. The bill before the Senate, I would argue, does not.

In the brief, I draw your attention to pages 2 to 5, where I list a number of facts and statistics mostly compiled from the government and *Juristat* that speaks to what we know. Briefly, without getting into great detail, things we know about Aboriginal offenders within the penal system are that they're overrepresented, not only as sentenced individuals but also as those waiting in remand.

A lot of the studies and statistics before you in this brief or otherwise don't actually capture the true number of people in both provincial and federal facilities. The incarceration rate for Aboriginal adults in Canada is estimated to be 10 times higher than the incarceration rate of non-Aboriginals. In 2010-11, 41 per cent of females and 25 per cent of males in sentenced custody, both provincially and federally, were Aboriginal.

To say there's a crisis of overrepresentation of Aboriginal people within Canada's justice system or penal system is an understatement. The court in *Ipeelee* in 2012 said if it was a crisis at the time of the decision of *Gladue*, what is it now?

Recognizing that a mandatory minimum will have a completely adverse effect, particularly on those Aboriginal offenders who find themselves before the court, I think is an important one that the committee must consider.

What else do we know? We know that the impact of mandatory minimum sentences is harmful to Aboriginal offenders because those who are incarcerated in the penitentiary system realistically don't get rehabilitation while they serve their time. In fact, they generally come out worse than before. There are a number of studies and there are citations within this brief that speak to the fact that incarceration actually increases the recruitment of Aboriginal individuals who are held in custody.

I apologize that I wasn't here for the last speakers, CISC or the RCMP, but some of their own reports speak to the fact that incarceration and federal custody are actually conducive environments for Aboriginal gangs to recruit and to increase affiliation. This is something that must be considered if you're going to contemplate putting into place mandatory minimums and then compound it by having the sentences not be concurrent but consecutive.

An individual who comes before the justice system — and historically, an Aboriginal individual who comes before the justice system receives a harsher or longer sentence — will be convicted or plead to more of the charges, even if there are more than one on the information, and they will be convicted. In this bill, the need to consecutively sentence individuals will increase the duration if there is more than one mandatory minimum. What we know of those, for example, that are in custody is that the longer they're in, the higher the chance or risk that they will become gang affiliated.

The problem is when they're released. Whether we see something as a serious criminal offence, the time isn't immeasurable in custody. What happens when they're released is they go back to the communities they came from, often as a better criminal.

One of the points I also want to raise is around the implications and principles of *Gladue*, what the court has said in *Ipeelee*, and what we must consider when we talk about judicial discretion. Section 718.2(*e*) is a provision that *Gladue* explains to us, which requires the court to consider the circumstances of the Aboriginal offender before the court. Mandatory minimums remove that discretion.

My colleague used a scenario or what's known as a reasonable probability. I was going to do the same. I won't now, but if you took the same scenario and replaced it with Aboriginal youthful adults, you would see the likelihood is it wouldn't be just another kid but probably a family member or a relative within their community. Maybe it wouldn't be pirating electronics; maybe it would be some other crime.

Essentially, though, the result for the Aboriginal individual will likely be longer custody, and what we know is they will stay closer to warrant expiry, that they won't have access to the same programs within the facilities, both provincial and federal, because they will be seen as a higher risk by virtue of their Aboriginality. This is problematic when you consider the Aboriginal gang problem that's occurring, but the catalyst is often right through the institutions that are supposed to be protecting or providing public safety.

This brief also touches on the fact that the high-risk factors for Aboriginal youth are different or slightly different than for other groups, and they include continued institutionalization. A lot of people don't like to hear it, but I'd be remiss if I didn't touch on the residential school impact to family and the Sixties Scoop because these are all things that layer and build and change the perspective. Then we talk about Aboriginal communities and some of the poverty or lack of opportunities they have. These are all things that we know actually help prevent any involvement in gangs.

I'm almost out of time. I just want to touch on one other point in terms of the third point. What I really want to highlight is what works and what doesn't work.

The reports as they relate to Aboriginal offenders, particularly youthful Aboriginal offenders, clearly say what doesn't work is incarceration. It doesn't work to stop gang affiliation. Historically in Canada, gang suppression strategies have won out over evidence-based treatment and prevention. Unfortunately, scarce resources have been spent on get-tough approaches, where young gang members are incarcerated at huge financial costs. Program models are male-oriented, and the unique needs of young women or Aboriginal people are not met through these programs.

The brief touches on and talks about the need to look at and fund resources. The recommendations we are making are cited on page 12 in relation to why it's important to think specifically about the impact that this bill will have on Aboriginal people, communities and offenders. It's not only offenders; it affects an entire community and it affects numbers of youth. It's important to consider and contemplate the consequences beyond the one offender.

Our recommendations, therefore, are that this bill should not pass as it's contrary to section 718.2(*e*) of the Criminal Code and vulnerable to constitutional challenge. Second, if the bill is passed, the mandatory minimum punishment of imprisonment be removed and the consecutive custody requirements be removed. Finally, that resources and research be dedicated to impactful prevention and strategies for youth involvement in criminal organizations.

The government completed a report that actually talks about what is successful, what works and what doesn't. Smart investments go a lot further in terms of minimizing the risk that young people have, particularly Aboriginal young people, to become involved in gangs.

I think it's important to recognize that we don't need more prisons. From an Aboriginal perspective, it's often seen that Aboriginal people are being warehoused, and they're often the most vulnerable to a system that has historically and arguably contemporarily treated them unjustly and unfairly. It won't just compound the crisis of overrepresentation; it will worsen it.

**The Chair:** Thank you. We will begin the questions with the committee's deputy chair, Senator Baker.

**Senator Baker:** Thank you to both witnesses for very excellent presentations.

My first question is to Mr. Spratt. He has pointed out an element in this bill that has to be changed. He identified it as, I believe, 196.151. He said the committee has already recognized this error in this legislation. I would like for him to comment on that after I ask my question.

With private members' bills from the House of Commons, I have noticed recently a very successful procedure was included in Bill C-489, an Act to amend the Criminal Code and the Corrections and Conditional Release Act (restrictions on offenders). You will recall, Mr. Spratt, you were called before the committee in the House of Commons. It was a very successful procedure they initiated, because they had you and I think somebody prior to you point out where you believed the errors were. Then the committee had a short recess and went into clause by clause. Then, behold — they made some of the changes you suggested in your recommendations. So when we pick up this bill now in the Senate, I can see that those major errors have been corrected.

But let's look at this bill for a second. You've identified one thing that needs to be corrected. The House of Commons, also, I might point out to you — I don't know if you are aware of it — but when you look at clause 9 of this bill. When you look at new section 467.111, the House of Commons heard testimony — the same testimony we heard — that said you must insert the word "coerces" to go along with "recruits, solicits, encourages and invites."

The witnesses we and the House of Commons heard said the coercion is done with very young people coerced into gangs and coerced while they are in the gangs. But the amendment put forward in the House of Commons does not cover those people under the age of 18 at all. It's put in under "solicits, encourages, coerces or invites a person." Then, in the next paragraph: "in the case where the person recruited, solicited, encouraged or invited is under 18 years of age" without the word "coerced." That is a major error. That was admitted by the cabinet minister from the Province of Manitoba, who appeared before this committee yesterday by video conference.

One further thing, and then I'll let you answer. When you recited Criminal Code sections 467.11, 467.12 and 467.13 — these are three separate charges under this clause — the first one says "knowingly . . . participates" in an indictable- offence-committing criminal organization. Then "knowingly instructs" is in section 467.13 — the same criminal organization with the qualifying elements, but "knowingly" is nowhere in this section.

So it distinguishes itself, and the constitutionality of the provision may be visited because of that.

Could you explain why you said that we need to amend this bill, first, to include a section dealing with a paragraph 196.1(5)(*i*)?

**Mr. Spratt:** Section 196 deals with the written notice and deals with intercepts. You can see already if you look at paragraph 196.1(5)(*a*), specifically, that it already includes in that section the three sections you have mentioned.

**Senator Baker:** Yes.

**Mr. Spratt:** So it would be important for completeness, especially in terms of subsection (5), which is a "despite" clause, that this section be included, as well.

The oversight you spoke of with not using the word "coerce" in dealing with the youth portion — and I can only assume it is missing the consequential amendment in 196 — speaks to not only the complexity of Criminal Code but sort of how unadvisable it can be to tinker with something that already works. This works as it is.

When we look at, for example, the coerce section, where you might want to have "coerce" the most, especially given now that we are talking about Internet safety, privacy and information that's publicly accessible, the coercion of young people is perhaps most important. You could imagine that you get some information on a young person through Facebook, the Internet or through something they posted, the real danger is that such could be used to coerce them to do something they wouldn't do otherwise. Certainly, that should be in that section.

But the point is that we need not have this debate. We need not risk making mistakes; we need not risk having a provision that is too narrow and different without those factors that the Crown need not have to prove. We need not have a section that is ripe for constitutional attack — and new sections invite constitutional scrutiny. We need not have all those problems, because the solution is already in the Criminal Code; it's already there, applied and mentioned in all the cases that deal with criminal organization. Just search "criminal organization and recruit" on CanLII, Quicklaw and Carswell, and you'll see they all come up with reference to this, quoting the minister at the time saying the intent of Parliament is made clear.

**Senator Baker:** She did so before this committee.

**Mr. Spratt:** So don't open up the can of worms; leave it closed. This works perfectly well. Complexity should be avoided.

**Senator Plett:** I wish we had an hour and half this afternoon instead of the short time we have. Mr. Spratt, let me open with this, and you don't even have to answer the question, but I'll ask it anyway: Do you ever find yourself on the same side of an issue as the law enforcement officers? It seems that every time we have a bill here, you're on one side and they're on the other. Why is that?

**Mr. Spratt:** I don't view it "sides," so to speak. I'm not a member of a political party; I do my work in court. I follow the evidence, and it so happens that, sadly, recently, the evidence has not supported the measures that we've seen. I was here before this committee on the bill that came out of the *Tse* case, dealing with emergency intercepts. You'll recall that one of the things I said then was that it's a pleasure to actually be here and agree with measures. I think I was even quoted in some debates.

So I do agree with things. Unfortunately, in that case, the bill was initially found to be deficient. After it went to the Supreme Court, the Supreme Court said it was deficient. Then there was some legislation based on evidence. So I was agreeing with the Supreme Court at the time but also with the government at the time.

Therefore, I do agree with law enforcement quite a bit. I agree that recruitment into a criminal organization should be criminalized and discouraged, and I'm thankful it is already in the Criminal Code.

**Senator Plett:** Mandatory minimums have been around for a long time; this government did not initiate them. They have been there for crimes that are particularly heinous and offensive. Aside from the fact that this law doesn't have to be here, because it is somewhere else — obviously law enforcement doesn't agree with you. Justice Canada doesn't agree with you. We need to have this law.

But aside from that, let's talk about the mandatory minimums and what this bill seeks to do. I would say this to both of you: You've made a great case for Aboriginals in that they are overrepresented in prisons and so on, but I would think that, because of that overrepresentation, this bill does more for Aboriginals than it does for everybody else, if that overrepresentation is there. This seeks to help all young people, not just certain segments of our society — all young people, certainly including Aboriginals.

We had Minister Swan and Mr. VanMackelbergh. Today, we've had Mr. Stamatakis talking about mandatory minimums. They say they do work in ensuring a guaranteed consequence for action.

So I would rather prefer that people are recruiting gang members in prison than on the schoolyard. If someone is going to be out there recruiting, let's have them recruit in prison, not on the schoolyards. That's what this bill is speaking to.

I would like to hear your comments. I know you will do this from a legal perspective, but in your heart of hearts, this bill speaks to helping children, to punishing adults, and we need to draw a line somewhere — 18, 17. The law says you are an adult at 18 and you are a child till then, so the definition of that is set out and we have to draw the line somewhere.

I would like to have your comments on that and whether, with a heinous, offensive crime such as recruiting Aboriginal youth, people should not face a mandatory minimum sentence.

**Ms. Big Canoe:** Thank you, Senator Plett. I would like to speak to the fact that in the scenario you've given me, and you've stated clearly you prefer to see recruitment occur in custodial facilities than to youth, I would submit maybe that's where it starts. Maybe that's where expansion of affiliation starts. It's when the offenders go back to the communities that recruitment of youth occurs.

I know you say there is a line drawn, but arguably an 18-year-old exposed to this law is, quite frankly, youthful and falls within the parameters of what is known as youthful gangs. Most gangs have an age range between 12 and 24, with some members in their 30s.

Quite frankly, I don't see the difference. If anything, it perpetuates a legacy that's happening and is treated more violently. When you have over-crowded provincial and federal institutions, which we currently have, taking into account remanded as well as sentenced offenders, it provides opportunity. When someone is sitting in remand they are in dead time, which means no programming is put in place. It gives them an awful lot of time, while sitting in custody, to be meeting with people and affiliating with people they would never have had exposure to in the first place.

They come back to communities, not making the communities safer but now having a network that once didn't exist. The longer they're exposed to that, the larger their network gets. Frankly, I don't distinguish between whether it happens in the community or it happens in prison. The way that wildfire spreads, this is the way Aboriginal-specific gangs spread.

It is Aboriginal-specific because most Aboriginal people who affiliate with gangs only affiliate with Aboriginal gangs. It's a small number that joins other gangs, such as biker gangs.

**Senator Plett:** If the bill read that if you're 25 years old and you recruit a child and we had a grace period from 18 to 24, would you support the bill?

**Ms. Big Canoe:** Why is it necessary?

**Senator Plett:** I agree, it shouldn't be necessary, because I like it at 18. But you've made the point that somebody 18 recruiting a 17-year-old, it's too close. They're 17 one day, the next day they're 18, and now it's a criminal offence and they'll get six months in jail. If we gave them the grace of 18 to 25, does the bill become better?

**Ms. Big Canoe:** No, it doesn't become better. Again, you're putting in reasonable probability of different scenarios.

The fact is, the way our judicial system already works is a judge has that discretion, particularly as it relates to 718.2(*e*) and what is to be taken into account when you have an Aboriginal offender before you. It would be up to the judge's discretion to determine the most fit and appropriate sentence for that offender. That judge would then have to, applying *Gladue* principles, take into consideration, on a case-by-case basis, those factors. Whether it's a 25-year-old recruiting a 17-year-old or if it's a 19-year-old recruiting a 12-year-old, that information would arguably be before the judge. The judge is in the best circumstance, the local judges on the ground, the prosecutors and the police on the ground, are in the best circumstance to determine how and what is important.

**Senator Plett:** Just like what we're doing.

[*Translation*]

**Senator Rivest:** First, I would like to point out that I share your concerns about minimum sentences in terms of their effectiveness, their sustainability and their impact on certain crimes. The current government uses minimum sentences automatically. In my view, you do not punish a crime, you punish an individual who committed a crime under a set of circumstances that must be taken into consideration by the judge. Using minimum sentences flies in the face of the Criminal Code, which judges individuals and provides a great deal of discretion to judges. However, if the current government is systematically or almost systematically applying minimum sentences, is that consistent with the Canadian Charter of Rights and Freedoms? Is it possible to challenge certain types of crimes in court? Can the constitutionality of a minimum sentence be challenged?

[*English*]

**Mr. Spratt:** The starting point is this: Minimum sentences, in some circumstances, have been found to be constitutional. The starting point is that other governments in the past have brought in minimum sentences.

As I told my kids yesterday, just because your sister did something that's wrong and gets punished for it doesn't mean that you should do something that's wrong and get punished for it.

We know the Supreme Court passed judgment on the constitutionality of specific minimum sentences and found them to be unconstitutional. That determination is geared by reasonable hypotheticals. There are reasonable hypotheticals, given the breadth of the criminal organization legislation, that could lead to constitutional problems with the application of this minimum sentence.

What is important to note is that there is no criminological evidence and no expert evidence that shows that minimum sentences deter people from committing crime or make the community safer.

What we do know is that minimum sentences are good at putting people in jail and punishing people. The problem is that sometimes that punishment is too harsh. The problem is that sometimes, as in this case, as Ms. Big Canoe said, incarceration can actually make things worse because people are released eventually. It's the lack of reliance on expert evidence, as it relates to minimum sentences, that can lead to constitutional problems, and that's what we've been seeing as of late.

The most striking comment I read in the testimony when this was at committee before the House of Commons was a member of the government said, in relation to experts, that experts were what they called folks with good, old- fashioned common sense. That is not what an expert is.

What I can tell you, in terms of good, old-fashioned common sense, is that anyone committing a crime — especially any youth committing a criminal organization crime — doesn't pick up a Criminal Code, read through it and say, "Wow, there's a minimum sentence. I'm not going to go ahead with this." Good, old-fashioned common sense is good for telling us one thing: it tells us that that's not what happens. That's what experts tell us, too. It doesn't deter; it makes things worse.

Given the reasonable hypotheticals presented today, that's what leads to constitutional infirmity here, and this is very ripe for challenge.

**Senator McIntyre:** Thank you both for your presentations.

As you know, the bill covers a lot of ground: criminal organization recruitment, clause 9; electronic surveillance, clauses 2 to 6; disclosure of income tax information of criminal organizations, clause 7; sentences to be served consecutively, clause 10; witness protection, clause 12; DNA samples, clause 13; judicial interim release, clause 14; and, finally, parole, clauses 15 and 16.

I don't intend to review with you each clause. I think you have made it very clear that this bill is not necessary and therefore it should not become law. Apart from the fact that it's not necessary and should not become law, and apart from the issues raised by Senator Baker regarding coercion, is there anything in this bill that you see in a positive light, assuming it becomes law?

**Mr. Spratt:** I think the intent of the bill is definitely positive. That is a positive feature. It doesn't detract from the points I've made.

Of the other consequential amendments in here, the meat is clearly clause 9, the new offence. The other clauses are necessary to make sure that what is currently on the books would apply to the new provision. I suppose that strengthens my point that this may not be necessary. If you have to amend everything else to bring this into line, it's already there in the other sections.

It's positive that someone has done a search of the Criminal Code and found where to insert the proper things. That's positive. Other than the intent and the detailed amendments of all the other sections to make everything make sense, there's nothing entirely positive, because it lacks utility to some extent.

**Senator McIntyre:** Don't you think that the legislation brings clarity in terms of the other three serious offences regarding organized crime — 467.11, 467.12, and 467.13?

**Mr. Spratt:** In some respects, it does bring clarity. You can bring clarity either through that or through other public statements because there's one area in which it's crystal clear that this applies, and that's in the courts where it will actually apply. To the extent that clarity is needed, I think that can be done in other respects that don't bring the same problems that might be brought with this bill.

**Senator McIntyre:** Ms. Big Canoe, do you wish to add anything?

**Ms. Big Canoe:** I would agree that the intent or the objective is obviously a positive one. I just believe there are better means to go about it. If I'm being completely frank as a litigator who practices, the best part of this bill is that it is so vulnerable to constitutional challenge from an Aboriginal perspective, specifically as it relates to *Gladue* and *Ipeelee* principles. If it is passed, then there's this opportunity. So that should be viewed as a weakness of the bill that's particularly before you.

**Senator McIntyre:** You're looking at mandatory minimum sentences as far as Aboriginals are concerned?

**Ms. Big Canoe:** As far as Aboriginals are concerned. I would argue it would apply beyond Aboriginal individuals, but particularly as it relates Aboriginals.

**Senator McIntyre:** As a Charter argument?

**Ms. Big Canoe:** As a Charter argument, yes. It's something that's already working its way up through the courts. In Ontario, it's before the Court of Appeal already, particularly as it relates to Aboriginal offenders in recently passed legislation. I assume it will work its way up to the Supreme Court, at which point, there is that vulnerability. It's up to the court to determine the constitutionality. The brief that I provided speaks to constitutionality or Charter-proofing any legislation. That's an important consideration. Otherwise, it is actually a waste of resources to litigate things that are costly, and the outcome, at the end of the day, is going to be. It also puts people whose constitutional rights may be being harmed somewhere like remand or convicted and waiting for an appeal process to come up when, in fact, their rights have been constitutionally breached.

**Senator Batters:** First of all, Mr. Spratt, I was very happy to be reminded of your support for the *R. v. Tse* bill because that was actually a bill I sponsored. Given the fact that you were finding yourself in the unusual position of being in favour of a piece of government legislation, I'm proud to say that I helped to see that that came into law.

Dealing with the hypothetical that you talked about earlier, you were speaking about three 18-year olds selling pirated software and recruiting someone else. You also referred to a drafting issue where you said that this particular bill's provisions don't include certain provisions that are included in 467.11, which makes certain elements about criminal organizations unnecessary for the Crown to prove. If you're correct on that, wouldn't the fact that those elements are going to be required to be proven mean that, in the hypothetical situation you're talking about, it would be very difficult to prove that those particular individuals would be part of a criminal organization?

**Mr. Spratt:** No, that's just one hypothetical. You could think of another offence committed by young people in an organized way.

**Senator Batters:** Let's deal with that one.

**Mr. Spratt:** Currently, under the provision, whether this provision exists or not, those individuals could be deemed to be a criminal organization, given that there are more than three people and that they meet the other definition.

But, under the new section, it actually may be, in some respects, sometimes harder to prove that the recruitment was actually an offence because, if you look under the legislation —

**Senator Batters:** In your hypothetical, wouldn't that be a good thing?

**Mr. Spratt:** It would be a good thing for me as a criminal defence lawyer. It would be a good thing for my clients. It would be an incredibly bad thing when you're looking at, perhaps, more serious offences.

**Senator Batters:** Right, but we're talking about that particular one.

**Mr. Spratt:** It may save those specific offenders, but you may have someone who is dealing crack cocaine in schools and recruits someone and is also not captured by the new legislation. So it's not a positive thing. That uncertainty and ambiguity is not positive. Again, in the provision as it currently exists, it's made clear that the prosecution need not necessarily prove that the organization actually benefited. That's not an essential element. That may not need to be proven under the new legislation as well, but I query why it is absent there. For what purpose? It doesn't connect with what's there already. I don't see, logically, why it's not there. It can raise problems in that it can make it easier for people who commit serious offences to be found not guilty or harder for them to be prosecuted, but it doesn't preclude, at all, unjust applications of mandatory minimum sentences for some of the less serious hypotheticals that you can imagine.

**Senator Batters:** I'd like to move on to Ms. Big Canoe.

I'm from Saskatchewan, and Aboriginal gangs are a major problem there. I would contend that the provisions of this bill will really help Saskatchewan's large Aboriginal youth population, thousands of whom, right now, are being targeted for gang recruitment in Saskatchewan. What I would say to you is that, instead of focusing on those adult Aboriginals who are using unscrupulous criminal tactics, horrible things we've heard about here, to recruit vulnerable Aboriginal youth, why not focus on the really positive effect this bill will have for so many thousands of vulnerable Aboriginal youth all across Canada? I'm specifically thinking, today, of the ones in Saskatchewan.

**Ms. Big Canoe:** Thank you, Senator Batters. The perception may not be so accurate. You're absolutely correct that the largest number of Aboriginal-affiliated gangs are in Saskatchewan. Saskatchewan also happens to have the largest Aboriginal inmate population, at both the federal and provincial levels. Upwards of 80 per cent of the offenders who are serving or in remand are Aboriginal. The brief I provided touches on some research around the institutionalization of Aboriginal people through child apprehension. There are a number of factors that actually distinguish and make Aboriginal gangs and Aboriginal youths' involvement with gangs very different, and one of those is the continued institutionalization. One perspective, for example, is that it perpetuates things similar to residential schools and the Sixties Scoop — child apprehension. We are currently apprehending Aboriginal children at a higher rate than we did during the height of residential schools, and these are all factors that actually direct youth into gangs because they have issues of lacking parenting, good resources, educational opportunities, job opportunities. A gang, all of a sudden, becomes very appealing and Saskatchewan is a good example. In communities where a number of people are institutionalized or penalized and go into custody, where is the deterrence in a mandatory minimum sentence when most of your cousins and relatives and friends and a large number of your youth and young adults are in custody? There is no deterrent value. I really struggle to try to find a positive aspect. I think what would be more positive would be to remove the mandatory minimum. Put the research in place. Do what we know works, which Public Safety Canada has already done at least one report on, and start putting those preventative strategies into place. That would be a better use of taxpayers' money than simply warehousing Aboriginal people because that's what we're still doing; we're warehousing Aboriginal people.

**Senator Frum:** I've heard you say that you think the intent of the bill is positive and that you think that recruitment of youth to criminal organizations should be criminalized. I understand your argument that you think it's already covered, so let's put that to one side for a minute.

If you believe it should be criminalized but also believe a six-month penalty is too harsh, I'm having difficulty understanding your idea of criminalizing a crime as serious as recruiting a child into a life of crime. You do think it's a crime. You think it should be criminalized. I think you said that six months is too harsh a punishment. You say it won't achieve rehabilitation; it won't bring deterrence. There's no evidence for that. Okay. Putting that aside, we're left with the punishment itself and societal sanction, and six months is too much for you.

**Mr. Spratt:** No. I wouldn't want to be heard to say that in all cases six months is too harsh a sentence. Clearly, six months would be grossly inappropriate in many cases. The problem with minimum sentences, when you look at the research, the empirical evidence of it, is that there can be reasonable hypotheticals in which a judge, acting judicially in exercising their discretion, would impose less than six months.

The hypothetical I gave you was an individual with no criminal record engaged in a non-violent crime who is youthful, pro-social, lots of support, going to university and committing a more minor crime than we normally think of when we think of criminal organizations. A six-month sentence in that case, I would submit, would be unfair and ultimately would be ruled unconstitutional. Clearly, if you're recruiting young children to deal crack cocaine in the schoolyard for the benefit of a criminal organization because you're greedy and you're a drug dealer and the member of an urban gang, clearly six months is completely appropriate. In fact, more would be completely appropriate.

**Senator Frum:** And would be allowable.

**Mr. Spratt:** And would be allowable.

But the fact is that there's no evidence on these low sentences. Show me a case where someone has been recruited into a serious, violent urban gang or an organized motorcycle gang and the courts don't give them a serious sentence. Show me that. I don't think you can show me that, because the courts apply the discretion they're given. These are viewed as aggravating factors. In 90 to 97 per cent of cases, something substantially more than six months is required. But where the courts strike down these offences, whether gun crimes or other mandatory minimum sentences, is where there's a reasonable hypothetical that could arise or that does arise where that sentence would be unfair, overly harsh and unconstitutional. Gun crimes are some of the most serious crimes we see, yet those minimum sentences were struck down not because courts give lenient sentences to people who traffic or deal or use guns but because there can be examples, which we might not be able to think of right now around this table, of reasonable hypotheticals that can arise because the combinations of offender and offence type, those permutations and combinations, are almost infinite. If some of those permutations and combinations, that reasonable hypothetical, would mean that six months is unfair, the judge says I would give a suspended sentence or one, two or four months, but I can't. That's where laws get struck down as unconstitutional. That's how we end up at the Supreme Court. Ultimately, that leads to perhaps this section not applying the way it should.

It would be different if there were a stack of cases where courts were handing out inappropriate sentences. Sometimes we hear arguments that it's occurring, but I haven't heard that argument with respect to recruiting people for criminal organizations. That's why mandatory minimum sentences, quite frankly, are pretty offensive to the judicial process.

**Senator Frum:** We heard from our police witnesses that there's not a lot of prosecution. It's not a crime that's currently prosecuted. One thing that legislators try to achieve when they change the Criminal Code like this is to put an emphasis on the type of crime that society finds repugnant, and they want to see an emphasis placed on it.

**Mr. Spratt:** Do it in a constitutional way that doesn't cause problems. Have the prosecutors apply the law appropriately. There aren't a lot of cases dealing with recruiting and criminal organizations where somebody is prosecuted for recruiting someone. Most of the cases involve recruitment and then all of the other criminal acts as well. There are cases where recruitment is a key factor across the country in these prosecutions and in the case law, but there are ways to achieve. We can all agree that recruitment into serious criminal organizations should be dealt with seriously and that six months probably isn't the most appropriate. I'd like us to be able to agree on as well, if we sit down and look at the evidence dispassionately, the fact that criminologists and the evidence don't support mandatory minimum sentences to protect the public, to deter. If they want to be used for other means to denounce or punish, that's fine, but they don't deter.

**Senator Frum:** That is fine. Punishment can be fine, too.

**Mr. Spratt:** If it's the position that this law is to punish and it does not deter, it will not prevent crime. It will send people to jail.

**Senator Frum:** It's not necessarily that, but I'm saying you and I could agree that it will punish; and I believe it will deter. I know we're not going to agree on that.

**Mr. Spratt:** We won't because when I say it won't deter, my basis is not just on a belief or as was said below based on good, old-fashioned common sense but rather on the evidence. You can say yes, this law will be very good at punishing and deterring but it does so potentially unconstitutionally.

**Senator Frum:** Again, we heard that one of the reasons criminal gangs recruit young people is that they're well aware of what's in that Criminal Code. They know if they commit the crime, they will get a harsh sentence, but if they get a 15-year-old to do it, the kid won't. They are perfectly well aware of what's in the Criminal Code. I do believe it will deter them.

**Mr. Spratt:** I hope that belief is shown in the evidence.

**The Chair:** We're not going to continue this back and forth debate. It's had more than adequate time.

I have one quick question for Ms. Big Canoe. You referenced the *Gladue* principle a couple of times. I'm curious: In terms of mandatory minimums and your opposition to them and the impact they have on the Aboriginal community, are there any mandatory minimums in the Criminal Code that you can agree with that you think are appropriate?

**Ms. Big Canoe:** You're putting me on the spot a little, Senator Runciman. I would say that, in principle, no, because we take systemic approaches to systemic problems. When we address in litigation or get involved in a test case, it's always around some of the systemic issues. *Gladue* and *Ipeelee* have clearly set out that the judge must take judicial notice of the colonial legacy and the harms. Part and parcel of that are mandatory minimums. Why? Because mandatory minimums have impacted or affected Aboriginal offenders more adversely than others because they're often coupled with multiple charges, over policing, lack of support, lack of resources, and a colonial legacy. That's the short answer.

**The Chair:** I understand that, but I'm thinking of repeat drunk driving and murder. You express sort of a blanket rejection of mandatory minimums.

**Ms. Big Canoe:** For the most heinous crimes where there's mandatory minimum, I'd have to agree with my colleague. There are certain things that absolutely require accountability to the victims, the community or the offenders. Mandatory minimums that we see crop up in the current legislative environment are for 90 days, four months and six months. They're not the same. If I could just say that the small, short, sharp ones bear no empirical evidence that they're doing anything — established practices of the code. We always start from a presumption of innocence when we represent an individual and that's kind of what criminal defence lawyers tend to do.

**The Chair:** Thank you both for your contribution to our deliberations. We much appreciate your time and your testimony.

Members, in two weeks, on May 28, we will continue with Bill C-394. We will hear from police representatives and legal organizations. We have invited again the sponsor of the bill, Mr. Gill. The clerk will send out notices once the witnesses and times have been confirmed. I suspect most of you know that Bill C-23 is now in the chamber and will be our next order of business when we complete Bill C-394.

Thank you. The meeting is adjourned.

(The committee adjourned.)

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