Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

Issue 13 - Evidence for October 23, 2001

OTTAWA, Tuesday, October 23, 2001

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-7, in respect of criminal justice for young persons and to amend and repeal other acts, met this day at 5:10 p.m. to give consideration to the bill.

Senator Lorna Milne (*Chairman*) in the Chair.

[*English*]

The Chairman: Honourable senators, this meeting of the Standing Senate Committee on Legal and Constitutional Affairs is now in session.

This is our seventh meeting on Bill C-7, the Youth Criminal Justice Act. Our first panel of witnesses this evening includes Mr. Jonathan Rudin of Aboriginal Legal Services of Toronto and Mr. Cal Albright of the Federation of Saskatchewan Indians Nations who is accompanied by his counsel, Darren Winegarden.

Welcome, gentlemen.

Before beginning, senators, this committee has always followed the tradition of not having votes before we have all the evidence before us. Perhaps at this point we should all agree to adhere to that tradition. Is that agreed?

Hon. Senators: Agreed.

The Chairman: It is agreed.

Gentlemen, please proceed.

Mr. Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto: Senators, I am very pleased to be here today to have the opportunity to present the perspective of Aboriginal Legal Services of Toronto on Bill C-7, the Youth Criminal Justice Act - an act that we fear could lead to an increase in the dramatic over-representation of Aboriginal people in prison.

Aboriginal Legal Services of Toronto, ALST, is a non-profit organization serving Canada's largest urban Aboriginalcommunity. ALST operates a wide variety of programs. Of particular relevance to our presentation to the committee today are four programs that I will discuss very briefly.

The four programs are our Young Offender Court Worker Program, our Community Council Program, our test-caselitigation activities, and our participation in the *Gladue,* Aborig inal Persons, Court.

Our Aboriginal Young Offender Court Worker works with Aboriginal youth charged with all manner of offences under the Young Offenders Act. The court worker assists clients to obtain counsel, explains the court process to accused persons and their families and helps to set up sentencing alternatives and options for clients.

The Community Council Program is a criminal diversion program. The program has been hearing cases since 1992 and was the first urban Aboriginal diversion program in Canada. The program has dealt with over 900 cases since its inception. The Community Council is open to all Aboriginal offenders, regard less of number of prior convictions and has taken on cases involving a wide range of criminal offences - from theft and mischief to arson and criminal negligence. Last year, thanks to funding from the Youth Justice Branch of the Department of Justice, the mandate of the Community Council Program was extended to cases involving young offenders.

Our test-case litigation activities are part of the mandate of our legal clinic. ALST has appeared as an intervener in the Supreme Court of Canada in a number of cases. Most relevant to our appearance here today are our interventions in three cases - *Williams*, *Gladue*, and *Wells*.

Earlier this month, the Gladue (Aboriginal Persons) Court began hearing cases at the Old City Hall courts in Toronto, the busiest court in Canada. We are very proud that we were involved in the initial deliberations and meetings to establish the court, and we continue to take a leading rode in the court's development. The purpose of the Gladue Court is to establish the criminal trial court's response in *Gladue*, section 718.2(*e*) of the Criminal Code and consideration of the unique circumstances of adult Aboriginal accused and Aboriginal offenders.

The Gladue Court performs no different activities than any other court in Old City Hall, although it offers them all in one court. What distinguishes the court

is that those working in it have a particular understanding and expertise in the range of programs and services available to Aboriginal people in Toronto. This range of expertise allows the court to craft decisions in keeping with the directive of the Supreme Court of Canada in *Gladue* because the information required to develop such responses is before the court.

At the outset, we wish to congratulate the government on its commitment made in the Speech from the Throne to "... reduce the number of Aboriginal people incarcerated or in conflict with the law. Within a generation, there should be no disparity in the incarceration rates between Aboriginals and the rest of Canadian society." In our discussions with government officials in the Department of Justice, we have found a great desire to see this promise realized and we are heartened by the efforts made by the department.

Unfortunately, as currently written, we think the proposed Youth Criminal Justice Act will not support the government's aim to reduce the rate of over-incarceration of Aboriginals. Indeed, we fear that it might actually make the situation worse.

We have two broad concerns with the bill. First, it does not incorporate into it the provisions of section 718.2*(e*) of the Criminal Code, thus making the *Gladue* decision of the Supreme Court of Canada inapplicable to cases coming before youth court. Second, some of the measures designed to foster alternatives to custody and reintegration of Aboriginal offenders may well, in practice, have the opposite effect.

I will turn first to our concern about the absence of section 718.2(*e*). As we did when we appeared before the House of Commons Committee to discuss Bill C-3, the predecessor bill to Bill C-7, we urge this committee to add the words of section 718.2(*e*) to clauses 38 and 39 of this bill. Section 718.2(*e*) of the Criminal Code was part of Parliament's comprehensive sentencing reforms passed in 1996 as Bill C-41. The section states that when imposing a sentence:

all available sanctions other that imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

This section was considered by the Supreme Court of Canada in the landmark case of *R. vs. Gladue*. In that case, the court found that one of the purposes of section 718.2(*e*) was to respond to Aboriginal over-incarceration. While the court stated that itwould not be possible to address all of the cautions of over-representation through sentencing reforms, it did note that alternatives to imprisonment were particularly necessary for Aboriginal offenders.

The court spoke about the need for restorative justice approaches in sentencing and made it clear that such approaches should not be restricted to non-violent offences. The court also made it clear that restorative justice approaches are not necessarily lighter forms of punishment and may be able to accomplish the goals of deterrence and denunciation better than jail sentences.

Why is there a need for section 718.2(*e*) to be placed in the youth criminal justice act? Clause 140 of the bill states that the Criminal Code applies to all proceedings involving young offenders except where it is inconsistent or excluded by the act. Given that the act contains its own sentencing provisions, judges will be precluded from considering section 718.2(*e*) in their sentencing deliberations, even if they want to do so. Thus, consideration of the realities of Aboriginal youth and the need to examine alternatives to incarceration in all cases are absent from the current bill.

This is a matter of great concern. Clauses 38 and 39 of the bill, which outline the sentencing principles and the circumstances in which incarceration would be appropriate, are much weaker than section 718.2(*e*). There is no specific admonition to a judge to consider the circumstances of Aboriginal offenders whenconsidering a custodial sentence. This fact is particularly significant when we realize, as the Minister of Justiceacknowledged during a presentation to the Commons Justice Committee during hearings on Bill C-3, "... the fact [is] that Aboriginal youth are disproportionately represented in our youth courts and unfortunately in our youth detention facilities."

Perpetuating the process that will lead to the incarceration of more and more Aboriginal youth is in itself a crime. It is important that the Youth Criminal Justice Act contain a provision that will explicitly require judges to look for alternatives to incarceration, particularly with regard to Aboriginal youth.

One of the reasons this is such an important issue is that the Aboriginal population of Canada is significantly younger than average. The Royal Commission on Aboriginal Peoples noted that the Aboriginal population of Canada is increasing as a percentage of the total population. This increase is particularly noticeable among young people.

It might be said that section 718.2(*e*) of the Criminal Code is not needed because the proposed act has its own provisions to address this issue. For example, clause 3(1)(*c*) of the bill provides:

(c) within the limits of fair and proportionateaccountability, the measures taken against young persons who commit offences should

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and young persons with special require ments;

This is very general and vague provision is no substitute for the direct wording of section 718.2(*e*).

We know that generalized statements to the court to avoid the incarceration of young people will have no effect on the rates of Aboriginal over-representation. We know this because studies in Alberta and Manitoba on the impact of similar provisions in the Young Offenders Act showed that even where the incarceration rates of non-Aboriginal young people declined, the incarceration rate of Aboriginal young people increased under the Young Offenders Act. If the purpose of clauses 38 and 39 is truly to place restrictions on committals to custody, should not youth court judges consider the same issues that judges in adult criminal courts consider?

There is another very important issue in this regard that must be raised. As we have made clear in our submission, it is our opinion that the provisions in the Youth Criminal Justice Act regarding the sentencing of Aboriginal youth are markedly inferior to similar provisions in the Criminal Code. This leads to the absurd result that judges have more legal resources to avoid placing adult Aboriginal offenders in jail than they do Aboriginal young offenders. It means that innovative programs such as the Gladue (Aboriginal Persons) Court that have been established for adult Aboriginal offenders cannot be made available to Aboriginal young offenders.

However, this situation is more than just absurd. It is a violation of the Canadian Charter of Rights and Freedoms. Adult Aboriginal offenders are receiving a benefit that their younger brothers and sisters are not able to receive. If the bill is passed as it is, Aboriginal young offenders will be facing discrimination on the basis of age, a violation of section 15 of the Charter.

If section 718.2(*e*) of the Criminal Code is not placed in the Youth Criminal Justice Act, following proclamation of the act Aboriginal Legal Services of Toronto will appear, at the first opportunity, before a youth court judge preparing to sentence an Aboriginal young offender and bring a section 15 Charter challenge to that sentencing hearing. We are confident that our application will be successful and that this challenge will survive appeals to higher courts. However, this is not the preferable way in which to resolve this issue. A Charter challenge will take years to reach the Supreme Court and thus have an

impact on the sentencing of all Aboriginal and non-aboriginal youth in Canada. During the time it will take for an appeal to wend its way through the courts, thousands of young people will have been sentenced. We urge the committee to amend the bill now and preclude the necessity for a Charter challenge.

Another difficulty with the bill, from our perspective, is that in attempting to do good, it may well achieve the opposite effect. Aboriginal people know only too well that actions taken by the state for ostensibly the best of reasons can have tragic ramifications. We would like to focus briefly on three clauses of the bill; clause 19, which deals with conferences; clause 27(4), compelling the attendance of parents at youth court; and clause 42(2)(*n*), imposing a mandatory additional period of community supervision on any sentence of incarceration for young offenders. I will address each in turn.

The bill is commendable for its emphasis on alternative justice initiatives. However, in clause 19, the bill appears to make conferences the preferred form of Aboriginal dispute resolution. While conferences are not specifically defined in the bill, the term has come to be used to describe a particular form of alternative dispute resolution. The bill gives certain individuals, such as judges, police officers and prosecutors, the right and ability to convene a conference and allows the provincial Attorney General to authorize others to convene them as well. Clause 19(2) suggests that conferences are to be the primary means by which alternative justice responses are to be delivered.

We have no objection to using conferences as a means to resolve matters. However, that is not the method that the Aboriginal community in Toronto has chosen to resolve disputes, nor is it the approach taken by many other Aboriginal communities. To favour one alternative dispute mechanism over others, to favour certain individuals on the basis of their status in the justice system with the ability to convene these processes, and to do so explicitly in a statute, is unnecessary. It indicates a preference for a particular form of dispute resolution and in so doing takes away the right and ability of Aboriginal communities to develop their own responses.

Clause 27 of the bill attempts to ensure that parents attend hearings in youth court involving their children. Subclause (4) allows a judge to find a parent who does not attend court to be in contempt and to sentence the parent accordingly. This is a wrong-headed approach. Of course we want parents to be there for their children, but some parents cannot or will not be there. For many Aboriginal people live in more remote reserves or in rural parts of Canada, attending court is not an easy matter. It can take a great deal of time and require access to a vehicle. In addition, some parents may be dealing with any number of issues that interfere with their ability to act as they might like as parents. Our fear is that when there is an analysis done of what parents are cited for contempt under this section, we will find, not surprisingly, that Aboriginal persons will once again be over- represented.

Finally, clause 42(2)(*n*) of the bill requires that whenever a young person is incarcerated, there automatically be included as part of the sentence a period of community supervision that is one-half as long as the custodial sentence. The rationale for such an order is that young people should have the resources necessary to reintegrate them into the community. The reality is that such a section simply increases the period of time that an Aboriginal young person is subject to supervision by the justice system, thus increasing the possibility that they might be charged with failing to observe a condition of their supervised release - such a breach leading once again to jail.

We must remember that report after report on Aboriginal people and the justice is system has found that Aboriginal people are subject to both direct and systemic discrimination. One of the ways in which this discrimination manifests itself is by justice officials regularly exercising discretion against Aboriginal people. Giving justice personnel additional opportunities to exercise discretion that could result in the incarceration of Aboriginal people, be they Aboriginal parents or young offenders on community supervision, will lead to more and more Aboriginal people being incarcerated.

We do appreciate the opportunity to place our views before the Standing Senate Committee on Legal and Constitutional Affairs. We are glad the Senate has held hearings on this bill, as the House of Commons did not see fit to do so. We are concerned, however, that the haste with which this bill is being put through Parliament will mean that not only will our concerns not be heeded, they will not be given serious consideration.

When important decisions are made in the Aboriginal community, we are often reminded by the elders that we must think seven generations ahead. As Oren Lyons, faithkeeper of the Onondaga Nation said:

In our way of life, in our government, with every decision we make, we always keep this mind the Seventh Generation to Come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours - hopefully better.

When we walk on Mother Earth we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.

We realize it is often difficult for politicians who must run for re-election every four years to think 10 or 15 years down the line, much less seven generations. However, this sad reality, the tragedy of Aboriginal over-incarceration in this country can be at least partially understood by the fact that decision-makers have often not looked at all on the impact of their decisions on Aboriginal communities.

Placing section 718.2(*e*) of the Criminal Code in the Youth Criminal Justice Act and addressing the other concerns we have raised here today will not, on its own, stop the resolving door from the street to the prison in which so many Aboriginal people find themselves caught, nor will it immediately make our communities safer. However, it will start us down that road, a road that we can look back on in a generation or two and say that when we had the chance we took the steps necessary to make our world a better and safer place.

Thank you, miigwetch.

Mr. Cal Albright, Program Manager, Youth Justice, Health and Social Development Commission, Federation of Saskatchewan Indian Nations: Senators, I am of Cree/Soto ancestry from Treaty 4 territory. My community is actually in Manitoba, but I grew up and worked most of my life in Saskatchewan. I currently work for the Federation of Saskatchewan Indian Nations, which is a political umbrella body of 75 communities in Saskatchewan. We represent 100,000 First Nations people. My role as First Nations Youth Justice Manager is to bring to the fore issues facing First Nations youth and to assist in establishing policies and legislation that we believe can promote a restorative youth justice system. The FSIN is more than 50 years old.

With this particular bill, we have probably had morediscussions about youth justice than about any other justice-related issue of which I am aware.

I will proceed to talk about the First Nations concept of justice as healing. Ultimately, the youth justice system can have only limited impact on levels of offending behaviour. Singledimensional, punitive solutions to multi-faceted social problems will necessarily meet with limited success. Achieving substantial reductions in rates of offending behaviour by First Nations youth will require significant changes in their lives, their communities, their families and their schools. The FSIN, in partnership with the First Nations, is implementing a justice initiative that is intended to promote healthy lifestyles for youth and to reduce offending. These include solvent abuse programs, summer activity programs, militia training and science camps. We also have a number of restorative justice initiatives occurring at the community level.

Before present our recommendations, I want to address this committee with respect to the funding and resource issues that we believe will be affected by this legislation. I will propose something that we believe could work with the program that we wish to implement in Saskatchewan as a result of some of the

initiatives that we foresee coming forth from the new legislation.

Many of the most critical issues related to First Nations youth concern the lack of funding for services by First Nations. Resistance to the provisions of adequate resources reflects a concern about a loss of jobs and resources for non-First Nation service providers. We believe this fear is unrealistic and that there could be as many jobs in a healing system as there are in a prison system.

In any case, the federal government is failing to honour its fiduciary duties to the First Nations. There is a strong argument that the present section 70 of the YOA and clause 156 of Bill C-7 allow the federal government to impose conditions on a province in regard to funding provided for First Nations youth. However, it would be preferable that the new legislation be amended to specify that the federal government may enter into specific agreements with Indian communities or First Nationsgovernments to provide funding support for programs or facilities for First Nations youth dealt with under the youth justice system.

In Saskatchewan, 80 per cent of the resources for young offenders is spent on custodial programs. We suggest that the province meet with First Nations and together we can determine ways of realigning resources use with the objective of allocating more to community-based justice programs. For example, we would like our province to commit to a downsizing of custody beds with the saved money going to restorative community programs.

We have met with many justice stakeholders concerning youth corrections programs. At one facility we visited, the staff indicated to us clearly that they believe that 70 per cent of the youth in those facilities could be managed in a community-based program. Having Aboriginal youth in the criminal justice system should not be the sole responsibility of the federal and provincial justice departments. Rather, we suggest that both levels of government must coordinate comprehensive multi-departmental approaches to provide a multidisciplinary solution to the problem and challenges that are facing our youth. If we truly value our youth, we must share the responsibility for their well-being as broadly as possible among the sectors.

Without prejudice to the Treaty Right to Justice, the FSIN supports the general direction of Bill C-7, however, we would like to see the following changes made. First, the declaration of principle in the proposed Youth Criminal Justice Act specifically recognizes the needs of Aboriginal young people. The existing Young Offenders Act has no such principle and we welcome this change. However, the needs of Aboriginal youth must be recognized in the application of every part of the proposed act.

We also support the transfer of the priorities within the youth justice system from deterrence to a greater emphasis on rehabilitation and reintegration into the community. Restorative measures will work better for Aboriginal youth than custodial sentences. Taking a purely deterrent-based approach has not worked. In particular, in Saskatchewan, it has resulted in the over-representation of Aboriginal youth in custodial settings. It is costly, inefficient, and detrimental to the development of our youth. Judge Omer Archambault says that legal professionals have an obligation to become involved in working to ensure that a better balance is established between the protection and interests of society as a whole and the needs and rehabilitation of young persons in particular.

With respect to the section on alternate and extra-judicial measures, we believe that First Nations people need to have possession of greater control over justice and correctional services for our youth. This need can be realized in the implementation of extra-judicial measures. When I am referring to extra-judicial measures, I am also referring to sanctions. In my mind, they are still what we currently call alternate measures.

Until this objective is achieved, there is significant potential to use extra-judicial measures to ensure appropriate,community-based, non-adversarial treatment of First Nations youth. However, because section 10(2)(*a*) requires provincial approval for any such scheme, there are limited First Nations youth programs in Saskatchewan, despite the fact that First Nations communities have developed comprehensive proposals to establish such programs. The provincial government is currently unwilling to give the authority to provide sufficient funding for First Nations youth justice models and delegated authority.

It is our belief that First Nations constitute a "class of persons" under the act and, as such, are contemplated by the act as having the capacity to receive delegated authority from the province to create and implement extra-judicial programs. The plain wording of the sections in both the proposed YCJA and YOA does not appear to preclude a delegation of responsibility to First Nations since the language is used in the broadest possible sense, stating that the Lieutenant Governor-in-Council may designate "a person, or a person within a class of persons."

We would like to see a provincial "First Nations extra-judicial measures act." We have developed our own legislation. We have an Indian Child Welfare Act. We would like to see a First Nations extra-judicial measures act that sets out the framework and parameters for First Nations participation in the youth justice system, thereby constituting a formal agreement where the alternate measures programs could be delegated to First Nations.

However, since Saskatchewan disagrees with our views on this matter and will presumably continue to refuse to delegate any such responsibility to First Nations, we believe the architects of this act must make it clear that such delegation to First Nations is indeed contemplated by the act.

Therefore, our recommendation is that the federal government should ensure that funding for First Nations extra-judicial measures youth programs are administered through First Nations organizations. It is also desirable for section 10(2)(*a*) of the YOA to be amended to specify that if a First Nations community is unable to obtain designation from the Lieutenant Governor-in- Council, they may seek designation from a youth court judge, who may then direct that funding be provided by the provincial government.

We also recommend that First Nations therefore be recognized as a class of persons for the purpose of this act.

This act proposes to enhance community-based programs for youth that would otherwise be in custody or are currently in custody. Where are those resources going to come from? That seems to be an issue with many stakeholders who are looking at this act right now.

We would like to convince the provinces to work with us and formally agree to a downsizing strategy of beds, and some of the money could be re-directed to help enhance and develop the needed community-based programs for the judiciary to use in the first place.

With that, I will turn it over to Mr. Winegarden.

Mr. Darren Winegarden, Legal Counsel, Federation of Saskatchewan Indian Nations: My name is Darren Winegarden, but that is not my Aboriginal name. I was adopted. I was part of the 1960s scoop and taken away from my family and raised with a different family. I am from the Kawacatoose First Nation about90 miles north of Regina. My whole life - from the beginning until now - has been an example of Aboriginal issues. I wanted to say some things about that to give you an introduction to who I am.

Mr. Albright and I have been working in First Nations justice for quite some time, about six years. We have seen a lot. We have tried to work in as many areas of justice as we can. We have been to the Supreme Court on occasion, and we have been to court in the far north in Saskatchewan and pioneered a lot of sentencing circle work in Saskatchewan and that sort of thing.

We had occasion today to meet with a new head for one of the Justice programs. We were a little disheartened, or I was. I felt I should try to share that. He was younger than us, and I think he had less experience in the justice area than we have. He was talking about funding and the realities of moving bills through the house and this sort of thing. I felt compelled to retort that in the near future I will be doing a death inquiry, a coroner's inquest, into the death of a young lady in Pinegrove Facility. She was 22 years old, but when she was 16 or 17 years old, her mother would bring out her and her sister and ask the johns which one they would like to sleep with. That was her mother doing that.

That is the reality of the children that we are talking about. It is not something that can be dismissed or looked at from the side and dealt with in a clinical basis. It is a very emotional issue, and it is very important to our people.

As my friend Mr. Rudin points out, the omission of the principles from section 718 in the Young Offenders Act from the proposed legislation is, in my opinion, a lie. It is to say that the concerns of First Nations youth are not paramount in Canada. We know that when we are talking about the incarceration of youth in Canada, we are primarily talking about the incarceration of First Nations youth. In Saskatchewan, the incarceration rate of First Nations youth is at 90 per cent and of non-native youth at about 10 per cent. In effect, we see that those people are being incarcerated and penalized for the fact they are Aboriginal.

I invite you to make no mistake about that fact. It is the reality we live in. It is not a result of their being bad people. It is a result of the fact that we, or our parents, have dealt with the residential school issue all our lives and now we are dealing with it as very young people in very troubled circumstances. To say that the special circumstances of Aboriginal people ought not be a factor in sentencing is a lie, and I ask you to exercise your powers of authority to correct that circumstance.

I am continuing on from page 8 where Mr. Albright left off, 4.3, the role of the police officer. On behalf of the Federation of Saskatchewan Indian Nations, we understand that it is very important that police be involved in the equation and that their participation is essential. However, one of the things we see in clause 6.2 seems in some ways a reversal from clause 6.1. Clause 6.1 provides some direction to the way policing ought to be done in terms of delivering of cautions and so forth, whereas in section 6.2 there is a reversal. I suppose that is included to give the police back their discretionary use of their powers. However, it is our reality that those discretionary uses of powers have not always been delivered in the best way possible. I cite the example of police officers dropping off Aboriginal people outside of Saskatoon, and some of them had the misfortune of freezing to death as a result.

We have not always agreed with the way in which that discretion has been used. We think that limitations ought to be placed on it. Our third recommendation is that clause 6(2) be struck and that more serious limitations be considered regarding the use of prosecutorial discretion and police discretion when deciding whether to charge Aboriginal youth.

I have already talked somewhat about the principles of sentencing. Ninety per cent of the youth in correctional facilities in Saskatchewan are Aboriginal - primarily First Nations youth.

Article 37(*b*) of the United Nations Convention on the Rights of the Child, of which Canada is a signatory, says that incarceration of children "shall be used only as a measure of last resort and for the shortest appropriate period of time;". However, it is not used as the measure of last resort. It is often used as a stop-gap measure.

For example, one young offender whom I currently represent is 12 years old and committed a series of crimes this past summer. His mother is an alcoholic, as is his father. They are not living together but there is a stepfather in the equation, and he too is an alcoholic. They spend a lot of time drinking and the young gentleman is on his own quite often. In the evening, rather than being at home with these people drinking, he is out on his bike getting into a little bit of trouble. He got into trouble three times last summer. Rather than being placed with other family members or on reserve, he was taken into custody under the principle that if someone is getting into trouble for a period of time they must be taken out of equation so that they cannot continue to commit crimes. He was put into remand in Prince Albert, Saskatchewan, from where he was sent to the remand centre in Saskatoon. When that remand centre became full, he was sent to the Paul Dojack Youth Centre in Regina. That placement did not work out very well either, so he was moved to North Battleford, Saskatchewan. We finally managed to get the matter brought back into court so that we could try to get a better circumstance set up for him and he was flown from North Battleford back to Prince Albert. He had toured the province.

This was his first experience of incarceration, he was 12 years old, and his parents were poverty-stricken alcoholics who could not move around with him throughout the province. This was a traumatic situation for this young person.

That is clearly heavy-handed use of incarceration andmisadministration, at the very least. We would like to have those kinds of principles reflected in changes to the bill.

One example of how we would like to have sentencing more sensitive to Aboriginal youth is in clause 39 which says:

(1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

(*a*) the young person has committed a violent offence;

We would like to have that changed to read "a serious violent offence." Some of the less serious violent crimes that young offenders commit are assaults on one another. The fact that they commit those sorts of violent offences does not mean that they are bad people or serious offenders. The act should reflect that it is the dangerous or habitual young offenders need to be addressed with heavy-handed measures such as custody.

We reviewed clause 42(2)*(n*), an important element in terms of the sentencing aspect of this legislation, which Mr. Rudin discussed in his presentation. We found this clause to be convoluted and difficult to read. It is not easy for community people to understand, and we are sensitive to the needs of community people in our work. We have been working, for quite some time, in community justice delivery in Saskatchewan. We work with people from First Nations in Saskatchewan who are involved directly in justice delivery. We go to their communities and try to help them. They work with legislation such as this, and its convoluted wording is very difficult for them to understand.

We recommend that those types of clauses be re-drafted with an emphasis on clarity and perhaps brevity, to make them more focussed for our community people who need to work with them.

We have the same issue with regard to clause 19, which deals with conferencing. From the First Nations perspective, we have used the sentencing circle, which stems from our worldview. It reaches the thoughts of Aboriginal youth much more effectively than conferencing. Conference has traditionally - at least in Saskatchewan - been delivered by the police. Hence, "confer encing" there is really a police-based model that admonishes the First Nation sentencing circle model. That is near-sighted.

In Saskatchewan, Judge Mary Ellen Turpel-Lafond has recently started a youth sentencing court based on the circle model. There we see the Young

Offenders Act falling behind the activities of the judiciary in Saskatchewan. The least Canada can do is to keep pace with progress that is being made in various fronts.

Finally, there is a host of powers and authorities that we would like to see in the act transferring capacities to First Nations to use the programs and institutions we are trying to develop in Aboriginal justice areas. One of those is the Indian Child and Family Service Agency. It would be important for our processes to ensure that they are used by the courts and social services agencies. Rather than taking kids out of families and commu nities, we should try to deal with them in their communities.

With that, we invite your questions. I wish to thank the committee for this opportunity to express our views.

The Chairman: Thank you.

Senator Andreychuk: I wish to thank all the witnesses for making a compelling case that the bill does not sufficiently address the needs of Aboriginal youth or communities.

The act is very complex. Recommendation No. 4 in the Saskatchewan presentation indicates that you wanted one section clearer and briefer, but then you went on to actually say more than that. I will show my bias after sitting on the bench for many years. The whole process was alien to Aboriginal people. I think over the years, some of the elements of the youth justice system have some impact on the young people and their families and the constituency. This act, as someone said, in trying to do good, has become very complex.

I will ask a series of questions. Is this going to lead young Aboriginal youth more into the youth justice system as opposed to more into finding resolution for their life problems within their Aboriginal communities? Is this a better model than the YOA, or is it symptomatic of the same problems? When the YOA came in, we said it was not a good fit. That is my overall question.

I have a lot of small questions, but two that concern me. One is the whole parental thing. Is it still the case that the use of the word "parent" or "guardian" is not a good fit in the Aboriginal community? A child does grow up, particularly on the reserves, where there is a mother in the picture but she may not necessarily be raising the child at that point and someone else may. There is a communal responsibility. By zeroing in on "parent," we fail to really get at the caregivers and the important people in that young person's life. Is that something we should look at?

Finally, you indicate that the dilemma here is throughout the act. You made the compelling case that it does not take into account what even Aboriginal adults get through the section. If we are really going to solve the high rates of incarceration for Aboriginal people and therefore youth in the criminal justice system, it is not the criminal behaviour we must be looking at but rather resolving Aboriginal issues in the community and life skills issues that face Aboriginal people.

Those are some of my comments. After all those years, somehow I thought that if we took the money and dealt with Aboriginal problems, that that over-subscription would stop. Particularly in Saskatchewan, you say 100,000 people are represented by FSIN, yet 90 per cent of young people find themselves incarcerated. Those are the same statistics we have had for years. You have not given me any hope that we have made any dent into it. Do we really have to look at the system entirely differently, and is this really not a model for Aboriginal people?

Mr. Winegarden: I can answer the last question. I would say that the system currently in place does not address at all the Aboriginal circumstances. This is one of the issues. You point out the salient issue about parenting. People are raised in their communities, very much so. To place the onus just solely on the parent is probably a misnomer, but it is also the reverse. When people are placed into home placements and this sort of thing, it is wrong headed to think only about the parents. People are also raised by their aunts and uncles. Grandparents are always in the equation - even friends play a strong role. It has to be looked at more broadly. The cultural circumstances are quite different.

In terms of the lack of the Aboriginal equation and the question on life skills, we were having this discussion yesterday. We were meeting with people in crime prevention. Really, I do not think that many of the elements that affect First Nations kids are separate from justice or separate from young offenders issues or separate from social issues or health care.

We represented one young offender who was in the psychiatric ward in Prince Albert hospital by the time he was 11 years old because he was taking pills. He was working on the streets from the time he was seven years old and doing things like shoplifting to get money for drugs. He was a young offender and committing crimes, but he was not being parented at home. There were severe social issues or child apprehension issues that would take him into the social department. He had health issues such as drug dependency and that sort of thing that took him into the health department. Then he was committing crimes and that took him into justice. All of these government institutions are stove-piped and separate and cannot give a collective support for what he needs.

Is that not the circumstance that most Aboriginal people face, where all their issues are so far flung that any one institution cannot really address them? When we see people raising issues of deterrence and this sort of thing, I invite you to explain to me how taking an 11-year-old drug addict who has been on the streets for four or five years and giving him a little harsher sentence will do a bit of good. What he needs is a holistic kind of collective support from several institutions to make his life a more liveable one.

Mr. Rudin: Senator, I think you have raised some important issues. One of the things we should keep in mind is that the reality of Aboriginal over-representation has been known in Canada certainly since the late 1980s when Professor Michael Jackson wrote his report "Locking Up Indians in Canada." It is interesting that we have known that since the late 1980s and Aboriginal rates of incarceration have continued to grow. The fact that we know this is happening, that we all shake our heads and say it is a bad thing, does not prevent it from happening. It does not change anything from happening. Even with adults, even the sentencing amendments in Bill C-41 in 1996, have not led to a reduction in Aboriginal incarceration. The most recent figures predate the *Gladue* decision.

What does that say? I think it says that we are too quick to think that the response to Aboriginal crime is jail. That is because we too easily slot Aboriginal offenders into the incorrigible offenders, into the multiple repeat offenders - the sort of group that this bill immediately labels as the kind of people who deserve incarceration because they commit a violent offence or they do not render themselves amenable to discipline or to supervision.

One of the things that Aboriginal people particularly face in terms of sentencing or charges is failure to comply with probation conditions. Why is that? Well, there are many reasons. One is because you generally have non-Aboriginal probation officers working with Aboriginal children and adults, and when it comes time to exercise discretion, they decide to exercise discretion by charging rather than by warning or doing something else. That of course then paints an image of the person as being incorrigible and non-amenable to supervision. Therefore the only thing to do is put them in jail.

Alternatives such as the programs that the FSIN operates and our community council have are significant and important. However, the reality is that even those alternatives can only deal with a small number of people who are going through the system. Our adult diversion program in Toronto deals with

perhaps 100 or 120 people a year. There are probably 1,000 or more Aboriginal people who are sentenced every year in Toronto.

We must ensure that there is a restraint on the incarceration process placed in this type of legislation. We know that incarceration is not a neutral thing. We know as it relates to Aboriginal people - and I suspect for others as well - that going through incarceration does not simply leave the person the same except that they spent three months somewhere else. It makes them worse. It worsens the situation.

Hence it is very important for us that section 718.2(*e*) must be in this legislation because judges must be reminded, every time they sentence an Aboriginal offender, "Think before you do this. What are you doing?" We have run our Gladue Aboriginal court - and it has only had three sessions so for - but we have already seen a difference in the way Aboriginal people are dealt with in the criminal justice system because everyone involved in that court understands the reality of the offenders. Information is provided to the court that would not otherwise be provided and sentencing alternatives that can address the needs of the offender can be established.

Without section 718.2(*e*), that will not happen. I guarantee that because it is what happened with the Young Offenders Act. Although incarceration rates may go down for young people in general, they will not go down for Aboriginal people.

Senator Pearson: I was extremely interested to hear you. I am tempted to take advantage of the opportunity to ask you to tell us more stories, because it helps to put a narrative around the issues we are dealing with. However, I will not ask you to do that because that would keep us here all night.

Both you and Senator Andreychuk referred to the use of the term "parent" and the potential of being able to find a parent or hold a parent in contempt. That brings up an issue that has been brought up to us before, that of referring back to the child welfare system. In many cases, the children have come into the justice system because the child welfare system has failed. I do not know whether they might have succeeded in those cases if they had more funding, but the issue is really who is responsible for these children.

Often it is not the parent who is the natural advocate for these children, as can be the case in environments other than Aboriginal communities. Is there a useful way in which all children who come into contact with these systems could be connected with a natural advocate who would follow through the system with them? I find that when the advocate keeps changing, kids fall through the cracks.

You spoke about the children you are trying to defend, but that becomes a more expensive route. There should be a route before that. I do not know whether you have that kind of a system in Aboriginal communities where one guardian, mentor or advocate follows the case throughout the entire process.

Mr. Albright: You must understand the sad reality that many of the youth we are talking about really raise themselves. Yet, when they come into contact with the law, we expect that a nuclear family will suddenly appear and take responsibility.

With a little guidance, many of these youth can survive. I have worked with youth who have basically been on their own. They can survive with a little support from a community agency or someone in whom they can confide, whom the community supports as well. We should be more open to such scenarios.

When we bring kids into protection, sometimes they live together communally with adults who are there to be supportive and to offer guidance. It does not have to be a nuclear family. These kids do not know what a nuclear family is. They have left their nuclear family long ago.

I would be open to looking to individual community members who can oversee these youth without being in their face every day. A 15-year-old who has been in the child welfare system and is now in the young offender system may be looking for help and treatment. I do not know what we would call an adult who could support them, but that is the way to proceed with some of these cases. We must not impose middleclass values on these kids, because it sets them up for a worse situation.

Senator Pearson: I know that in immigration casesunaccompanied minors are sometimes assigned a designated representative who must follow the case from the beginning to the end. You would not want it to be professionalized, but just a caregiver designated by the community.

Mr. Rudin: That is important. In Toronto, we keep fairly detailed records of the people who come to our alternative justice program. About half the people we see who have come into conflict with the law have been adopted or in care. When the Royal Commission on Aboriginal Peoples went to the Saskatchewan penitentiary and asked the native brotherhood there how many of them had been in foster care or adopted, every hand in the room went up. One of the predictors of Aboriginal people coming into conflict with the law is removal from families, because then, when things start to go wrong, they have nowhere to turn.

In foster homes in Ontario, as well as in other parts of the country, when two kids have a dispute, the police are called automatically. Kids with emotional problems are put in foster care. If they have a dispute and threaten a foster care worker, the police are immediately called and more and more charges are laid.

The notion that those individuals need someone other than the people within the foster care system to help them is a very good one. One program we are trying to develop in Toronto looks at creating an institutionalized "auntie." The auntie would speak to the needs of the young person only.

I commend you for thinking outside the box. Those sorts of things are needed because once people fall into this system, it is incredibly hard to get out and it is incredibly hard to find anyone who speaks solely for their needs.

Senator Joyal: Mr. Rudin, my first questions deals with the *Gladue* test. When I first read Bill C-7, I thought I would find the *Gladue* principle in its sentencing section. I looked through the bill to see where "Aboriginal" was mentioned. Of course, as you said, it is mentioned only in clause 3.

Mr. Winegarden spoke about the U.N. Convention on the Rights of the child as it applies to clause 39. I share your view that the bill does not reflect the Supreme Court's interpretation of the status of Indian people in relation to sentencing under the Criminal Code and to Canada's international obligations. If this bill is not amended, would you profit from trying to intervene in the Court of Appeal of Quebec where those specific sections are under reference? It seems to me that if the bill is not amended to reflect *Gladue*, there is certainly an opening there that makes it reviewable on the basis of international human rights and of course the legal precedent in Canada. Have you looked at that?

My second point is in relation to Mr. Albright andMr. Winegarden. When we send an Aboriginal teenager into prison, we impose upon him or her even harsher conditions than would apply to another Canadian. You have not talked about conditions of incarceration. If we try to understand thepsychological needs of a teenager, we must remember he has not reached the adult stage of legality. When you put that person in the same conditions as an adult, you in fact impose upon that person conditions that are harsher for someone who does not have the psychological or emotional maturity that an adult has, or is presumed to have, in the eyes of the Criminal Code. It is singularly so for Aboriginal people because their cultural background is different from other Canadians, and the courts have recognized that in the definition in *Gladue*.

It seems to me it is very important to understand that when we are dealing with Aboriginal youth justice, we cannot approach a definition of a system exactly they way we approach a youth justice system for other Canadians. The court has said it. The Supreme Court said it in the *Gladue* case quite clearly. Could you comment on that aspect of the reality?

Mr. Rudin: Thank you for your comments. We agree on the issue of the significance of the absence of section 718.2(*e*). We will explore the opportunity that may be provided to join with the Quebec matter. It is a tactical issue at this point about the ability for us to introduce studies and information in another lawsuit that becomes our concern. I am not familiar enough with the proposed Quebec suit to know exactly what they are arguing and what our role would be, but I think we probably share some of the concerns on some level.

Specifically, though, we feel it is important and we are planning to commission research specifically on the impact of the absence of section 718.2(*e*) on Aboriginal incarceration rates based on the experience under the Young Offenders Act. I am not sure we can do that in the context of joining in with Quebec's litigation. That is the tactical response.

It may be necessary for us, in order to get the information we need before the court, to bring an application once the bill is passed, assuming that the bill survives an initial challenge. I do share your analysis and concern about the provisions in the bill.

Mr. Winegarden: I do not know if you wanted me to answer that part about the bill, but in Saskatchewan we have been thinking about challenging it based on some of the discussions that we have had here. We were thinking about waiting until it got to the Supreme Court so it would be more cost effective for us to do that.

With respect to imprisoning Aboriginal youth under the notion that they will learn from a harsher experience, I would say that many of the kids we are dealing with have never had any love in their life. They have not had that joyful experience of parenting. We have tried to create some mountain-top experiences for some of these kids, just a few, where we have been able to take them on trips and so forth. It has been effective in giving them some more perspective. In some ways, I think that that is the reality that Aboriginal kids face. They have not had any love.

The deterrence model is a threat of taking love away. It is an institutional threat to take love away from that person. It does not work for Indian kids because they have not had love, so it is a lie. It is absolutely a lie. I do not know that incarceration is harsher for them; I think that it is just a perpetuation of the same thing that is happening in their lives.

We must start looking at the concept of surrogate parenting and this kind of thing. It has to be more intelligent. There has to be a member of some kind of institution following that youth and trying to parent them somehow because the parents have not been able to do that for a host of reasons. We have to be more inventive. Raw deterrence and a black and white piece of legislation cannot lead you in that direction.

As Aboriginal service providers, the Federation of Saskatchewan Indians, we are prepared to do that. We are prepared to work to create the institutions that will do that. One concept that we considered - we run this flag up but no one salutes - is to buy an apartment building. Many of the young people that we are dealing with - 13, 14 years old - already have children of their own. They are living at home, and their kids are not being parented, and they need time off. They have no one to show them how to parent or change diapers and do things the way it ought to be done. No one read to them, so they are not reading to their kids. They need to see that. They are not going to see it in jail.

If we really want to save people or help people, if that is our goal, we have to do that for them. Get an apartment building and get the young ladies living in there with their kids, and get some social workers working in shifts in there to help them parent and to show them. We cannot be looking at harsher sentences. It will not work.

Mr. Albright: I have worked in these jails for some time. The "experts" who help us design programs say that if the people helping them can do no harm, they have done something. That is a sad statement. I want to believe that this legislation is, maybe in a long way around, trying to get to that point. When I was preparing for this presentation, I was thinking, is this really going to help? Is this really going to help us keep all young people out of the system? It is complex, but we are talking about human beings and we are complex people. Our Aboriginal youth, through no fault of their own, have these experiences. Will this act help them cope with those experiences?

Our Saskatchewan Indian Justice Council receives $2 million of Aboriginal justice money - $1 million from the federalgovernment and $1 million from the province. We have an emerging infrastructure. We need to build on that infrastructure. No one else in Canada has that infrastructure.

Will this bill help us build the programs so that we canhelp these young people who are traumatized? Or will the traumatization be expressed in criminal behaviour? Will this act keep them out of there? We are supposedly protected in some sense by the fact that we are recognized as "distinct" in the Constitution. Is a declaration enough? Will the federal and provincial governments recognize that and work with First Nations people?

This is an opportunity to make that strong statement to work where we are already building something. We are already doing much of that work. It is emerging. Maybe we can get this right now if we have the resources.

We know the province already gets a large amount - we know what it costs in Saskatchewan for the young offender system. We need to have that rebalanced so that we use facilities as the last resort. Right now I am led to believe that a common assault is a violent offence. You can go to jail for that. That is not acceptable. There is no need. I believe if that kind of individual is put through the system, he will come out much worse. That is not acceptable to First Nations.

Senator Joyal: Mr. Rudin, you mentioned two other cases in your presentation, *Williams* and *Wells*, and they seem to be on the same topic we are discussing but you did not mention them specifically in terms of principle in your brief. Could you elaborate on them?

Mr. Rudin: The *Williams* case was the case that allowed challenges to jurors for cause, on the basis that they may have a bias against an Aboriginal accused person. That is not specifically relevant to this case. *Wells* was in that line of cases decided at the same time as *Proulx* regarding the use of conditional sentences. Again, conditional sentences are not necessarily part of the Youth Criminal Justice Act, so I am not sure that they are relevant. The reference to the case was simply to show that we have an interest in criminal justice matters as they relate to Aboriginal people. The case that particularly relates to this would only be *Gladue*.

Senator Nolin: Mr. Rudin, I want to go back to clause 718.2(*e*). The department will probably oppose your argument relating to clause 3 and clause 38.2. Would you give us some reason for not following their reasoning and following yours?

Mr. Rudin: There are a couple of reasons. First, one of the things that is disturbing about clause 38.2, is clause 38.2(*b*). It says, "the sentence must be similar to sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances." This brings the notion of proportionate sentencing to the fore and we know that among many judges and Crowns who have resisted the *Gladue* decision from the

beginning, there is a concern that the threshold for sentencing is jail. If person A gets jail then person B must get jail as well.

The ability to argue that, for example, an Aboriginal youth should not receive a jail sentence because of their circumstances and because there are options available to them, is undercut by that clause because people would argue that if we do this for a non-Aboriginal person, we have to do it for an Aboriginal person. Therefore, I think that clause 38.2(*b*) is problematic.

I am particularly concerned, as is Mr. Winegarden, with clause 39, because clause 38 sets the general rules and then clause 39(*a*) says you do not incarcerate "unless." Then you look at what "unless" is - a violent offence. Mr. Winegarden has handled that well. In my experience in Toronto, the fact that two young people who get involved in a fight with a third young person is not considered violence, it is considered gang-related. The Crowns treats that as a gang-related offence, and they come down harshly on that behaviour if they choose to treat it that way.

Also, the notion of violent offence suggests there are some lines in the sand. What is the difference between theft and robbery? It is theft if I do not touch him; it is robbery if I do touch him. Who makes those decisions? Who makes those calls? It is the police initially, and the judge secondly. Therefore, what is considered a violent offence is very susceptible; it is very easy to suddenly draw people into that.

Then 39(*b*) says unless "the young person has failed to comply with non-custodial sentences." Now we return to the other problem: an Aboriginal person receives a bail condition or a non-custodian sentence and must report to a probation officer; if there is a conflict between the two, the probation officer can charge them with a breach. Suddenly they are no longer amenable to non-custodial sentences. That is not theoretical. That is reality.

There are alternative justice programs across Canada - which I shall not name - that started out as programs to deal with Aboriginal and non-Aboriginal offenders, and essentially became non-Aboriginal programs because none of the Aboriginal kids who could enter the program were considered able to enter because they were either charged with violent offences or they had prior offences or they had prior experience with non-custodial sentences that did not work out.

This is why section 718.2(*e*) becomes so crucial, because at sentencing, it requires the judge to turn his or her mind to the question: Is there an alternative? It allows an opportunity for the defence counsel or other individuals as in Toronto's Gladue court to provide information to the court about the circumstances of that person and to provide meaningful suggestions that might exist. Without that, clauses 38 and 39 will have no impact on Aboriginal incarceration. It will simply stream Aboriginal people into the incarceration stream and it will frankly stream many non-Aboriginal people out.

Senator Nolin: My second question is more technical. If you had the authority to amend this bill, would you add a section similar to 718.2(*e*) to clause 38 and clause 39?

Mr. Rudin: Yes.

Senator Nolin: What are your comments on clause 50, which states the principle that the sentencing in part 23 of the Criminal Code should not be applicable to this bill except for a series of clauses? Do you not think we should add section 718 to there instead? It is more technical.

Mr. Rudin: It is important that it be in the sentencing provision. Perhaps, for consistency's sake it could be in additional portions, but it needs to be in the sentencing section. That is where judges will be turning their minds. That is where Crowns will be turning their minds.

I would also tell this group that, for those people who did not like section 718.2(*e*), there are people that have told judges in this country who use this section that they can use it all they want now, but in a couple of months, that is all over.

The omission of this clause here plays right into the hands of those people who want to do away with the impact of *Gladue.* The *Gladue* case has not had the impact it could have, but it will play into those people's hands. It will make the clause worse, not better. If the committee has the power to do that, I would urge you to do that and trust you to make the necessary suggestions as to where that might be placed, where those amendments might be placed.

The Chairman: I thank the witnesses for their presentation. It has followed on very closely to the presentation we had at our last meeting from a group of young people. It also followed on very closely with the desire of the steering committee to have some strong Aboriginal presentations before this committee, particularly because of the high rate of incarceration of Aboriginal youth.

Honourable senators, we have before us representatives from the Indian Justice Chiefs Commission: Judge Tony Mandamin is a member of the Wikwemikong First Nation on Manitoulin Island who works in the youth court in Alberta and who is experienced with healing circles in the sentencing process; and Judge Peter Harris, from Scarborough, who is a leading expert in, and has written a book about, youth criminal justice.

Judge Peter Harris: Honourable senators, I appreciate the opportunity to appear before this committee.

I have a few ideas on the Youth Criminal Justice Act because I worked as a lawyer for 15 years in the youth courts in Toronto, and more recently for six years on the bench, primarily involved with youth court work although I take a regular turn in the adult court.

I had some opportunity to speak to the Senate legal committee back in the days when you were considering the Young Offenders Act, so that is how far back I go with juvenile justice in Canada.

There are some good elements in this bill that I can tell you about from first-hand experience. I was recently involved with a transfer proceeding in my court in Scarborough, Ontario, that involved a murder charge. The youth was before the court for the transfer hearing for about four weeks. It was clearly a case where this youth was not criminally responsible, as far as I could see. A random attack had occurred against somebody he did not know. The youth came from Somalia without a birth certificate, and there was an issue arose over the youth's age. Some people thought he was older than 18 years; the best guess was that he was about 17 years old, although there was no clear evidence. On the balance of probabilities, which is the consideration you make, he looked to be in that age range.

There were approximately 32 blows struck with a knife, for no apparent reason. Days later, he was found in his cell unclothed and chanting. According to his family, he had been like that for a number of months. They were very concerned about him and they tried to get him some psychiatric help, with no great success.

We held the transfer hearing on the murder charge. It was clear to me that the youth system was the best system in which to deal with his mental health issues. I concluded at the end of a lengthy judgment that he should be dealt with in the youth court. My decision was taken to the Court of Appeal where it was determined that the seriousness of the charge was a key indicator that the individual should be dealt with in adult court. They reversed my decision and the adult court proceeded to have a trial, during which time, they found him not criminally responsible.

The very thing that I was involved in for four weeks was really a waste of time. I could see he was not criminally responsible. Had we moved to the trial stage first, we could have done away with tremendous expense. There were three or four lawyers and numerous witnesses involved. The whole proceeding was redundant, because, in the end, as I expected, the superior court judge found him not criminally responsible. I guess he will go away to await the pleasure of the lieutenant governor, as they say. He will be held in a mental health facility.

This bill will allow the transfer proceeding to be moved to the end of the trial process, so that they do not have this bizarre legal process where the youth is presumed guilty for the purpose of having a transfer hearing, while at the same time thinking that we have not had the trial, so we must presume he is innocent.

These are clashing theories that we must deal with and make sense of as a judge. Besides which, it wastes a great deal of time, especially when it is appealed every single time. In terms of this young man's life, it added three years to his time in custody from beginning to end. The whole process took three years.

You could say that one and one-half to two years were partly to do with just the transfer hearing and the appeals that flowed from it. That was totally unnecessary. He could have been tried and dealt with. He actually deteriorated in custody, because the treatment they provided him over that period of time was not what he could receive in a mental health facility.

By the time he was actually on trial, he was hard to manage to the point where they really could not continue without many disturbances in the court. Most of the time, he was only half-clothed and he needed custodians to assist him. That is an example of what can happen if you continue with the transfer proceeding before the trial, as is it currently exists under the Young Offenders Act.

There are a number of very promising provisions in the proposed act. The new section that allows for different alterna tives on sentencing is important. This section deals with something called a "non-residential centre" - originally called an"attendance centre." The section relates to deferred custody, which is a conditional sentence regime, analogous to the Criminal Code adult sentence regime. There is a special kind of probation that involves intensive supervision. That provision is in a group of sections that are new in this bill that offer an extra level of structure for our youth in the community.

The intensive rehabilitation and custody section is very promising for those youth who are involved with very serious crime and who have some indications of mental health issues. Clearly, instead of just warehousing them, there is a chance to do something useful now, and perhaps achieve some level of rehabilitation in the course of the time that they are in custody.

These new provisions, under clause 41 and clause 42 will be very effective in terms of giving us some new alternatives with which to work in the youth court

I want to give you a flavour of what it is like to work in a high volume youth court, so that you can understand my thinking. I generally have a court that starts at 9:30 in the morning, and I face a room that is packed with people standing along the sides. There are usually 80 youth to 90 youth in the court with parents and200 charges on the list.

It quickly becomes clear that my task, among other things, is to see if I can get the list dealt with by the end of the day, because the staff have day-care issues, and they have to be out of there by 4:30. They do not get paid after 4:30. Those are practical considerations that mean there are time pressures.

If at about 10:30, a youth in custody is brought into the prisoner's dock. Let's call him Jimmy. Jimmy is charged with break and enter and fail to comply. He has been in custody for15 days. You find out that he has two other break-and-entries on his record and maybe another fail to comply - usually from a previous break-and-enter where there was a curfew placed on him to be in the home at some particular time on probation. This is his third break-and-enter at the time he was still bound by that curfew. Now you have a new fail to comply, a new break-and- enter, two previous break and enters, and another failure to comply.

That is fairly typical. We get a recidivist whose problems are not totally out of control. He is in custody because his mother cannot manage him, and he is missing time from school. Usually a Justice of the Peace in our building decides that Jimmy cannot be supervised properly because he is not satisfied on a secondary ground that there will not be a commission of an offence on release. He detains Jimmy.

The lawyers come in and say they have a joint submission for three months' open custody based on the new offence. Then you find out this youth has learning issues from a predisposition report that has been prepared. You find out the youth has some difficulties with his mother, following rules and maybe some substance abuse. The lawyers make this joint submission, which is a fancy expression, for a plea bargain. They are only interested in the three months' open custody and then some probation to follow with the usual terms - keep the peace and be of good behaviour, report to the court, get some counselling and attend school full time.

That is a fairly routine. I am not complaining about the lawyers. They are not social workers.

This new bill has conferencing provisions. To do the job right, the court would see a plan for this youth and get an understanding of what his issues are. Typically, if you have a conference, you get somebody to facilitate it. Perhaps someone attached to the court could bring together the school authorities, the police, the mother and somebody from a social agency that might be able to provide some services such as dealing with learning, and substance abuse. All those people together might be able to come up with a plan as to how to manage Jimmy. In this way, you may have some assurances that you are doing something useful instead of rubber-stamping deals made by lawyers.

This bill offers several new possibilities such as a non-residen tial centre or a non-residential facility. We have one in Scarborough that has just been developed.

Under Bill C-3, it was called an "attendance facility," so we used the word attendance as being some place the youth could go to after school. If the mother were having difficulty dealing with social problems the youth was creating, there would be some way of getting the youth involved with some counselling. It could be anything from job skills to learning issues. They are called cognitive skills. There could be computer training and all the different kinds of facilities that an attendance centre could have. It could be one-stop shopping for a conglomerate of different issues that a youth has. That could be an effective approach if that facility were involved in the planning for that youth.

You could talk about intensive supervision by a probation officer, but they have a caseload of perhaps 100 young people and adults whom they have to see. If you figure it out, the best they are going to do is two hours a week. What is two hours out of 168 hours? It will not have any impact on the youth, especially a youth under the outside influences of the community - substance abuse, truancy and so forth.

This is a youth that will be high risk in a couple of years if we do not stop it and do something effective now. This bill allows us to move in that direction; it offers conferencing that can be done with agencies and facilities. It also has provisions for attendance centres, intensive supervision and deferred custody.

A judge could sentence a youth to deferred custody. That means one mistake and the youth is put in custody. It will hang over that youth. If the youth is not prepared to demonstrate that he can live in a responsible way, he will have to serve some tougher consequences. In some way, you may be able to get a handle on a youth who is on the verge of developing real anti-social behavioural problems.

There are many things in the bill that I could talk about, but those are the main features to me. People say that it should be tougher or more lenient. I am not concerned with that, frankly. I have to deal with the reality of my resources and what I can do in terms of conferencing to get to those resources.

I think this bill is going to be substantial improvement over what I am working with now.

Judge Tony Mandamin: Thank you, honourable senators, for inviting me here. It may be helpful if I give you some background on myself so you understand the knowledge base that I am drawing on in speaking to you today.

I am a member of the Wikwemikong First Nation. That is a First Nation on Manitoulin Island consisting of Odawa, Ojibway and Potawatomi. I spent my formative years there before I left to go to boarding school in North Bay and then to university.

I have resided in Alberta since graduating from university first in electrical engineering. That was an error in my part. I thought they said "Injun-eering" at the time. I worked in Alberta for the Indian Association of Alberta and I was active in native organizations throughout my career. I was president of the Canadian Indian Youth Council in the early days. Before being appointed to the bench, I was president and later chairman of the Canadian Native Friendship Centre in Edmonton.

I worked for a number of years in Alberta and in Ottawa for the federal government, then I quit and went to law school. I graduated and started my own law practice, which I carried on for 17 years in Alberta. I acted mainly for First Nations, native organizations, Aboriginal individuals and other individuals on what could be best described as a general practice in Indian country. It ranged from youth court matters to civil litigation, to governance issues - the whole gamut.

I served on some non-native committees as well, on the Alberta Crafts Council, and I was chairman of the Edmonton Police Commission.

Two years ago, I was appointed as a provincial court judge. That appointment was in response to a proposal by the Tsuu T'ina Nation in southern Alberta. The Tsuu T'ina are a First Nation historically known as Sarcee. They are immediately adjacent to the city of Calgary. They have a population of around 1,800. They proposed to the provincial government that a First Nations court be established on the reserve, coupled with a peacemaker program. The First Nations court would be a provincial court but the players in the court, at the onset, would be native because of what it would say to the community in terms of involving the residents with a sense of ownership in the justice system. That court would be situated on the reserve.

The other very important reason for looking for people with Aboriginal background was to have everyone in the court conscious and aware of the Aboriginal considerations that arise. The proposal for the court was coupled with a proposal for a peacemaker program. Such a program meant that the police, the Crown or the court, to peacemaking in the community, could refer matters. The peacemaking process addressed the issues that gave rise to the incident that led to the charges and would allow a resolution that was satisfactory to all concerned.

The proposal required that participants had particularknowledge base in the court process so that the peacemaking process would be used to its fullest capabilities.

In response to the proposal, the province formed a review committee, chaired by an MLA and included federal and provincial representatives along with native representatives from that First Nation and others. That committee recommended the province go ahead with establishing such a court.

I was invited, along with other people, to have my name considered as an appointment to sit in that court. In October of 1999, I was sworn in as a provincial court judge with the assignment of sitting there, as well as elsewhere.

I will come back to the Tsuu T'ina court in a moment, but I was listening to the earlier presentation and there were references made to the large numbers of Aboriginal youth. I want to take you a long way back and give you some perspective.

There have been various estimates about the Aboriginal population of North America at the time of first contact, particularly in Canada. The most conservative estimates are in the order of a quarter of a million people, but they range much higher than that. If we took that conservative number, there was one-quarter of a million Aboriginal people living in Canada at the time of first contact, 1492 or 1497, depending on which sailing ship one wants to follow.

By the turn of the 20th century, the Indian population - being the largest of the Aboriginal groups - was estimated by Department of Indian Affairs to be in the order of 95,000. In the space of 400 years, the largest component of the Aboriginal population had declined from 250,000 to 95,000.

When I was leaving the reserve and going to university, I was interested in such Aboriginal issues. The Indian population at the time was approximately one-quarter million. So from about 1905 to the 1960s and 1970s, the population increased by the same amount that it had fallen off.

I do not know what the estimate is today, but I do not think I would be far off in saying that we are talking about three-quarters of a million. That is the change from, say, 1968 to present day.

The rebound in the Aboriginal population is due to quite a few factors. First, we have gone through all of the epidemics of new diseases that afflicted Aboriginal people following times of contact. There were also severe economic circumstances. The Aboriginal economies collapsed bringing all of the associated troubles, on top of the loss of life through illness.

Health and basic living standards have improved considerably. They have improved even in terms of my own observation and experience. I can remember having electric lights for the first time. I can remember the first television on the reserve. I can remember a couple of cars on the reserve. There has been that kind of increase. As a result, the Aboriginal population is growing very rapidly, much more rapidly than the Canadian average. That is similar to what occurred in Europe during the Industrial Revolution.

In the Canadian population profile, you have a bulge representing the baby boom era, followed by a drop in numbers. The proportion of youth in this population overall remains relatively constant. The Aboriginal community is facing a different situation than the non-Aboriginal community. While the non-Aboriginal youth population has remained constant, the Aboriginal youth population has increased steadily. In most Aboriginal communities, you will find approximately 54 or55 per cent of the population under 25. In one Aboriginal community in Alberta where I chaired an inquiry, 65 per cent of their population is 25 or younger. They are dealing with a very different dynamic in terms of their population.

When I was on the Edmonton Police Commission, the police told us that one of the indicia of crime is the number of young people in a certain range in the population. For example, if there is an increase in the population of young males 15 to 25, the crime rate goes up, and if it decreases, the crime rate goes down. It is not because of any disorder; it is because they are going through adolescence, they have not matured, they are dealing with all kinds of issues, and that is what happens. If you apply that principle to the Aboriginal community, you have a problem.

We can step back and look at another issue, and that is that Aboriginal people have gone through difficult times. They have suffered an economic collapse. That did not occur at the same time in the same place in every community. In Southern Ontario, for example, communities that lived a traditional style of hunting and fishing disappeared 100 years ago. In northern Alberta, traditional communities are only now losing their traditions.

The point is, as their traditional livelihoods were threatened, many Aboriginal people took on new economies. The fur trade was a major economic factor, the fishing industry was a maker economic factor, and forestry was an economic factor. Farming, which is labour-intensive, was an economic factor. Those disappeared. Farming became mechanized. Forestry became mechanized. Fishing became commercialized, and hunting evolved into a sport, rather than a staple of subsistence.

The Aboriginal communities experienced economic collapse at different times and different places, but it is a common, shared experience. Then you have welfare, unemployment, alcohol problems, family break-ups, and in that you get other factors. The residential schools took children away from their parents. I went to a boarding school. The Indian boarding school closed the year I was leaving the reserve, so I went to a general boarding school in North Bay. I went at the age of 16, and that is not bad. Those people who went to the boarding school at the age of six grew up in the absence of a family. I would suggest they suffered the greatest impact. At 16, you are starting to go out and try your wings, and it is part of an experience that you go through, but in the earlier years, the results are tragic.

Those people are struggling. In the reserve communities, there is a lot of stress. You are not working. You are living on a minimal type of income - welfare. Welfare does not allow you to accumulate anything. It does not allow you to get ahead. It does not allow you to break from your lifestyle. Alcohol becomes very prevalent. Reliance on prescription drug abuse becomes prevalent, and other types of drugs come into the issues as well. You have a lot of domestic violence and family break-up and a lot of relationships that cannot withstand the stresses and children are growing up in the middle of that.

Over-incarceration of Aboriginal people is, in one way, a new phenomenon, and in another way, not so new. I remember Justice Murray Sinclair speaking about studies done in Manitoba that showed in the 1920s, 1930s, 1940s, Aboriginal people were in the penitentiaries in numbers below their proportion to the population. In the 1950s, they were in the penitentiaries in about the same proportion of the Canadian population, so if 2 per cent of the general population was incarcerated, then 2 per cent of the Aboriginal population was incarcerated. In the 1960s, it began to change, and the Aboriginal numbers were increasing. A 1968 study, "Indians and the Law, pointed out that the number of Aboriginal people in institutions was increasing. The numbers in the studies that came out in the 1970s were way out of proportion; in the 1980s and 1990s, we had a form of hyper-inflation. The studies done over the past 20 years all speak to over-incarceration.

The Royal Commission on Aboriginal Peoples had the benefit of issuing its report after all these studies were done: The Royal Commission on the Donald Marshall Jr. Prosecution, the "Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People," the "Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta," the inquiries in northern Ontario and British Columbia. There were many inquiries.

The royal commission said there are two reasons for more Aboriginal people being in prison. The first is that the Aboriginal people have a different worldview. As a result, they do not react in the ways that they are expected to within the system. The second is because there is more social disorder and turmoil in the Aboriginal community. If incarceration is supposed to protect society and make things more peaceful, it is not succeeding. It is as simple as that. There are more problems in the Aboriginal community now than before.

While these reports were being done in the 1990s, there was an awareness that things were not working, that different approaches should be tried. As a result, prosecutors, judges, police, and the people who operate the criminal justice system, were more willing to listen to alternatives.

I remember one judge in Alberta telling me that he had an Aboriginal person who appeared before him constantly, and always with the same problem - public intoxication and the attendant difficulties. He tried fining him, he tried sending him for treatment, he tried jail, and the person would appear again. Out of exasperation, the judge said to the native person: "What is the matter? Do you like jail?" The response - and it was not a young native person - was: "It's all right." The judge said that he realized at that point there was nothing he could do that would assist this person or assist society in changing that behaviour.

The judge lamented about this to one of the elders in the native community in that area, and the elder said, "That is because it is your justice system, it is not our justice system." The judge and the elder had some lengthy discussions, the outcome of which was the creation of what they called "Native Court." There is no official sanction, no approval, no authority, no legislation, but if a native person appeared in court and pled guilty - which they usually do - he could ask to be sentenced in Native Court. The court would reconvene, usually that afternoon, in another setting, with the judge, clerk, Crown prosecutor, probation officer, police officer, three community members and the accused seated around a table. The judge would explain that he had asked to be sentenced in Native Court. The Crown would recite the circumstances and there would be a discussion. When it was finished, the judge would impose a sentence.

That court ran for about 15 years. It is rarely used now and I asked the judge in that court, the Crown prosecutor and the Native Court worker why. The gist of the answer was that there are not many native people appearing in court any more.

In Fort Chipewyan, the community were concerned about what was happening to the young people. With a population of1,300 people, the Youth Court was taking two days a month for docket and trials. There are two Indian bands, the Métis community and a small non-native population. The Indians and the Métis got together to try to do something to deal with the fact that their youth were being sent outside their community for detention. They did not want to see that. They saw negative effects from that practice. When these individuals returned they were harder, wilder, and more difficult to control.

They looked for funding to have a facility on the reserve or in the area, and could not find the needed funding. They read in the Young Offenders Act that you could have a youth justice committee. Therefore, they went to the judge and said that they would like to be that committee. The judge told them he would think about the matter. He later came back and agreed.

The judge started sending the youth and the guardians to the committee. He did not require their consent. He sent them. They would meet with the youth, and with the guardian or parent. They would talk to the victims. They would think about it, deliberate, and they would come back to the judge with a recommendation. Typically, they would spend a couple of hours with the youth, instead of the 10 or 15 minutes that the Youth Court takes in sentencing.

They would say to the parent, "How can we help you with your child?" They would say to the youth, "What is happening in your life that is giving you so

much trouble or making you act the way you are acting?" I remember one member of the committee telling me that in those committee meetings what they do is love their children.

They had a practice of never wanting to send any youth to closed custody. They would try every way they could to keep him in the community. There is a native adolescent treatment centre, called Poundmaker's Lodge in St. Paul, Alberta. Youth with alcohol or drug problems would be sent to this centre. That was and still is the only facility in Alberta. They would ask the young people how they could help. They would tell the youth that they should get an education so they could be future leaders and no one wants a stupid leader. This would set the youth back. No one had ever talked to them about being a leader.

When I was appointed, I went up to the tenth anniversary of the Tsuu T'ina. That is the tenth anniversary of when the government recognized them, although they actually ran two years before that. Youth Court takes half a day a month now in Fort Chipewyan, down from two full days a month.

The Tsuu T'ina, they have a court with a high level of knowledge about Aboriginal youth. It is not rigidly Aboriginal in terms of the justice. If I am not there, another judge will go in my stead. The Crown prosecutor is native but if she is not there another prosecutor fills in, likewise for the duty counsel.

They have a peacemaker coordinator in the court. He is entitled to speak on peacemaking issues on his own initiative. He does not need to have permission from the Crown or even myself. He can interject if he thinks peacemaking is appropriate. The peacemaker, in conference with the Crown, the accused, and the defence, will decide if a matter will be taken into peacemaking. If he is unable to decide on the spot, he will take it on assessment and we will adjourn for two weeks while he considers the matter.

They have a hard-and-fast rule, which states that if there is a victim the victim must always agree to be involved. If the victim refuses, they do not accept it in the peacemaking. It causes a few anomalies, but that is their decision, that is their community's choice. For example, if the victim is a police officer, the police have a policy of always pursuing the case and they also have a policy of not participating in peacemaking, even though the youth in question wishes to.

If a matter is accepted into peacemaking, that peacemaker coordinator then chooses a member of the community to be a peacemaker. They choose the members by going to every household in the community and asking residents who they trusted to be fair. They were asked to submit names from within and from outside their own families. They got a list of names, screened out those who were otherwise occupied, in a conflict position or had the wrong backgrounds and came up with a list of 50 names. Those 50 people were given orientation on the meaning of peacekeeping and, following training, they run the program.

The peacemaking comes back. The Crown will withdraw the charges if it is successful, or if it is serious the peacemaking outcome is a recommendation to go to court.

The Chairman: Judge Mandamin, how will this bill influence the processes that you are describing to us in the court?

Mr. Mandamin: Aboriginal people talk about restorative justice. They talk about restoring relationships between people. They talk about healing individuals and relationships, whether the victim or the accused. This language is common among Aboriginal people, no matter what form their approach takes. I say this because it comes from that different worldview that the Royal Commission identified. It is organic as opposed to rule-driven.

I went to a conference on youth justice committees that included native and non-native youth justice committees. There is a difference between the two. The native justice committees are people-oriented; they make connections with people and think of what to do. The non-native committees were rule-driven; they are concerned with protocol and rules. This bill fits the latter approach.

I do not see much evidence of what native people talk about. If that is to be accomplished, it may be in the discretionary areas, in the gaps here and there in the criminal justice system.

If you are talking about the impact of the bill, consider that the percentage of Aboriginal youth involved in the criminal justice system is way out of proportion to that of non-Aboriginal youth. Lowering the age, introducing more adult sentences, and putting more conditions in terms of the dispositions will mean that the group most involved in that system will be the ones most caught by it.

Resourcing is a major issue for Aboriginal communities. In one Aboriginal community where I sit, they had a youth probation officer who did an excellent job for three months. Suddenly there was no money so there was no youth probation officer. That will be the reality in most of native communities.

The Chairman: One of the points that has been made by every group that has appeared before us is that, for this bill to be successful, the resources must be placed behind it to give judges the opportunity to divert young offenders out of the system and into alternative resources.

Senator Andreychuk: I am sure I have nothing to ask the two witnesses, except to apologize. I am trying to man too many committees in one evening, and I apologize that I was directed to be in the other committee. It would be unfair to ask questions. I will certainly read your testimony. I did catch the last portion of your presentation.

I started in the juvenile court system in 1976. From what you are telling me, not much has changed. We look for discretion to try to do what the situation demands, and there is no single model that will give us the success story. Resources and people will make the difference.

Particularly in regard to the Aboriginal society, the system needs to understand the community more. However, we were saying that 20 years ago. I think you are making the point that not much has changed.

Senator Pearson: Judge Harris, it is interesting to spend a day in court with you. You have a heavy load to bear. You deal with many young people in a short period of time, with all the complications that implies.

From a practical point of view, if we do pass this bill and police officers start to think first about avoiding charges before they actually lay them, is there any way in which it will be possible to track whether you are hearing fewer cases?

Mr. Harris: I suppose there will be a visual change. It is a matter of relativity. I may be wrong about this, but I am told that of all cases where there is potential to lay charges, about50 per cent come before the court. If we cut our volume by50 per cent, I would not need statistics. I would know instantly that there is tremendous change. The discretionary facet of youth justice is a provincial matter. All the provinces have different levels of diversion.

If we could achieve higher levels of diversion by pre-trial screening, including the kind of diversion a police officer used to do - which is to give a warning and speak to the parents - then I would have more time to spend on more involved cases.

With the necessary planning that goes into trying to influence the outcome, to stop crime and reduce recidivism levels - which includes lawyers making joint submissions all day - and imposing sentences and pro forma probation orders, we will not have any impact at all on the high levels of custody. However, if the rate of extraordinary or alternative measures were to increase dramatically, we would see the results right away. We would have a real opportunity to tackle, in a more extensive way, the planning that must go into helping change a criminal lifestyle and reduce the risk of youth.

Senator Pearson: That is the answer I expected, but it is helpful to have it on the record.

One of our members, who is dealing with the Anti-terrorism bill at present, has a particular interest, as do I, in the question of the publication of names. As a judge, are you able to comment on that in a more general way? Basically, the feeling is that, under the age of 18, we should not publish names. Publication does not mean the sharing of information, and excludes the exception where authorities are trying to find a person.

Mr. Harris: This is a little difficult and requires a lot of study. At the committee hearings before the Young Offenders Act was passed, a lot of experts were called who said that the rehabilitative process would be seriously impeded by the glare of publicity and the stigmatization of a young person the community.

I can see both sides of that argument. In a big city like Montreal, Toronto or Vancouver, hardly anyone knows anything about what is going on with local individuals and there is no reporting, so it would not matter if names were made public. The court is some distance away from the community and there are not reporters in each local court.

However, in a small community this is crucial. One major brush with the law, such as car theft at the age of 15 or 16, can lead to ostracization in a community because parents would not want their kids hanging out with someone involved in that kind of activity. That may cause that youth to gravitate to an undesirable subculture rather than becoming fully reintegrated into the community.

I see both sides of the issue but, on balance, it is probably healthier for immature criminals to have the opportunity to outlive an unfortunate history that could have been caused by any number of pressures and may not be the way they would naturally have approached living in the community on a long-term basis. They get to outlive that if their name is not published.

There are some very serious offences, however, which entitle the public to the right to know. That seems to be dealt with in the bill. There is a publication provision for when an individual has an eligibility hearing for an adult sentence. Even if they end up with a youth court sentence, serious offences can still be publicized. That makes sense in some ways, because when the offence is sufficiently serious the balance shifts from concern about rehabilitation to protection of the public.

Senator Moore: Judge Harris, do you deal with many Aboriginal youth cases?

Mr. Harris: I have dealt with one in the last two years, and it is notable because it keeps coming back. I can certainly relate to what Judge Mandamin has been talking about. This young offender does not respond to the kinds of things that you might think he would, such as an incentive program to put his criminal activity behind him.

Vernon Harper, from Toronto, has a country retreat with a sweat lodge and the whole spiritual and cultural environment available for native youth. We thought it was a wonderful opportunity to place the youth I am speaking of in this residence. He was very enthusiastic, but after only a couple of weeks he took off and got involved in some other criminal activity. This young man did not mind being in custody because all his friends were in custody. The issue becomes how to approach rehabilitation and how to behaviours.

Senator Moore: Judge Mandamin, with respect to the peacekeeping process and the native court you mentioned that was in place for 15 years, what was the experience in terms of repeat offenders? Did the youth respond positively? Did it result in fewer repeat offenders?

Mr. Mandamin: There were no statistics kept, which seems to be a pattern with Aboriginal justice initiatives. We are looking at that question in Tsuu T'ing with the peacemaking court. It took us a year to get it running and we have been operating for about a year. We are trying to track the results.

People in general, but especially youth, respond to people. Robert Yazzie, chief justice of the court of appeal of the Navajo Nation, said that it is a Navajo saying that when someone misbehaves they are acting like they have no relatives. It is the presence of other people that engage the youth, bind them and commit them to following more helpful courses of action.

Senator Moore: Do you sit as judge in the peacekeeping process?

Mr. Mandamin: No. Peacekeeping occurs in the community away from the court. When a matter is referred to peacekeeping, the offender is directed to contact the peacemaker's office. We adjourn the case for three months, typically. The peacekeeping process runs its course. If the process is unsuccessful, it is returned to court without comment with no prejudice to the offender and the court process continues. If the peacekeeping process is successful, they will give a brief report to the court, typically in the form of a letter. The Crown assesses it and decides whether it is suitable to withdraw the charges.

The peacekeeping process occurs without a judge. It is a community method of dealing with the issues. If the matter is sufficiently serious that the Crown feels it cannot withdraw the charges, the peacekeeping process makes sentencingrecommendations to the court.

Senator Moore: What was the situation that you mentioned with the judge and the three elders?

Mr. Mandamin: I gave that as an example of something that happened historically in one community. It is a good illustration of a different path.

Senator Moore: Do you see repeat offenders in thepeacekeeping process? How long has the process been in place?

Mr. Mandamin: It has been going on for one year. You must understand, too, another factor is that the conditions that are bringing those individuals into the court are still there. That environment is still there. It is still shoving them in a certain direction.

The best example I can give you concerns the Yukon sentencing circles, which try to do an assessment. They took serious chronic cases, those involving substance abuse and aggravated assaults - in other words, indictable offences - and told the individuals involved that if they have been out of the program for one year, they will look at the preceding year. If they had been out of the process for five years, they look at the preceding five years. They then try to add it all up and see what it tells them. I have never seen a published report, but listening to a presentation on their outcomes, they said that they had an85 per cent reduction in indictable offences by those individuals. That did not mean that the individuals did not re-offend. Many of the re-offences were process offences. In other words, they involved failing to follow probation, falling off the wagon or that type of thing. However, they saw it as an improvement.

Senator Moore: But the indictments went down; is that right?

Mr. Mandamin: Yes.

Senator Nolin: I thank our two witnesses. It is rare that we hear from two judges. Thank you very much for agreeing to appear before our committee.

Judge Harris, you related to us a case, and I understand and appreciate that it is unusual for a judge to comment on a decision of a higher court turning down one of your decisions. However, I want to go on the principles that were used and not on the facts.

In light of the gravity of the infractions, the upper court decided that it was proper to transfer to adult court.

Mr. Harris: That is right.

Senator Nolin: You decided, to the contrary, that due not to the gravity of the infractions but the state of the youth himself that it was proper for that person to stay in front of you. Am I right in that?

Mr. Harris: It is a little more subtle than that, but that is pretty well it.

Senator Nolin: I am sure you have read the bill in front of us. The sentencing principles that govern your decisions are set out in clause 38(2). If those measures were in place, do you think you would have been able to take the decision that you took?

Mr. Harris: Whatever decision I took was wrong anyway, according to the Court of Appeal.

Senator Nolin: I knew you would say that.

Mr. Harris: I will lose this one no matter how I go. Under the Young Offenders Act is a reconciling test between rehabilitation and protection of the public. I thought I could reconcile those things because I thought the youth could be treated successfully with the time available, that is, the 10 years available under the act. We heard expert evidence that said there was a really good chance that in the 10 years we could have some substantial successes with his schizophrenia, which is pretty much what he was suffering from.

The Court of Appeal said that there was another expert, upon whom I did not put as much weight, but upon whom they relied. It appears that you have to exclude all possible opinions and not just rely on one and discard the other. I thought the one psychiatrist was a little more effective. However, that is not your question. I will get to it.

Under this bill the issue is accountability. Can the youth be held to account and yet still be kept in youth court? That is the sense of it. If held to account means: Can the youth be given the appropriate sentence and still be kept in youth court, then it is not so much of game of psychiatrists and how long it takes to rehabilitate the youth. It is more a game of what is this offence worth? If 10 years does not do it, then you could be required by law to impose the adult sentence.

Obviously, there are other considerations, but if the word "account" is used, then that means that is the kind of level of responsibility, sentence-wise, that should be imposed. That level of sentence has to be 10 years or less, if it is a murder charge, to keep the youth in youth court.

I have to say that I prefer the reconciling test as opposed to the accountability test because the reconciling test speaks more to the psychiatric and sociological issues about rehabilitation than does the accountability test.

Whatever happens, this is a general movement of those kinds of considerations to the superior court level. Anybody on a murder charge who is represented by counsel will likely take a preliminary at my level.

Senator Andreychuk: If you covered this in your testimony, I can read it. However, from a judge's point of view, have you calculated the time that the process set out in this bill will take as opposed to the process set out in the Young Offenders Act?

Mr. Harris: Are you referring to the whole process?

Senator Andreychuk: We have only so many judges, and we want to process that is efficient in a maturing mind. Thus, we want to move as expeditiously as possible while balancing rights, et cetera. Will it take longer to process a young person under the provisions of the YOA, or will it take longer to process them under Bill C-7, on average?

Mr. Harris: This is totally subjective and empirical; it is not scientific. I see a year and one-half being knocked off the process. That is because there is the issue of transfer and then the appeal process. The transfer takes six months from the time you start planning it. It is completed within a month to six weeks. The appeal process then starts and it takes about a year to get a result. That is the nature of the appellate process and the length of time it takes to get on. You then have a result and you get a chance to decide where you are going for trial on a particular offence. Whereas if you have the trial, the sentence, then you can have the eligibility hearing and, perhaps before that, the hearing as to whether it is a third serious offence, if that is the type of issue it is.

I cannot comment on how long the trial will take. However, if the youth is found guilty, the process after the trial is probably all wrapped up in three or four weeks.

Senator Andreychuk: Is that even with the elections and the preliminary?

Mr. Harris: Even with the eligibility hearing, the preliminary and the sentencing, I would say it would take one to one and one-half years off the process.

Senator Cools: Mr. Harris, you devoted a fair amount of your testimony to the youngster you called "Jimmy" and in particular, to the phenomenon of the processes of the transfers to adult court. Do you have any idea how many such transfers there are per year in Scarborough, Ontario? Mr. Mandamin, could you give us the same numbers for your province? I would like to know how many transfers there are, roughly, per year.

The transfer described by Mr. Harris was obviously a case involving severe mental problems. Perhaps, Mr. Harris, you could give us some insight as to how many of the transfers actually involve mental problems. How many of those may involve character malformations or even psychopathic behaviour? I am interested in the phenomenon of the transfer.

Mr. Mandamin: I sit on two reserves, where there have been no transfers. There have been no trials in those courts during the time that I have been sitting - one and one-half years in one area and one year in the other. Native people do not often take a matter to trial. That is probably by virtue of their culture,

because it is an acknowledgment of what they have done. The issue is what to do about it.

Transfers occur in provincial youth court in Alberta, typically in murder cases. I cannot quantify that for you, but it happens periodically. We do not have a very good grasp of how many mental problems are involved in those cases. However, there are cases involving fetal alcohol syndrome and fetal alcohol effect. It would be my sense that we are not catching it at all.

There can be a youth who seems to be fine and seems to hear and respond accordingly, but then repeats the same offence perhaps two days later. Possibly, in such a case, we are dealing with a problem that the native communities are trying to grapple with. There has been a high incidence of alcohol use. They did some surveys of mothers and have found high levels of alcohol consumed during pregnancy among certain people in the population. They know they have individuals with thatcharacteristic in the community, and certainly, they are in before the courts. It is not coming up in our system. There is no way to have them assessed or identified in an easy fashion.

Senator Cools: I am pleased that you have raised that issue because as much attention as the bill and the system places on the transfers, we seem to have remarkably little information about these youth. I mentioned this before.

For a period of time many years ago, I served on the National Parole Board. The last of those youth who had been tried in the adult system, and even condemned to death but had their sentences commuted, were still in the system when I was on the parole board. I remember reading about their cases with great interest. It seems to be a property of the whole system that when you raise questions about these individuals, there is very little information available.

Mr. Mandamin: That is right.

Senator Cools: There have been cases involving very serious character malformations, seriously deformed individuals.

Mr. Harris: Just as an overview, there is probably something in the range of about 30 transfer hearings across Canada per year. That is a fairly consistent figure over time. In Toronto, there may be three or four. In the odd year, there may be one or two, possibly five or six, but it is somewhere in that range.

The cases are usually a battle over whether the youth has a personality disorder or what is called a "conduct disorder," which is the juvenile version of a personality disorder. No psychiatrist with any forensic skill will say there is a likelihood of a successful rehabilitation with that particular type of mental health issue, as opposed to some other types of mental health issues that have better prognoses for rehabilitation.

It is difficult to say in any given year which cases will go in which direction. They usually involve a battle between two or three psychiatrists, the defence and the Crown. The judge decides to rely on one. Sometimes there are three or four professional mental health witnesses. I do a great deal of compiling and briefing of these cases, and there seems to be a tendency to apply the test of the act that more youth are being transferred to adult court than are being seen in youth court.

This is the final product of it all, after it goes to the appeal courts, but it is a pretty tough test in the Young Offenders Act, and these are serious offences. You really must establish that this youth can be cured of his or her problem, to the point where there is no longer a social and societal risk, within 10 years if it is a murder charge or within a lesser time period if it is second degree. With second degree, seven years is the maximum sentence. Those are the parameters within which you must work. It is anybody's guess as to how the youth will come out of the process.

Some youths do not show up with any identifiable mental health issue. They may be transferred to adult court and go on to be acquitted. Knowing where these cases are heading or what the numbers are is almost impossible without some kind of professional survey of the individual types and the results.

Senator Cools: It is a huge subject matter. In respect to these young people in trouble with the law, are the numbers significant where the offender is a youth and then an adult offender after his eighteenth birthday? There was a serious murder case in Toronto. A judge told me that the accused had been before him as a youth offender the week before this murder. The youth had turned 18 within that week.

I have often wondered about the whole phenomenon of these young people negotiating that transition, which in their lives may be one day to the other. In the eyes of the law, it is an enormous bridge. Do you have any studies on that?

Mr. Harris: I do not. Professor Doob is coming tomorrow, and I understand that he has some material on that. The department of criminology at the University of Toronto has studied the phenomenon. To what extent youths exhibit this kind of recurring, escalating pattern, if you were to start to develop predictors, you would say this youth would do something serious one of these days.

Researchers are currently concentrating risk assessment, as opposed to some other approach to dealing with crime. These risk assessment tools are getting very sophisticated.

The Chairman: I want to return to one point that Judge Mandamin mentioned. It was in regard to the increasing number of young people who have F.A.S. What happens to someone who is an offender before youth court and is suffering from Fetal Alcohol Syndrome? Both of you may answer. Out of curiosity, I would like to know what happens to these people who likely have no hope of comprehending what it is they have done and why.

Mr. Mandamin: One of the difficulties is that we do not often know who is subject to that condition when they are appearing before us. There is no easy way of getting that assessment done.

In Lethbridge, Alberta there is a protocol that started as a police initiative. They have a committee. If a youth is charged, and they think the youth may have F.A.S. or F.A.E., they have a way of getting an assessment done quickly. If that assessment is confirms the syndrome, they will take other measures to address the issues that the youth has and will withdraw the charges or stay the charges. In the case where it is serious, the F.A.S. assessment and recommendations will come as part of the court package. That is an initiative in Lethbridge.

In the native communities where I sit, one in particular, Siksika has looked at that question on a community basis, but we have not got to that point yet. They have taken steps to have a psychologist available so they could develop the capacity to do those assessments.

Mr. Harris: I have never had anybody actually assessed as having been subject to F.A.S., at least in his or her youth or adult years, but I have suspected such. One might have that suspicion based on the kind of background material you get in a pre-sentence or predisposition report, much of the social work material, and from the learning assessments that indicate that a youth who appears to be bright in the moment cannot function at any kind of level. The only effective way that I have seen of managing these youth in the community, and it may are be more cost effective than anything else we can do, is to have a one-on-one worker out in the community with that youth to offer a friendship and supervision - a big brother or big sister that would be there to curb tendencies on a regular basis.

Without any kind of inhibitions, social constraints or anything, if that is the indicia of F.A.S., you will probably have someone who, almost on a day-to-day basis, could be involved in criminal behaviour. There a number of organizations of which I am aware that can supply a one-on-one worker in the community on a continual basis, subject to funding. That is probably the best way to approach it.

The Chairman: We come back to the question of funding again. Thank you for waiting so long and appearing tonight. Senators, we will meet again tomorrow, I believe in our regular meeting room at 3:30 or when the Senate arises.

The committee adjourned