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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): We're going to call this meeting of the Standing Committee on Justice and Human Rights to order as we continue our study of Bill C-75, an act to amend the Criminal Code, the Youth Criminal Justice Act and other acts and to make consequential amendments to other acts.

Today, we are joined by the Criminal Lawyers' Association, represented by Mr. Michael Lacy, president, and Mrs. Apple Newton-Smith, vice-president.

Legal Aid Ontario is represented by David Field, president and chief executive officer, and Mr. Marcus Pratt, director of policy and strategic research.

Welcome. It's a pleasure to have you all here.

On the telephone, we have Mr. Philip J. Star, who is a criminal defence attorney at Pink Star Barro. Mr. Star, welcome to the committee.

Mr. Philip J. Star (Criminal Defence Lawyer, Pink Star Barro, As an Individual): Thank you very much.

The Chair: As agreed, we are going to turn to you first, Mr. Star. You have eight to 10 minutes, so please go ahead.

We will then have the other groups, and then take questions.

Mr. Philip J. Star: Thank you very much.

This is my first time having the pleasure of appearing before this committee. I have to give some comments on or insight into at least some of the legislated changes contemplated by Bill C-75.

As a general prelude, I operate a general practice, but most of my work is as a criminal defence lawyer, mainly in small towns in rural Nova Scotia. One would surmise that even though the Criminal Code and the other related statutes that we all deal with are national and apply or should apply uniformly throughout the country, there clearly are differences in the manner in which the criminal laws are adjudicated upon. I am certain that other criminal defence lawyers here will echo my comments, not only from province to province, but even in different regions in each province.

The reason I referred to this is that part of the bill allows for the exercise of more discretion by Crowns as to the operation of preliminary inquiries, hybridizing more or most of the offences in the Criminal Code, and certain other things. My point today is not to mount an attack on Crown attorneys just because I'm a criminal defence lawyer. Rather, I propose to offer some general comments and some concepts that may have gone by the wayside. I'm certain a lot of this is going to be redundant or repetitive to what my colleagues will say here.

We've all read a lot of literature not only about Bill C-75, but also about many other suggested bills and amendments to the code, and this could be parliamentarians, legal scholars, newspaper reporters, Crown attorneys, defence lawyers, or members of the public. All this is under what I'll refer to as the rubric of making Canadians feel safer —I've seen the words “public safety” and “national security”.

Obviously we all want that, but I think it's important that we not lose sight of some of the most important concepts of criminal law that we at least used to take for granted, and I hope we still do: namely, the presumption of innocence and the concept of proof beyond a reasonable doubt. I know I'm speaking of a given here, or what's supposed to be a given, but I sometimes wonder, with the utmost respect, with respect to some of the amendments or proposed amendments, whether the pendulum is swinging way too far the other way.

People can never really truly appreciate the safeguards and high standards of our system until they or a loved one is facing a criminal charge. I find it amazing when I am representing a police officer now, or a Crown, or a judge, or a family member of one of those persons, how people start carrying the torch for these safeguards if a family member or a friend is in the unfortunate position of facing a serious criminal charge.

At the risk, once again, of being redundant or repetitive, I'm going to speak briefly about some of the preliminary inquiry amendments and some of the purported reasons or justifications for the reduction or elimination of preliminary inquiries that I respectfully submit are just simply not borne out by the statistics. I won't refer to the statistics specifically. We talk about the number of matters that go to preliminary inquiries and so on. We talk about saving victims or not revictimizing victims by having them testify more than once. We talk about trial efficiency and efficacy, and the 2016 decision of the Supreme Court in Jordan. In actuality, I submit that Jordan was to a large extent a reaffirmation of what courts have been telling us or trying to tell us for a long time.

Paragraph 11(b) of the charter was enacted in excess of 36 years ago, in April 1982. It was not meant to be mere window dressing, so the actors or participants—i.e., the Crown, the defence, the police and the judges—have been told to get their act together.

The preliminary inquiry serves a unique and instrumental purpose in the system, not just for the defence but—it's important and I'm going to emphasize this—for the Crown. It allows both the Crown and the defence to test witnesses as to their actual observations and recollection of events that happened in the past. It permits both the Crown and the defence to identify often crucial issues that may not otherwise be noticed in the disclosure: i.e., the RCMP reports, statements and so on provided by the parties.

● (1535)

It allows both the Crown and the defence to see not only what somebody says in a written statement, but how they say it: the nuances, the body motions and the inflection of the voices. To use a blatant example, if someone is asked if they consented to sexual relations, a transcript might show them saying, “No”, when it's either “No!” or “Um...no.” On paper, they look the same. These are but small examples of just how much benefit can be provided not only to the defence or the accused but also to the Crown.

In my experience, preliminary inquiries result not only in a committal to trial, but often in a weeding out of cases that should not be proceeded with, either by having the Crown withdraw the charges or, certainly more so, by having a resolution of charges after both the Crown and the defence have had an opportunity to have a true view —one might say, a dry run—as to what the case consists of. They're incredibly helpful, not only to the accused, but to the Crown and ultimately to our system, by cutting down on delays and costs, at least in my experience, not just in rural Nova Scotia, but in a lot of other areas. I'm in Halifax virtually every week, and I find the same up there.

I'm just coincidentally involved in two very serious cases, one of which, last week, was dangerous driving causing death. A day-long preliminary inquiry probably saved us a trial of a week and a half because the case was resolved. I realize you can't look at one case and use that as the cornerstone, but I think it's important to highlight that, because I'm certain all of us could speak from similar examples in our experience.

A lot of this has already been addressed by Parliament by reducing the time in preliminary inquiries by enacting section 540 and related sections of the code. The Jordan timelines, I note, allow for another year for indictable offences.

There are other things here, but at the end, what I have left is certainly the most crucial aspect of what I propose to comment on today. I prefaced my remarks earlier by referring to the hallmarks, the cornerstones, if you will, of our criminal justice system: the presumption of innocence and the concept of proof beyond a reasonable doubt.

In my view, removing a procedural safeguard such as preliminary inquiries will almost certainly lead, at least indirectly if not directly, to more wrongful convictions. Canada, in my respectful view, has a criminal justice system that, although not perfect, is likely among the best, if not the best, on this planet.

Having said that, we have skeletons in our closets, the Donald Marshall Juniors of Nova Scotia and the Guy Paul Morins, to name but two people who have gone into infamy because of serving lengthy periods of incarceration for crimes they did not commit. That time cannot be given back to them. This is irreparable.

The system was not good previously. I look at the rape shield laws, where there was an open season on alleged victims before, and the pendulum swings. I think it's important to remember that the pendulum should not swing too far the other way. We should not allow legislation to be passed that could have the direct effect of leading to more, perhaps many more, Donald Marshall Juniors.

There's a mention of the need for robust initiatives, transparency and a culture shift by all, but we should not and cannot erode, undermine or sacrifice these benchmarks of our criminal justice system at the altar of public safety and\or national security.

Thank you very much.

● (1540)

The Chair: Thank you very much, Mr. Star, and thank you for delivering your testimony in a more difficult way than is normally the case. It's hard to see your audience and still speak, but you did it very effectively. Thank you.

We'll now move to the Criminal Lawyers' Association. I'll turn it over to you, Mr. Lacy.

Mr. Michael Lacy (President, Criminal Lawyers' Association): Thank you, Mr. Chair and honourable members. We're glad to be here and to be invited to speak to the work of this very important committee.

Really, we appear today on behalf of the 1,400 members who are part of our organization, which includes criminal defence lawyers and also academics in Ontario and otherwise. We hope to persuade you to consider making recommendations to amend the bill as it currently exists and to also consider suggesting that aspects of the bill not be passed at all.

By way of introduction, we have been critical of the bill, but there are many aspects of the bill that we think are laudable and heading in the right direction, aspects that you've heard about from other witnesses, such as amending the proposed bail provisions; the concept of judicial referral hearings; giving the discretion to judges not to impose the victim fine surcharge; increased case management powers; and, finally, bringing criminal justice into the century that we practice in by taking advantage of video conferencing. Obviously, these are all positive things that will assist in the orderly, timely administration of criminal justice throughout Canada, but there are aspects of the bill that we find particularly troubling.

We have outlined those submissions in the paper we've provided you in advance. Many other people will speak to many of the things we've outlined, but today, in the brief time we have, the 10 minutes before we are asked specific questions, we would like to talk about the proposed jury selection amendments.

Again, we want to acknowledge at the outset that the government's acknowledgement of the potential problems in the jury selection process and the goal to bring more fairness and transparency to the process are laudable. Eliminating discrimination in the jury selection process and ensuring that jurors are truly representative of the community where the crimes are alleged to have occurred is a goal that we wholeheartedly support.

The goal of addressing systemic racism or discriminatory practices within the jury selection is similarly shared by our members, but unfortunately, as we look at the means that have been chosen, they fall far short of what's required and, if adopted, will not actually assist in addressing the problems.

We view ourselves as significant stakeholders in the administration of criminal justice. We believe that, like all significant stakeholders, we have a responsibility to ensure that community members who become jurors decide the case fairly, objectively and without prejudice, bias or favour for either party, whether it's the accused or the Crown prosecuting the case.

The race, gender, nationality, socio-economic status or other descriptor of either the accused person or the victim of crime has no role to play in terms of what the result in a criminal case should be. Discrimination or improper stereotyping has no place in the courtroom or in jury deliberations, or in the way in which juries are chosen.

The way in which jurors are chosen not only has to be substantively fair, but it has to appear to be fair. The appearance of fairness with respect to the jury selection process is very important. This includes having a diverse pool from which the jury can be chosen.

Recent high-profile cases have raised questions about whether the current procedure, including the use of peremptory challenges, meets that standard, particularly in relation to the appearance of fairness. We don't need to name the cases that get named all the time with respect to this issue, but let's just be clear. No one was entitled to have a biased juror. No one was entitled to have a biased jury in favour of the accused or in favour of the Crown.

That is no doubt the impetus for this really significant change. When the minister came and spoke to you most recently, she described this as a significant, substantive change to the law, and we agree. The difficulty is that in terms of eliminating the peremptory challenges without some of the other proposed ways that academics and practitioners are telling you to consider, changing the jury selection process will not help the system. It will not lead to diversity and in fact will leave us without the opportunity to protect our clients, who are most often racialized, indigenous or other marginalized people. These are the bulk of the people who come into conflict with the criminal justice system.

● (1545)

The unfortunate reality is that although racialized and indigenous persons are overrepresented in the criminal justice system as accused persons, their communities are unrepresented in the jury pool from which the jurors are chosen to decide a case. In communities with large indigenous populations, there are often very few indigenous people who ultimately come before the court as part of the jury pool from which 12 men and women from the community are chosen to decide a case. Even in large urban centres like Toronto, the pool of eligible jurors does not reflect the diverse Toronto urban community.

There are many reasons for this, some of which can be dealt with through legislative action that is missing in the proposed bill.

First, although this is not within the purview of Parliament, the way in which people are summoned for jury duty—which is left to the provincial governments and has been done by relying on property tax assessment rolls or on other areas—leads to a situation in which a case does not actually draw the representative, diverse community wanted in the jury pool. Historically, this leads to the exclusion of people like renters, boarders, and low-income people—people who might be considered to be on the margins of society but who nonetheless reflect our communities. It also leads to the exclusion of indigenous jurors. You have many submissions before you from groups that speak to this issue, not simply from the Criminal Lawyers' Association. One of the problems is that the pool from which juries are chosen is not diverse.

Second, which this committee knows particularly well, is the failure on the part of provincial governments to compensate jurors properly for their time in court. It was the subject of a report that this committee released in May. One of the recommendations you made is important with respect to this issue.

Just imagine how this plays out in practice. People get excused from the jury pool on the basis of financial hardship. Anyone living day to day in Toronto, Ottawa, Saskatoon or in more rural communities who cannot afford to take time off work to serve on a jury pool is going to be excused, and so should they be. You don't expect people to go into financial ruin to serve on the jury pool. What does that leave you with? It leaves you with some unionized people whose unions are smart enough to negotiate compensation. It leaves you with a lot of retirees. It leaves you with very wealthy people. You're not drawing a representative sample in terms of the eligible people who can in fact serve on a jury.

When it comes to dealing with the issue of peremptory challenges, the collective experience of our members is that when an accused person is a different race or colour or looks different from most of us in this room, who are white, it's important that potential jurors be asked questions to determine whether there are racial stereotypes or biases that will affect the way they will adjudicate the evidence vis-à-vis our clients. This is normally done through a challenge for cause process. You have all the background information on this. Jurors are basically asked one or two questions so that someone can decide—some other two people who are chosen from the jury pool—whether they display bias such that they should be removed from the jury.

As a consequence of the lack of diversity in the jury pool, peremptory challenges are used each and every day by responsible criminal defence lawyers in this country to try to get deeper into the jury pool in the face of having lack of diversity on the jury. When you're looking out at a room of 200 people and your client is a young black man from the city of Toronto, and you see five, six or 10 people who, by the time those with financial hardship are weeded out, are actually eligible to sit on the jury, you're trying to find someone diverse on that jury.

As I said, we're not interested in bias or partiality. What we're looking for is to have someone in the room who is representative of the actual community. That's the way our members are using peremptory challenges. It's the only tool we have in our tool kit to get deeper into the jury pool to try to improve the diversity of the jury. Sometimes people can get through a challenge for cause—for reasons that are difficult to explain—even if they do display signs of bias. I know the new legislation will give a judge the power to control the challenge for cause, but again, peremptory challenges allow a lawyer to try to shape the jury in such a way that actually encourages diversity.

● (1550)

There are three things this committee should consider:

First, it should consider providing a more robust statutory challenge for cause, based on evidence. This means taking an evidence-based approach to determining how the jury is chosen and asking modest questions of the jurors to determine whether or not they display potential bias.

Second, it should consider inviting submissions from the parties. Professor Roach, whose submission you have before you, speaks to this issue as well, and I know you're going to hear from other academics on this issue. There seems to be a myth being perpetuated that the practitioners are at odds with the academics on the issue of jury diversity or on the issue of peremptory challenges. We all want the same result. It's how you get there, at the end of the day.

Third, it should consider forcing the provincial government to create mechanisms to have representative jury pools. Because of the division of powers, the only way to do that is with the proposed amendment that we suggested for subsection 629(4), which would be a new provision that would allow for a challenge for cause based on the lack of representation in terms of the jury pool that's been assembled.

If the provincial governments won't act, then this government needs to act. It needs to create a challenge for cause process and provide compensation for those jurors. Your recommendations were welcome before, and they will be welcome again, but let's go further. Let's suggest transfer payments to the provinces so they can compensate people, or do whatever is needed. With all these very smart people running our collective governments, perhaps we can compensate people so that the poor, the marginalized and the racialized are not excluded.

We have a lot to say about the legislation otherwise, but I do appreciate this opportunity to speak to you directly about the jury issue.

Thank you very much.

The Chair: Thank you very much.

We'll move to Legal Aid Ontario now.

Mr. David Field (President and Chief Executive Officer, Legal Aid Ontario): Thank you for the opportunity to appear before this committee again. Legal Aid Ontario, LAO, is Canada's largest legal aid plan, and a significant funder and provider of services in every level of criminal court in Ontario. We have a pressing interest in the federal government's criminal justice reform initiatives.

LAO's submissions on Bill C-75 reflect our position and views, both as a funder focused on making the most cost-effective use of public funds, and as an access to justice organization dedicated to addressing the legal needs of our low-income and frequently highly vulnerable clients.

LAO has a particular interest in the bill's amendments aimed at addressing bail and remand issues. LAO would like to see a section added to Bill C-75 that ensures that the bail process outlined in the R. v. Tunney decision becomes the baseline procedure for bail. The bifurcated process requires the justice to consider the appropriate release after submissions by the defence counsel and the Crown before moving on to the suitability of a surety. This simple change of procedure makes the bail process faster and fairer, and the Criminal Code needs to be amended to reflect the Tunney decision and recognize that without direct procedural reform in bail court the new amendments will fall short of making the necessary changes to fix the bail process.

LAO supports many of the expanded police powers in Bill C-75, as they aim to address police concerns that may be preventing them from exercising their authority to release. LAO agrees with Justice Gary Trotter and others, who have made the point that expanding the powers of the police to impose conditions must be approached with caution so that the very reforms aimed at alleviating pressure in the justice system do not have the unintended consequences of adding even more people into the system.

A particular concern about expansion of police discretionary powers is the potential for disproportionate and discriminatory impact on particular groups. For these reasons, LAO recommends modest amendments to proposed subsection 501(3) of the bill, consistent with the principles of restraint and the goal that conditions can be reasonably complied with so the police are not given the authority to impose the following two types of conditions, which we believe are overly broad, unnecessary and likely to increase rather than decrease the number of remand detentions: conditions aimed at preventing the future commission of unnamed future offences, and curfews attached to residential conditions of release, in particular the requirement that a person present themselves at the entrance of their residence on request, which is a condition that is used sparingly even by justices, and when used is too often breached for innocuous reasons, resulting in further charges and detention orders.

Bill C-75 as drafted restricts the availability of preliminary inquiries to offences punishable by life imprisonment, which we've heard concerns about already. On its face, this would appear to be a cost-saving and delay-reducing reform, as it eliminates a step in the process. However, LAO's own experience and research conducted by prominent criminologists indicate that this is a more complicated issue that should be approached cautiously.

LAO is not convinced that this proposed amendment will reduce court system delays or costs. In fact, it may produce the opposite effect. There appears to be no evidence suggesting that preliminary inquiries are a major cause of delay in the system. At the same time, there is evidence that preliminary inquiries serve as a screening function that enables more matters to be resolved without the necessity of a trial.

LAO's own data suggests that preliminary inquiries play an effective role in screening out charges and reducing the number of cases that proceed to trial. We looked at internal data related to cases funded through our big case management program between 2004 and 2014. Over this 10-year period, preliminary inquiries were held in 491 cases of 1,034 LAO-funded cases that did not involve life sentences; 75% of those cases did not result in setting a trial, providing a clear suggestion of the value of preliminary inquiries in reducing cost and delay. We believe that there is a strong case to be made for rethinking this proposed amendment.

Therefore, LAO recommends removing the restriction on the availability of preliminary inquires to offences punishable by life. At the very least, we believe there needs to be a process for requesting access to a preliminary inquiry on a case-by-case basis.

Another potential way to reduce some of the negative impacts of removing the preliminary inquiry screening function may be to broaden the scope of discovery to encompass some of the screening aspects of this process. LAO also strongly recommends further study on the issue.

LAO has significant concerns with increasing the maximum sentence for all summary conviction offences to two years less a day. This would open the door to harsher sentences for lesser offences. It would broaden the serious immigration consequences of a criminal conviction by rendering non-citizens potentially inadmissible to Canada or subject to deportation on the basis of a minor conviction.

● (1555)

It would also preclude law students and paralegals from assisting persons charged with minor offences. For LAO, and other legal aid plans, this proposed amendment would restrict our ability to meet our mandate by providing cost-effective access to justice for many low-income people who cannot afford a lawyer. Students and paralegals help legal aid plans to assist people who are facing summary charges that are serious enough to give them a criminal record and mar future employment or other life prospects, but are not likely to result in jail time.

Where the liberty test is not met, a person will be ineligible for a legal aid certificate in Ontario. As the committee knows, there are also stringent financial thresholds for certificate eligibility. Based on research, including our own independent analysis of eligibility and coverage, we know that those caught in this access to justice gap are statistically more likely to be women, members of a racialized community and indigenous persons.

The overrepresentation of indigenous and racialized persons in the justice system is a matter of record, and is of concern to both LAO and the federal government. Given their limited resources and restrictive coverage guidelines, LAO and other legal aid plans rely on services provided by students and paralegals to help fill the serious access to justice gap.

It is simply a fact that if the doors are closed to us by Bill C-75, more low-income and disadvantaged people will be representing themselves, thus contributing to, rather than alleviating, justice system delay. It is also likely that more will inappropriately be guilty, and may also be exposed to harsher sentences, thus growing the population of persons enmeshed in the criminal justice system as a result of a minor charge.

LAO recommends that subsection 802(1) be amended to ensure that law students and paralegals continue to be able to provide legal services to persons charged with minor criminal offences. This may be accomplished by either identifying specific exceptions, making it clear that these are offences to which agents like law students and paralegals may continue to provide services, or identifying serious offences where agents may not provide services, leaving it open for agents to represent individuals for the remainder of summary offences.

In closing, I would again like to thank the committee for the opportunity to provide our input. I would also like to mention that Stephanie Heyens, a senior litigator at Legal Aid Ontario, is presenting to the committee on the bill's amendments to the police affidavit evidence. LAO fully supports her brief.

Thank you very much.

● (1600)

The Chair: Thank you very much.

I will now move to questions.

Mr. Cooper, go ahead.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for their helpful testimony.

Mr. Star, you made reference to the limitation on preliminary inquiries and stated that, with limiting the scope of preliminary inquiries, there is a risk that individuals who are charged may end up being wrongfully convicted. Would you similarly agree that limiting preliminary inquiries may, in fact, make it more difficult to successfully prosecute guilty individuals? In other words, it's more difficult to achieve justice all around.

I say that because when our committee was in Edmonton, we heard from a Crown prosecutor who prosecuted one of the few successfully prosecuted human trafficking cases in Canada. She told the committee that without a preliminary inquiry, it would have been very doubtful that she would have achieved a conviction in an egregious case involving gross violations of workers, because witnesses were disappearing, etc. However, she was able to get them in and use that evidence, ultimately, in securing a conviction.

Mr. Philip J. Star: It's a good point. I do concur with that.

I've indicated that I've been involved with a fair number of cases in which the preliminary inquiries help the Crown much more than myself by pointing out weaknesses that they're able to rectify. It has often arisen, both very recently and a number of years ago, that witnesses, as you say, are either not available or deceased. We actually had two tragic cases here in the last 18 months or so in which the alleged victim had committed suicide. One person had been subjected to a preliminary inquiry by testifying; the other one had not. The case of the one who had not testified went by the wayside. For the one who had testified, the Crown successfully applied to the court to have his testimony—it was a male alleged victim—successfully admitted before the Supreme Court judge and jury.

I agree that it can help prosecute guilty persons. We are all hopeful that the safeguards are there, not just for the accused persons but for the system. I agree with you that having this enhances the system from both sides.

Mr. Michael Cooper: Thank you for that.

I take the point of the witnesses, the general concern about limiting preliminary inquiries. The government has set two streams, one involving cases where the maximum sentence is life, which would be eligible for a preliminary inquiry, and the other involving the rest of the cases, which would not. Do you see any logic in that? It certainly seems like the government is impliedly concurring that there is value to preliminary inquiries, from the fact that they're maintaining at least some. Why is there this separation between cases with life sentences and everything else?

Mr. Philip J. Star: That's a very good question. I can't answer that. All I can say is that we all know that most of the offences in the code do not have a maximum life sentence, so we're very much limited. One can certainly impliedly reach the conclusion you just did. Further than that, I cannot say. I agree wholeheartedly with your suggestion there. I can't understand why the next step down from life imprisonment is 14 years. Why that particular benchmark was used, I cannot say.

● (1605)

Mr. Marcus Pratt (Director, Policy and Strategic Research, Legal Aid Ontario): I think the question suggests further study. There does seem to be an element of arbitrariness, albeit a bright line, between when a prelim will be available and when it won't. There are a lot of offences that might require a prelim where it will be lost. Arguably, there are some cases for which a prelim might not be as valuable. I think further study on when a prelim is effective, in all aspects and in terms of learning about the Crown's case and screening out weak cases, would be useful. We can draw that line as to when a prelim is required and when it isn't.

Mr. Michael Cooper: How much time do I have, Chair?

The Chair: You have another minute and 20 seconds.

Mr. Michael Cooper: The whole reason for this bill is the Jordan decision. Do you see limiting preliminary inquiries as having any impact on Jordan, to the degree that the Supreme Court factored it in as a procedural step in setting the 30-month timeline?

Mr. Marcus Pratt: I think the data shows that it will have very little impact, if any. There are very few cases in the Ontario Court of Justice that involve prelims, relatively speaking. While it sounds like we're going to cut out 87% of preliminary inquiries, which sounds impressive, the reality is that there are very few cases and little court time taken up with preliminary inquiries. Preliminary inquiries are relatively short, on the whole. I think Professor Webster noted that they were on average one or two days. They are not what we stereotypically think of as two or three weeks. They're short in duration and don't take up a lot of court time. In my view, eliminating them will have no impact on reaching the Jordan timelines.

Mrs. Apple Newton-Smith (Vice-President, Criminal Lawyers' Association): For the Criminal Lawyers' Association, we are urging that this amendment not be adopted. If you look at our submissions, and as you see in the statistics, 86% of cases that have preliminary inquiries are resolved following that preliminary inquiry. I think that's a very important statistic to bear in mind. Preliminary inquiries don't just provide a gatekeeper function, although that is how they are traditionally described, to weed out cases that ought not to proceed to trial because there isn't evidence. They also provide a case management function. Those cases that do continue on to trial are managed much better because the preliminary inquiry circumscribes the issues much better. Therefore, witnesses don't necessarily need to be called again at the trial. The case management function of the preliminary inquiry is a very important thing to bear in mind when talking about taking away the preliminary inquiry.

Mr. Michael Lacy: I'll add to the member's question. The criminal process is about enhancing the truth-seeking function. That's part of what the criminal trial is about. The way in which the government has said it is going to abolish preliminary inquiries, for all but those cases where life imprisonment is at play, acknowledges implicitly that there is a value served by the preliminary inquiry in terms of the truth-seeking function. If you're going to approach this issue from a principled perspective, our association has suggested that if you're going to make substantive, significant changes, then at the very least you should propose an amendment that would allow either the prosecutor, the Crown, or the defence to apply to the court for leave to require a preliminary inquiry—for the very reason that the honourable member has raised the question—since in some cases where life is not engaged, the truth-seeking function of the criminal process will benefit from one or the other, or both, of the parties having the opportunity to have a preliminary inquiry, in a focused way, that is managed through the case management powers of the court.

The Chair: Thank you very much.

Ms. Khalid, go ahead.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair.

Thank you to the witnesses for their testimony today.

Mr. Lacy, you spoke at length about the proposed jury selection process, and about getting rid of peremptory challenges in Bill C-75. Yesterday we heard from an indigenous organization that spoke in favour of getting rid of the peremptory challenges, but you outlined that it would not have the impact that we want it to have here in terms of diversifying the jury selection.

I'm not sure if you had the chance to go over what their arguments and reasoning were.

● (1610)

Mr. Michael Lacy: I did. We're talking about Jonathan Rudin's submissions to this committee, in which he fully endorses the recommendations of Professor Roach. This is about how each organization may choose different ways to express the point, but if you reflect on our submissions and reflect on Professor Roach's submissions, all of which were adopted by Aboriginal Legal Services, you'll see that we are all talking about the same thing—that a stand-alone elimination of peremptory challenges combined with the one other change, which is allowing a judge to determine the challenge for cause, will not result in actual diversification of the jurors who are chosen to decide a case.

In that respect, there is actually no conflict among the positions taken by our organization, by Aboriginal Legal Services and by Professor Roach.

Ms. Iqra Khalid: Thank you.

As a recommendation in terms of amending the bill, you also mentioned taking an evidence-based approach to jury selection, with regard to asking questions or bringing in testimony, etc. Can you talk about that a little more? Also, can you talk about whether or not that would delay the whole process? That is something that is already a concern in our justice system.

Mr. Michael Lacy: It is very much an anecdotal exercise when you ask us to reflect on what happens. As it stands now, this is what you know about potential jurors absent a challenge for cause: you know their name, in most cases; you know the city where they reside and perhaps their municipal address; and in some cases you know their occupation. That is it. You know nothing else about the person.

The way it is now, by its very nature the peremptory challenge forces you to rely on stereotypes about people, whether they are socio-economic stereotypes or gender stereotypes, based on a particular case. In this regard, we agree with Professor Roach that there is a way in which you can have limited questioning of the jurors in a challenge process that allows you to find out a little more about this person who is going to be sworn in as a judge to decide whether or not someone has committed a criminal offence.

In the United States, as Professor Roach and other academics have pointed out, the system has gone a bit awry. It has led to lengthy proceedings and jury-vetting procedures, but it need not do that. One of my colleagues, who does a lot of work with respect to aboriginal communities, was telling me about an inquest he was recently involved in, in the province of Saskatchewan. The coroner was able to allow limited questioning of the jurors and was allowed to draw a jury—a differently constituted jury, obviously, for that purpose—that included representative people from the indigenous community and also from the rest of the community. He was reflecting on the experience and, knowing that I was coming here today, he said that when you allow a little bit of inquiry and you control it through judicial management—in that case, the coroner was managing it—you get a much better appreciation for the particular biases, whether they're known biases or implicit biases, that might be affecting not the willingness of the person to decide the case fairly, but their ability to do so.

We do support an evidence-based approach in that regard.

Ms. Iqra Khalid: Would giving extensive discretion to counsel on either side to pick and choose which jurors are being selected perpetuate an unfairness and lead to people selecting a jury based on which way it would lean, for a favourable outcome for whichever counsel?

Mr. Michael Lacy: No. The proposal would be to allow some limited questions, and then allow submissions to the trial judge as to why a particular person's questions display a bias or not. With the new proposal, you're going to be doing that for challenge for cause, but challenge for cause is currently practically limited to race-based challenges or publicity challenges. It doesn't allow you to deal with other potential biases that may be affecting the ability of the jury to decide a case fairly and objectively, which is what all the stakeholders want and what the community wants.

● (1615)

Ms. Iqra Khalid: Thank you.

Do I have more time?

The Chair: You have five more seconds.

Ms. Iqra Khalid: Goodness. I wanted to talk a bit about the reverse onus in bail. We heard yesterday about intimate partner violence and the notion that having the reverse onus for previous offenders would stop women from coming forward with the charges anyway. It would be a big step back on pushing the needle forward on gender-based violence and bringing these people to justice.

Do you have any feedback on that?

Mr. Marcus Pratt: We don't have a specific position on that issue. Certainly, while we commend the government for its work in the area of bail, there are still some areas that need work, one of them being the increasing use of reverse onus provisions. That seems to work against the principle of restraint that animates much of the bail amendments. The issue around intimate domestic violence is difficult. To be frank, we haven't turned our minds specifically to that issue, though we are concerned about the increase in reverse onus provisions.

Ms. Iqra Khalid: Thank you.

The Chair: Thank you, Ms. Khalid.

Mr. Rankin, go ahead.

Mr. Murray Rankin (Victoria, NDP): Thanks to all the witnesses for being here. I have very little time, so I would like to start, please, with the Criminal Lawyers' Association.

You really focused in on the jury representation issue but didn't do justice to the excellent points you made elsewhere in your brief. There are three points I want to get on the record and see if you want to elaborate on any of them.

The first involves preliminary inquiry reform. You are against what's in this bill.

Second, your position on increasing the maximum sentences to two years less a day for all summary convictions—clause 319—is that you're against those changes.

Third, on the routine police evidence, clause 278, you point out that, in your judgment, this clause is unnecessary.

I want to make sure that's on the record.

Mr. Michael Lacy: I'm going to let my colleague speak to the first and third matter. It is on the record that this is our position, but I will allow my colleague to expand on it a bit.

Mrs. Apple Newton-Smith: I'll start with the routine police evidence, because we've talked a bit about preliminary inquiries. We are against the admission of what is called routine police evidence by way of affidavit. We strongly urge this committee not to adopt that amendment.

We understand and acknowledge that there are certain areas of evidence that do not necessarily always require the calling of witnesses. Issues relating to continuity, or the issues that are captured in proposed paragraph 657.01(7)(b), "analysing, preserving or otherwise handling evidence", relate to a category of evidence for which you rarely require witnesses.

As far as the amendments are aimed at trying to streamline and be mindful of time constraints and efficiencies, we don't take issue with that. What we take issue with is the question of what is being called routine police evidence, which covers so much. In our respectful submission, it has no place in the Criminal Code.

Quite simply, it would put an onus on the accused to demonstrate why the Crown has to prove its case. That's really a reversal of the burden of proof, so I think it's important for us to put this on the record.

Mr. Murray Rankin: On the preliminary inquiry point, you also take issue with what we've heard the government say. The justice lawyers say we can get rid of preliminary inquiries because the world has changed in terms of Crown disclosure obligations, from Stinchcombe and on. Therefore, we really don't need preliminary inquiries; they're archaic.

What's your response? In your brief, you speak about Stinchcombe maybe not being a sufficient reason for this. I'd like to hear you speak further.

Mrs. Apple Newton-Smith: Absolutely. It is our position that Stinchcombe doesn't end that. The discovery function of the preliminary inquiry doesn't end with what's contained in the police brief of disclosure, which is usually just witness statements.

The preliminary inquiry is a forum where counsel can explore, for example, potential charter issues or motions that may be raised at trial. You can use the preliminary inquiry for that. You won't be able to answer those questions just by looking at the disclosure. It requires some exploration of witnesses, particularly police witnesses, if you're talking about charter motions. Through the process of the preliminary inquiry, counsel may realize that maybe they don't need to bring that charter motion at trial.

● (1620)

Mr. Murray Rankin: It actually can be time-saving.

Ms. Apple Newton-Smith: Exactly.

Mr. Murray Rankin: I think the same point was made by Mr. Star in the anecdote he gave about a day-long preliminary inquiry that saved lots of time down the road. Your reference to Professor Webster's material I think is also helpful in that regard.

In the interest of time, I want to go back to your issues on the jury selection process. You have an elegantly simple suggestion in terms of giving the judge the opportunity, by adding subsection 629(4) to simply allow either party to challenge the jury panel on the ground of unrepresentativeness, as found by successive studies and judicial inquiries.

You said two things. You said this would allow the prosecutor or the accused to make that motion and the judge to have that overriding discretion, but then you also said that you wanted to make the statutory challenges for cause provision more robust. Exactly how could you do that? Would you amend the challenge for cause sections? If so, how would you do that to make sure it wasn't abused?

Mr. Michael Lacy: You would have to legislatively amend the provisions, because the common law now creates a very limited regime, as I've talked about. You would have to amend the Criminal Code to allow a judge to engage in a challenge for cause process to question potential jurors about issues related to bias.

To some extent, judges do this through some initial screening in their opening remarks, talking about whether they know anyone associated with the case, that kind of thing. We certainly do it when we have high-publicity cases, when we want to make sure no one has formed an opinion about the case. There are, however, certain types of cases where people have strong opinions about whether or not people are likely guilty or probably guilty, likely innocent or probably innocent, and these situations would not now be caught by the normal challenge for cause provisions.

I'm not trying to invite more work and study. Sometimes I think, frankly, we spend too much time studying and looking at these things. Action is certainly required, but sometimes a simple solution to a complicated problem, like just eliminating the peremptory challenges, doesn't actually solve the complicated problem.

Mr. Murray Rankin: You have no specific suggestions as to how we would amend the sections of the challenge for cause provisions, even though you just remarked that we need to do so if we were to get rid of the peremptory challenge.

Mr. Michael Lacy: I would look for guidance in the suggestions of Professor Roach, where he details it in his brief, and we certainly would adopt that as well.

Mr. Murray Rankin: Okay, good.

Thank you.

The Chair: Thank you.

We're going to go to Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, Mr. Chair, and my thanks to everybody for being here today.

I want to start with the Criminal Lawyers' Association. Mr. Lacy, I read your brief and I didn't see anything in there about the hybridization of offences. Please forgive me if you have already mentioned that.

Can you tell the committee about the Criminal Lawyers' Association's position on the hybridization of offences, whether you see that as something that will assist in addressing delays by giving the Crown more flexibility to choose the best procedure, perhaps in a more simplified way? In your answer, could you also discuss whether you see this impacting the range of sentences available when proceeding by summary conviction rather than by an indictable offence?

Mr. Michael Lacy: Somewhat ironically, when you hybridize the offences and eliminate the preliminary inquiry, you have exactly the same procedure for both cases, except as it relates to the jury aspect of the case. It would only be in those cases where a sentence of five years or more is available.

We think Crowns in our province and across the country are asked to exercise their discretion in hybridization as a concept. We support the idea of giving the Crown the option of proceeding summarily versus by indictment in a broader range of offences, because there are collateral consequences in terms of the ability to obtain what's now called a record suspension, for example, which is affected by whether they proceed by summary conviction or by indictment.

You heard from a witness yesterday from the CCLA who suggested the need for consequential amendments to the immigration statutes as well, which I think is a very important point that this committee needs to consider seriously.

Our greater concern, though, is the increase on the maximum penalty for summary conviction offences—increasing that to two years less a day. There are other witnesses who are going to speak to that. The Law Society of Ontario has raised concerns about that, as has Legal Aid. We do believe that's going to be an access to justice issue and that it would be a mistake to allow paralegals or law students to represent people facing charges of two years less a day. Right now we have a dual system of super summary offences, 18 months versus six months, and we think that system works.

● (1625)

Mr. Colin Fraser: Thank you very much for that answer.

Mr. Star, perhaps I could turn to you. Thanks for joining us today.

I'll just pick up on the point that Mr. Lacy made. We've heard at the committee that the result of changing the maximum sentences for some of these new summary conviction offences, or hybrids that could be chosen to go summary, is that the six months maximum won't allow law students, agents, or paralegals to appear in court. Can you speak to your experience in the importance of the court having articling students and law students appearing in court on behalf of people?

Mr. Philip J. Star: Just speaking from my own experience, it's a significant access to justice issue, at least in my area. In southwest Nova Scotia but throughout most of Nova Scotia, not just rural towns but in the city, we see so many self-reps nowadays. I think if that was permitted without the amendment to allow the law students or articling students to appear, it would create many more problems, or it would enhance or increase the problems we're dealing with here with respect to access to justice. It's a buzzword here in Nova Scotia. It's a buzzword across Canada. We've all heard the former Chief Justice McLachlin speaking about access to justice. I don't think we want to do anything to deter that.

I know one of the big concerns, of course, is the experience and the lack of experience of law students and articling clerks, but they're monitored by both the law society and their principals, and I fully support their being able to appear in limited circumstances.

Mr. Colin Fraser: Thank you.

Mr. Star, just sticking with you and your answer, based on your experience, we talked a minute ago about routine police evidence in this bill as proposed. Basically, the reason for that would be purportedly to expedite routine police evidence that could go in without the right of cross-examination automatically. Can you talk about your experience in dealing with Crown attorneys and how oftentimes things relatively simple, such as continuity of evidence, goes in by admission?

Mr. Philip J. Star: With respect, Mr. Fraser, the word “routine” makes me squirm. What is routine? We've all been involved in situations in which we're asked to admit continuity, as an example, in blood samples, drug cases, and so on.

Coincidentally, I had a case last week that involved alleged abuse on a senior in a seniors' home by a worker there. We got there and the Crown had asked me to admit continuity of a bib that this alleged victim was wearing. I said, “Before I can admit it, you have to provide me with the evidence surrounding it,” so I never did. I realize, as indicated by a previous witness, that this is very much anecdotal, but we got to trial and came to find out that the original bib had disappeared. The one that they presented to the court they got that morning, some 18 months after the incident, so we were asked to admit to stuff without any indication in the disclosure or otherwise.

It's a very slippery slope to get involved with. I'm not saying it can't be allowed in very limited circumstances. For instance, in regard to the serving of certificates, we already have those provisions in there. I don't think it increases the time involved very much, and I'm very concerned about allowing that to be spread too far.

Mr. Colin Fraser: Thank you.

The Chair: Thank you very much.

Thank you to the witnesses. Because of the fact that we have panels that are going subsequently one to the other very quickly today, we can only do one round of questions. However, your testimony was enormously helpful. Thank you, and in particular, of course, thank you to Mr. Star for joining us by phone.

We ask that the next panel please come forward. We're going to recess briefly, but let's try to change very quickly so that we can get the next panel done in time.

● (1625)

(Pause)

● (1630)

The Chair: We will resume.

It is a great pleasure to have our second panel with us today. From the Association for Canadian Clinical Legal Education, we have Ms. Jillian Rogin, who is an assistant professor; and from the Canadian Alliance for Sex Work Law Reform, we have Ms. Kara Gillies, a regular at this committee by this point. Welcome.

We're going to go in that order, if that's okay, starting with Ms. Rogin.

Prof. Jillian Rogin (Assistant Professor, Association for Canadian Clinical Legal Education): Thank you.

My name is Jillian Rogin and I am an assistant professor in the faculty of law at the University of Windsor. I'm so honoured to be here today on behalf of the Association for Canadian Clinical Legal Education, or ACCLE.

I just want to take a moment to acknowledge that the land we're currently on is unceded territory belonging to the Algonquin Anishinabe people, and I'm really thankful for being allowed to be here today.

In addition to being an assistant professor and appearing on behalf of ACCLE, I'm also a criminal defence lawyer. Relevant to what we're going to talk about, I've worked as a duty counsel lawyer in the provincial courts. I was also a reviewing lawyer at a legal clinic in Windsor, Community Legal Aid, so I have experience in the provincial courts representing marginalized people.

To start out, ACCLE commends the intent of Bill C-75 insofar as it aims to reduce inefficiencies in criminal matters and it focuses on reducing over-incarceration of indigenous people and other marginalized people, but I want to focus on aspects of the bill and the proposed amendments that might undermine those laudable goals. Specifically, I'll be looking at the reclassification of offences and the impacts of that reclassification scheme both on law students and on the clients that legal clinics serve across Canada.

The increase in the maximum penalty, the proposed amendment to subsection 787(1), of course precludes law student representation, articling student representation, and representation by paralegals. All three will be precluded entirely from representing anyone any longer in any criminal matter in the provincial courts. This is of course because there's no corollary amendment to section 802.1 of the code.

To be frank, there is no stated rationale that I can find for this dramatic and drastic change to the legal landscape in Canada. There's no data I can point to that shows there is any difficulty with law student representation of people charged with minor criminal offences, and it's not clear what the legislative purpose is of eradicating that form of representation for marginalized people.

What we do know is that this eradication of law student representation will cause an access to justice crisis across this country. Legal clinics across Canada that for decades have been representing clients in summary conviction matters will suddenly come to a halt, and accused people will not have much-needed access to legal representation to answer to the criminal charges they're facing.

As it currently stands, section 802.1, as you all know, allows for the provinces to enact orders in council. I'm going to speak briefly about why, in my respectful submission on behalf of ACCLE, that is not an appropriate or adequate response to the difficulty of the proposed amendments.

Firstly, it's a piecemeal approach, so it means that provinces may or may not act. You may have a situation where there are some provinces that act and some that don't. There's no obligation on any province to do so.

Secondly, which is most alarming to me, even if the provinces act, it's very unlikely that they will do so in a manner that's timely, to prevent a gap in representation. If Bill C-75 were enacted tomorrow and passed into law the day after or on the day, we would have to attend court and make applications to get off the record for the current clients we have. That would have to happen all over Canada. We would not be able to appear in court except to get off the record.

Thirdly, on that point, in a sense—and I say this with respect—it's misguided to suggest that the antidote to the massive decrease in the provision of legal services can derive from the provinces enacting orders in council. Respectfully, the question should be, why are we taking away the current law student representation that has been in effect for three decades? Of course, it's a very drastic change.

We know also that this can't be justified by efficiency. It's not more efficient to have more people in the provincial courts who are unrepresented, with no legal representation. We know that not only are unrepresented litigants at a disadvantage, but they tend to clog an already clogged system, and the purpose of the bill is to address delays. We know, as I referenced in our brief, that unrepresented indigenous people disproportionately plead guilty when charged with an offence. The lack of representation is an incentivizing force of guilty pleas, and that should be alarming for all of us, especially with the stated intention of the bill.

This access to justice crisis is a crisis not just for clients who are facing those criminal charges, but also for law student education. Exposure to working with marginalized people facing criminal charges, exposure to the community organizing that has been a hallmark of clinics for decades, exposure to the promotion of social justice issues and—perhaps most important to me as a mentor and as somebody who had wonderful mentors—the opportunity to work really closely under the direct supervision of a criminal defence lawyer is a foundational experience of law school education. In my opinion, it's crucially important, particularly in criminal law. It is a crucial part of that clinic experience.

● (1635)

The evisceration of law student, articling student, and paralegal representation has constitutional dimensions, and it may impact fair trial concerns pursuant to section 11(d) and section 7, and perhaps section 15, depending on who is being denied representation, and in what circumstances.

In terms of our clients, I'm going to address the increase in the maximum penalty. It has been stated that this is not a change in sentencing ranges; however, it is a direct intent to raise the maximum penalty for summary conviction offences. The idea that it's not going to have an impact on sentencing ranges, in my respectful view, is misguided.

I'm speaking from that experience of being in the provincial courts, being in the plea court when you have a client who has 1,000 convictions for theft under. They go before the judge and the Crown is asking for 30 days and the judge says, “I'm done with you, six months”, because that's the maximum. The idea that's not going to happen and isn't justifiable with legal principles is, respectfully, perhaps misguided.

In terms of court efficiencies, we know that the proposed changes are not going to alleviate delays in the lower courts, in the provincial courts. There's nothing to suggest that's the case. The provincial courts are already overburdened. Many lower courts across Canada are facing crisis levels of criminal cases passing through, as I've noted in our brief. Provincial courts currently, in a recent Statistics Canada report, are seized with 99.6% of all criminal cases in Canada, the superior courts secure 0.4%. In that sense, it's very difficult to imagine, in terms of the hybridization of offences, how the choice to proceed summarily is going to create further efficiencies for the Crown or for the criminal justice process.

I'll turn now to the recommendations that ACCLE is putting forward.

We're boldly asking that the proposed amendment to subsection 787(1) not be made at this point, not with a more thorough charter analysis of the proposed amendment having regard to who it might most impact. This includes perhaps looking for further ways to reduce court delays that do not disproportionately impact marginalized people. Alternatively, we're asking that if this does go through, then an amendment be made to subsection 802.1 that allows for the continuation of law student representation.

Thank you.

● (1640)

The Chair: Thank you very much.

Ms. Gillies.

Ms. Kara Gillies (Canadian Alliance for Sex Work Law Reform): Thank you so much.

Good afternoon and thank you for the opportunity to address you today.

The Canadian Alliance for Sex Work Law Reform is a coalition of 28 sex worker and allied organizations from across the country advocating for law reform that advances the rights and safety of people who sell or trade sex. Our member groups have expertise regarding the impact of criminal law on the lives and well-being of sex workers, so it's on those grounds that we submit our response to Bill C-75.

I'm going to be really frank and say that we are very disappointed and frustrated that the Criminal Code provisions targeting sex workers and their personal and work relations are not slated for repeal or meaningfully addressed in Bill C-75. The Liberal and NDP parties of Canada voiced staunch opposition to the Protection of Communities and Exploited Persons Act, or PCEPA, when it was introduced. In 2015, the justice minister declared that she was “definitely...committed to reviewing the prostitution laws”, yet this review has stalled.

This isn't just a matter of principle or a matter of promises unkept. Each day that passes, sex workers' rights, safety and dignity are violated through the individual and collective impact of laws prohibiting the communication for, purchase of, material benefit from, procuring of and advertising of commercial sexual services. We are past the time for review, and we need action.

We believe that excluding the repeal of PCEPA from Bill C-75 was a gross missed opportunity, given the overall alignment of many the bill's principles and elements with those of sex work law reform.

First, Bill C-75 rightly repeals several Criminal Code provisions ruled unconstitutional by Canadian courts. In 2013, the Supreme Court found in Bedford that several criminal prostitution laws caused harms that violated sex workers' charter right to security of the person. The subsequent Criminal Code provisions enacted by PCEPA replicate these harms, and their constitutionality is similarly impugned.

Second, Bill C-75 rightly repeals the offences of anal intercourse and abortion that targeted sexual or reproductive activities and autonomy and that disproportionately impacted LGBTQ2S communities and women respectively. Prohibitions on sex work activities similarly undermine the rights to liberty, autonomy and security of the person and disproportionately impact women, indigenous and migrant communities, and other marginalized groups.

Third, Bill C-75 correctly proposes to attend to the discriminatory treatment and overrepresentation of indigenous and marginalized peoples in the criminal justice system. Sex workers and/or personal and labour relations reflect the diversity and inequality of social locations in Canadian society. For many, sex work prohibitions represent the criminalization of their poverty and perpetuate the over-policing and over-incarceration of indigenous and black peoples.

Sex work laws continue to be employed and enforced in a racist and colonial manner. Indigenous women are over-policed and under-protected. Asian migrant workers are targeted for investigation and deportation, and young black men who happen to be boyfriends or associates of sex work workers are labelled and prosecuted as pimps.

We recognize that most of the PCEPA laws have been absented from Bill C-75 and thus cannot be repealed or otherwise altered through committee amendments. We note, however, that clause 111 reclassifies the material benefit offence as a hybrid offence and that clause 112 amends the sentencing provisions of the advertising offence. Because these two offences are addressed within the bill, if it's a procedural possibility, we strongly urge amending the bill to repeal these Criminal Code provisions in their entirety. By criminalizing the act of materially benefiting from another party's sex work, section 286.2 restricts sex workers' capacity to engage in supportive work relationships that enhance our safety and improve our work conditions. In fact, this provision reproduces the harms of the prior “living on the avails” offence that was struck down by Bedford for violating our section 7 charter rights.

Any proposition that the listed exceptions to the offence satisfy Bedford are false. All but one simply codifies jurisprudence that predates the Supreme Court's decision. Then there are exceptions to the exceptions, which further repress sex workers' autonomy and security. For example, paragraph 286.2(5)(e) prohibits a liability exception in the context of a commercial enterprise. This captures all escort agencies, massage parlours and any other sex work business that creates safe, structured indoor work environments.

While we appreciate that the exceptions may allow a worker to hire, say, a bodyguard or a receptionist, we are mindful that only a tiny number of highly privileged workers have the resources to do so. Instead, many of us seek out parlours and escort agencies because they offer services such as screening, secure venues and advertising without the upfront costs and overhead of independent work.

● (1645)

It is often the most marginalized and under-resourced workers, such as indigenous, poor, or migrant workers, who benefit from working for someone else. However, these same laws that prevent sex workers from ensuring our safety and rights are upheld, because we work for businesses, do so, ironically, because they effectively preclude us from accessing basic labour, occupational health and safety, or human rights protection. To make it worse, material benefits arising from the context of a commercial enterprise is considered an aggregating factor upon sentencing.

As with the former “living on the avails” provision, the material benefit sanction imposes an evidentiary presumption on anyone who lives with or is in the habitual company of a sex worker. In addition to reinforcing the false assumption that people, particularly women, who sell or trade sex can't be legitimate objects of affection, the threat of presumed criminality disrupts the security and autonomy of our personal relationships.

I will make a final comment on the material benefits offence. Although when we discuss it we typically describe it as benefiting from another party's sex work, the provision itself does not specify a third party benefit. Under the letter of the law, sex workers are ourselves captured in the material benefits provision. We are only granted immunity from prosecution via section 286.5. This is a clear illustration that PCEPA does indeed continue to construct those of us who sell or trade sex as criminal.

We therefore recommend that clause 111 of Bill C-75 be amended to call for the repeal of the material benefits provision, as a first step towards a more comprehensive sex work law reform.

Next I'm going to turn to Criminal Code section 286.4, which prohibits advertising paid sexual services. As with the prohibitions on communicating and purchasing, this provision undermines the safety benefits that sex workers derive from openly communicating terms and conditions with their clients, and establishing boundaries in advance of in-person contact.

Prohibiting advertising creates significant barriers to working indoors, which the evidentiary record in Bedford demonstrates is much safer than working on the street. Since the enactment of the advertising provision, many websites and newspapers will no longer publicize sex worker services. Those that do have often discontinued their virtual lounges that allowed workers to share safety and other valuable information with each other.

With these points in mind, we recommend that clause 112 of the bill be amended to call for the repeal of the Criminal Code section 286.4.

Continuing with the Criminal Code provisions addressed in the bill, we want to reiterate our opposition to Bill C-38 and Bill C-452, which is now incorporated into clause 389 of Bill C-75.

Bill C-452 introduced an evidentiary presumption that living with or being in the habitual company of an alleged trafficking victim is proof that the accused exercised control, direction or influence over the alleged victim's movements for the purposes of exploitation. Given the ongoing conflation of third party involvement with sex work and trafficking, we are concerned that, as with the reverse onus provision for material benefit, this presumption will further alienate sex workers from police and social services, as we continue to actively avoid implicating our colleagues and loved ones as traffickers.

We do support the bill's removal of consecutive mandatory minimum sentences for trafficking offences. However, like others who have responded to Bill C-75, we are perplexed as to why mandatory minimums have not been repealed across the board.

Other Criminal Code offences that are insufficiently addressed in the bill are the bawdy house, indecent acts and vagrancy sections. These have traditionally been used to condemn individuals and communities based on their sexual activities, relationships and identities, including people who sell or trade sex. The Prime Minister's 2017 apology to LGBTQ2S people should be buttressed by the repeal of these sanctions.

The alliance doesn't have a current position on the bill's Criminal Code amendments regarding intimate partner violence. However, we will note that intimate partner violence impacts our communities, not simply because sex-working women, like other women, experience intimate partner violence, but also because such instances of violence are often mislabelled and prosecuted as materially benefiting, procuring and trafficking. If criminal sanctions related to intimate partner violence were used instead of third party sex worker trafficking laws, where appropriate, we might be able to express support. However, we're concerned that they would be used as add-ons.

Additionally, we have potential concerns about increased sentences and reverse onus bail provisions, because we know only too well the effect of heightened criminalization and its disproportionate impact on the most marginalized among us. However, we have no specific recommendations on these points.

Finally, on a general note, we are concerned that elements of Bill C-75 will impede access to justice and fair treatment for people in and associated with the sex trade who come in conflict with the law for any reason, and who are further marginalized by their social or structural locations.

● (1650)

Increasing the maximum sentence for summary convictions risks the continued over-incarceration of marginalized peoples, both through the increased maximum sentence itself and by restricting access to agent representations.

Permitting the written admission of routine police evidence risks undermining trial fairness by complicating defence access to cross-examinations that can expose cases of police error, impropriety or actual abuse, and which are especially vital to protect the rights of indigenous and black defendants.

Those are our thoughts and concerns. Thank you for taking the time to hear them.

The Chair: Thank you both so much for your testimony.

Committee members, as we know, the bells will start at about 5:15. I'll ask everybody to keep it to six minutes for your questions, and if we get them to six minutes, we should get through this round just as the bells are starting.

Mr. Cooper, please go ahead.

Mr. Michael Cooper: Thank you, Mr. Chair. Thank you to Ms. Rogin and Ms. Gillies.

Ms. Rogin, my question is to you. Bill C-75, in terms of the hybridization of offences, is premised upon the idea that less serious cases will be processed more quickly at the provincial court level, but as you noted, 99.6% of criminal cases in Canada, according to Statistics Canada, are heard before provincial courts. It's very difficult to see, as you point out, how that's going to reduce backlog and create greater efficiencies. It seems like a wholesale downloading of cases onto already overburdened provincial courts. From the standpoint of Jordan, as you know, there is a 30-month timeline for matters before superior courts between the laying of charges and the conclusion of a trial versus 18 months in provincial court before delay is deemed presumptively unreasonable.

Is there not the risk that rather than reducing delay that, in fact, you're going to add to the delay and see even more cases thrown out of court, not less?

Prof. Jillian Rogin: That is our position, yes. It's an overburdening coupled with a decrease in legal representation, and I don't think that those two things can be separated in many ways. You're talking about further matters that are going to be going to the provincial courts at the same time as people will have less access to being able to assert their rights.

Another aspect of hybridization that I'm not sure has been raised before is that this means, by virtue of section 34(1) of the Interpretation Act, all hybrid offences are deemed indictable until the Crown elects. That means that section 524 proceedings can be triggered upon a greater number of offenses—524 being the section that can cancel a person's bail—and that a greater number of cases will be a reverse onus in bail proceedings pursuant to section 515(6).

Therefore, there are corollary consequences to the hybridization of criminal offences, and, absolutely, it's very difficult to imagine further overburdening of the provincial courts in my view and in my experience both as duty counsel and in the legal clinic system.

● (1655)

Mr. Michael Cooper: Thank you for that.

I want to move on to the issue of section 802.1, and the fact that as a result of increasing the maximums for a whole host of summary conviction offenses from six months up, that this is going to preclude law students and paralegals from acting on behalf of criminal defendants. You had suggested an amendment, which is to amend section 802.1 to provide that law or articling students under the supervision of a lawyer could represent these criminal defendants, but what about paralegals? That was a question that I posed, and the Law Society of Ontario said it won't work because you're going to leave out paralegals.

What's your response to that?

Prof. Jillian Rogin: First, I want to thank you for the question, and I want to clarify our position. I only mentioned some of our recommendations today, but in our brief, as you may see, we're asking for further consultation with legal clinics and the clients who access legal clinics before any amendment is made with respect to 787(1). In the alternative, if 787(1) is going to go ahead, we are asking that allowance be made for agents—paralegals, students, law students, articling students—to appear.

Mr. Michael Cooper: What would that amendment look like?

Prof. Jillian Rogin: Despite subsections 800(2) and 802(2), a defendant may not appear or cross-examine or examine witnesses by agent if he or she is liable, upon summary conviction, to imprisonment of a term of no more than two years less a day.

Mr. Michael Cooper: They'd just increase it from six months to two years less a day.

Prof. Jillian Rogin: Yes.

Mr. Michael Cooper: You don't see any issues with that.

Prof. Jillian Rogin: Yes, there are issues with that.

The issues with that are vast, which is why we want consultation. My colleague mentioned summary conviction offenses and the two years less a day maximum penalty. He referenced them as minor criminal offences. Respectfully, with two years less a day there will no longer be any minor criminal offences.

We're asking for consultation because we want a national conversation across Canada among lawyers, law clinics, law students and the lawyers who supervise them about what's appropriate for student and agent representation. We're asking for section 802.1 as an alternative because it's the second best choice. Maybe we can try to have those conversations province by province. That's less ideal than having a national conversation about what law students should be appearing on and what they shouldn't. Right now, as the code currently exists, there are limits to what law students can appear on.

Mr. Michael Cooper: I asked the Law Society of Ontario yesterday. They didn't have numbers. Do you have any idea of the scope of the number of law students, articling students and paralegals in the province of Ontario who are currently acting on criminal matters?

Prof. Jillian Rogin: No, we don't have exact numbers. We do know there are seven law student clinics in Ontario that represent marginalized clients in criminal law matters. The number of students per clinic would vary, but it could be likely hundreds.

The Chair: Thank you very much.

Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Chair.

I'd like to talk more about the super summary offences. We've heard a number of panels speak of these and they seem to be generally considered a problem.

In particular, you're mainly concerned about paralegals and regulated agents and so forth. Do you see it as possible and reasonable to amend section 802.1 to accommodate those kinds of people to be able to represent people in these offences that have a higher maximum?

Prof. Jillian Rogin: I'm not sure I understand the question.

If clause 787(1) becomes law then there will be no super summary offences.

● (1700)

Mr. Ron McKinnon: Sorry. I meant, in terms of the offences that would become two years less a day and the fact that there would be no more six-month offences, is it possible to amend section 802.1, which I understand provides for regulated agents to represent clients in certain cases? Can that be modified to accommodate cases with minimums of two years less a day instead of six months?

Prof. Jillian Rogin: We are asking for this as the alternative, if clause 787(1) is going to be passed and the maximum penalty will be raised.

Mr. Ron McKinnon: What sort of amendment would you propose for that?

Prof. Jillian Rogin: We would ask that the same exception for law students that currently exists in section 802.1 be carved out for penalties of two years less a day.

Mr. Ron McKinnon: The previous panel suggested that this wouldn't be a good idea, that law students should not be representing people in that situation. Would you agree with that?

Prof. Jillian Rogin: ACCLE's position is that we need to have a national conversation about that. Legal clinics, law students and the reviewing lawyers need to be involved. Perhaps the courts need to be involved. Historically, conversations about what law students are able to do involve many parties. Unfortunately this hasn't happened. The legal clinics in Canada have not been part of any consultation with respect to what law students should be able to do. That's one of the many reasons we're asking for further charter review and further consultation before any changes are made to the current classification scheme in terms of maximum penalties and law students' ability to appear.

Mr. Ron McKinnon: That was my next question. Absent that consultation and conversation, do you suggest that all of the existing six-month offences remain as such and that there remain a distinction between those offences and the super summary offences?

Prof. Jillian Rogin: Yes, and we're particularly concerned, as many people have said, about the immigration consequences of any change to the maximum penalty beyond six months, and about the other issues I've already spoken to.

Mr. Ron McKinnon: Right.

Those are my questions.

The Chair: Thank you very much, Mr. McKinnon.

Mr. Rankin.

Mr. Murray Rankin: Thanks to both of you for coming.

I want to start, if I may, with you, Ms. Rogin. I'm interested in the number of non-represented people who are in the provincial courts. I don't know if I saw it in your brief, but as of a couple of years ago in my province of British Columbia, 21% of all criminal accused had no lawyer. They were unrepresented in provincial court.

Do you have any idea how many people currently are unrepresented? What impact would this section have on a person's ability to get representation if paralegals and articling students are not allowed?

Prof. Jillian Rogin: We don't have the numbers. We don't have data in terms of how many people are currently represented by students, paralegals or articling students, but in our brief, we do note that self-represented litigants are not a small group. In the 2015-16 Canadian statistics on adult criminal court processing times, it was reported that 24% of charges in the adult criminal provincial courts in Nova Scotia, New Brunswick, Quebec, Ontario, Saskatchewan and British Columbia were against an unrepresented person.

Mr. Murray Rankin: When you spoke just now—it's not in your brief as such—you decried the lack of data on the effect of removing this right of law students, paralegals and articling students to participate, and you used words like “crisis”. You said it will create a crisis and you don't know what the legislative purpose for eradicating law student representation would be. Those are your words.

Did it occur to you that this might have been entirely inadvertent, that this may have been an unintended consequence? Having lack of data may simply suggest that the government had no idea, had not thought through the consequences of this particular reform. Is that not a possible hypothesis?

Prof. Jillian Rogin: I think that's a distinct possibility and all the more reason to engage in further consultation before taking such a drastic step.

Mr. Murray Rankin: In your brief on page four, you say, “Curtailing law student representation will also result in further court delays and further burdens on the provincial courts. It is widely understood that unrepresented litigants cause court delays and that the legal system as a whole works more efficiently when people come to court with legal representation.”

In your clinical experience, is it often the judges who are the most anxious to have people represented? Is this because of the delays and sometimes the judge having to bend over backwards when people have no representation? Does this actually make it harder for the judicial system to work?

● (1705)

Prof. Jillian Rogin: It makes it very difficult. In my experience, it's actually the Crowns and the judges who are vying for people to come and assist, and I speak directly from my experience as duty counsel. I was often paged into a courtroom where a trial was going on to see if I could assist. Of course, it wouldn't have been appropriate for me to do so, but it happened repeatedly, so much that you could tell there was a craving for representation. It's very awkward for the judge and for the Crown to try to go through any proceedings, a trial, a bail hearing or otherwise, without someone representing an accused person's interests.

Mr. Murray Rankin: You had something else in your brief at page four that was even more disturbing, I think. You said that, "Research shows that self-represented litigants spend more court resources and time, face repeated barriers in understanding court procedures, make more mistakes"—and here's the punchline—"and as a 2002 study corroborated, sometimes plead guilty to minor offences just to get it over with."

Can you think of other measures in Bill C-75 that might incentivize pleading guilty to get it over with, measures that might disadvantage those without proper legal counsel?

Prof. Jillian Rogin: In my experience, whether they are in custody or out of custody, people plead guilty to deal with the stress of attending court, whether it's because of a denial of bail, of having to attend the remand court over and over again, or of having to miss work to come and attend, which certainly disadvantages all involved. There is a serious problem with incentivizing guilty pleas in our courtrooms across the country.

Mr. Murray Rankin: Given they would have what we used to call a criminal record and given the impact on employment, on immigration, on renting an apartment, all those things—

Prof. Jillian Rogin: Family law implications.

Mr. Murray Rankin: —family law, immigration—I think you've really addressed something that's very disturbing, and I thank you for doing so.

Those are my points.

The Chair: Thank you very much, Mr. Rankin.

Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you, Mr. Chair, and thanks very much to both of you for your testimony.

Ms. Gillies, how would the repeal of bawdy house laws positively affect the people you serve: sex workers and their loved ones?

Ms. Kara Gillies: I will start by saying that we don't have data on whether the revised bawdy house law specific to the practice of acts of indecency has been used specifically against sex workers for sex work activities. Certainly, the legal analysis we've received suggests that, yes indeed, the bawdy house law could continue to be used to target sex work activities, although if that were to happen we would refer back to the Bedford case, which determined that the bawdy house law, at least specific to prostitution, interfered with and violated our charter right to security of the person.

We are also aware there are people within our sex-working community who are gay men or men who have sex with men and who continue to be targeted under the bawdy house legislation.

Mr. Randy Boissonnault: For you, then, it's both a security of the person argument re Bedford and an “archaic piece of legislation” argument that comes from the LGBTQ2 community.

Ms. Kara Gillies: One hundred per cent.

Mr. Randy Boissonnault: Okay.

We heard yesterday from Mr. Rudin that the reverse onus provision doesn't target but disadvantages indigenous women who get caught up in a charge from a male counterpart who says, “She started it”. There's an original charge that then leads to a conviction and, the next time, an even longer sentence. In your world, does this affect non-indigenous people as well in terms of the reverse onus provision?

Ms. Kara Gillies: Again, I can't say that we have any hard statistics on that; however, anecdotally, yes.

I would also say that as a coalition of 28 organizations across the country whose focus is primarily on sex work-related matters, we haven't yet carved out the opportunity to robustly discuss intimate partner violence and the impact of the bill thereon.

That said, as a community of folks who are criminalized—and the people around us are highly criminalized—we are very suspicious of and very reluctant to get on board with reverse onus provisions. Certainly, with the old “living on the avails” provision, and now with the material benefits provision, we see that reverse onus undermines the relationships at play. There certainly are charter implications.

While we certainly acknowledge that intimate partner violence is a serious widespread concern, we're not at the point of having a position on whether or not reverse onus or harsher sentences would actually have a meaningful impact.

● (1710)

Mr. Randy Boissonnault: Your answer leads me to my next question. You've put your finger on it. It's a highly criminalized community, and there's a crossover between the LGBTQ2 community and the indigenous population who are employed in and making their decision to be in the sex work trade. Do the administration of justice provisions in Bill C-75 help speed up the wheels of justice, in your alliance's analysis?

Ms. Kara Gillies: We haven't done an analysis of that.

What I can say is that we're in favour of the general principle of restraint in regard to bail. For a concrete example, at this point in time, it's not uncommon for people who are charged with sex work offences to get bail conditions that restrict them from going into the areas where they were working and where they were charged, but sometimes that's where they live as well, or where they access health care and social services.

Beyond that, again, as a huge coalition across Canada, we haven't been able to get into the nitty-gritty of such a large bill.

Mr. Randy Boissonnault: Thank you very much.

Mr. Chair, I was very quiet during Mr. Cooper's testimony. I would appreciate it if we would have that kind of respect during questions of the witnesses. It's systematic and it's not appropriate.

Ms. Rogin, what do you think about administration of justice offences?

Prof. Jillian Rogin: That's a broad question—

Mr. Randy Boissonnault: In Bill C-75, do you like where we're going?

Prof. Jillian Rogin: I have a number of thoughts on administration of justice charges.

We commend Parliament's efforts to try to come up with a solution to what really can only be called a bail “crisis” in Canada. However, it's our position that there is a broadening of police discretion here that already exists without the option of a referral hearing.

My colleagues have written about—and I think are here making submissions about—the risk-averse culture that pervades the bail process. This allows a police officer to defer the decision to release or to lay a charge to somebody else, and that feeds into what the heart of the problem is. The police have always had the discretion to not lay a charge and they should use that discretion—and in many cases, they do.

The concern here is that very same concern we have with existing police discretion, which is, who benefits most from the use of that discretion and who is hurt by it the most? That fundamentally doesn't change with Bill C-75 and the use of the referral hearing.

Mr. Randy Boissonnault: Thank you.

Thank you, Mr. Chair.

The Chair: Thank you.

Ladies, we are very lucky, because we brought that in just one minute before the bells are supposed to ring. I want to thank both of you for sharing your testimony with our committee. You were very helpful in terms of speaking to the points raised. Thank you so much.

We'll recess this meeting until after the vote. I'll ask everyone to come back as quickly as possible after we vote. We have three more panels.

● (1710)

(Pause)

● (1820)

The Chair: We are reconvening this session of the Standing Committee on Justice and Human Rights. It is a great pleasure to welcome our two witnesses from Toronto, who are testifying by video conference. We're joined by Mr. Brent Kettles, who is counsel from the Crown law office-civil, Ministry of the Attorney General of Ontario. We also have Mr. Kent Roach, Prichard-Wilson chair in law and public policy at the University of Toronto.

Welcome.

Thank you so much for your patience in terms of that vote; it happens all the time. We really appreciate your staying around. Each of you has up to 10 minutes to speak and then we're going to ask you a round of questions.

Mr. Kettles, you're up first.

Mr. Brent Kettles (Counsel, Crown Law Office - Civil, Ministry of the Attorney General of Ontario, As an Individual): Thank you, Chair, and thank you for the opportunity to make a submission on Bill C-75.

I am Crown counsel at Ontario's Ministry of the Attorney General, but it's important that I make clear I'm appearing in my personal capacity, and that my views don't represent the Government of Ontario or Ontario's attorney general.

The focus of my submission is on section 271, which is the proposal to eliminate peremptory challenges from the Criminal Code. I'm supportive of the amendment. My view is basically summed up in three points. I will try not to make them very long.

First, peremptory challenges undermine both the representativeness and impartiality of Canadian criminal juries. Second, peremptory challenges undermine the public confidence in the administration of justice, and third, peremptory challenges can invite mischief associated with jury vetting in some cases.

My first point is that the requirements of having representative and impartial juries are crucial elements to ensure both the fair trial rights of an accused person as well as ensuring that the conscience of the community is represented in adjudicating on acceptable conduct. When I say representativeness, of course, I don't mean there has to be a statistically perfect cross-section, or that every possible group and demographic subgroup in society has to be represented on a jury.

However, juries are really only representative if they are randomly selected from a reasonably representative segment of the population. Similarly, impartiality is achieved both by excluding people who are not indifferent as to the outcome in a criminal case, but it's reinforced by what sometimes is referred to in the case law as the diffused impartiality that happens when you have a representative and diverse range of viewpoints on a criminal jury.

It's my view that peremptory challenges undermine both of these goals. They certainly don't further either one.

When we're looking at representativeness, when you have peremptory challenges, you're getting further and further away from the ideal of random selection, and instead of having random selection, what you actually do is introduce an element of selection bias, where you're replacing the random selection with assumptions about behaviour that are based primarily on stereotypical assumptions, and no real information about how perspective jurors might behave.

When you're looking at impartiality in the context of peremptory challenges, instead of excluding people on a good faith or rational basis that they are not impartial about the outcome, what ends up happening is that both Crown and defence counsel are invited to attempt to secure a strategic advantage in the litigation to which they are not really entitled.

No one is entitled to a favourable jury, only one that's impartial. It would be my view that if there is a realistic prospect, and a rational reason why a juror might be incapable of being impartial, then the remedy for that lies in having a challenge for cause that's established on evidence and ruled on by a trier of fact.

Moving to my second point, having peremptory challenges cannot help but lower the public confidence in the administration of justice when members of the public and perspective jurors watch perspective jurors excluded on the basis of no reason, on the basis of no evidence, and without any information.

When those exclusions are based basically on the gut feeling of who is likely to be sympathetic to one side or the other, then that doesn't give the public or perspective jurors a feeling that jury selection is happening in a way that is fair and impartial, and also represents the community. Of course, it can't help but create an assumption that the juror who has been challenged, again usually on the basis of no evidence and for no reasons given, is in some way incapable or incompetent to have been selected or to be impartial in the case.

● (1825)

My third and final point is simply that the existence of the challenge for cause mechanism invites a mischief in the form of jury vetting. Jury vetting is the process of finding out information about prospective jurors for the purpose of finding or divining their attitudes, beliefs and preferences with a view, potentially, to exercising a peremptory challenge to exclude them. The case law is full of cases where this has been done, both on permissible and more impermissible bases.

My overall point is that the peremptory challenge creates an incentive for both the Crown and for defence counsel to try to find out information about jurors' backgrounds. Many prospective jurors would be alarmed if they knew what Crown or defence counsel were trying to find, and it can, in some cases, be a violation of their privacy.

Just to sum it up, it's my view that the existence of the peremptory challenge mechanism invites abuse by creating a perverse incentive.

That's my submission. Thank you.

The Chair: Thank you very much. It's much appreciated.

Mr. Roach, the floor is yours.

Professor Kent Roach (Prichard and Wilson Chair in Law and Public Policy, University of Toronto, As an Individual): Thank you very much, Mr. Chair. Thank you to the committee.

I start from the proposition that in 1999, the Supreme Court told us there was a crisis in our justice system when 12% of prisoners were indigenous. The most recent statistics, which are reflected in my brief, suggest that 28% to 30% of custody admissions are indigenous people: 50% of youth and 42% of women. Not only is this overrepresentation, but the murder rate of indigenous people is six times that of other homicide victims. The most serious crimes, those crimes that are most likely to be tried by juries, disproportionately involve indigenous people as accused and victims.

I've been commenting on and writing a book on the Gerald Stanley case as well as the Peter Khill case. Juries are here to stay. They are a symbol of the community that we are, and they are a symbol of the community we want to be. In this vein, I agree with Mr. Kettles that we should abolish peremptory challenges, which were used to exclude five visibly indigenous jurors in Gerald Stanley's case, but we need to do more. We need to do much more.

To that end, I will propose five amendments for the committee to consider. The first is to amend section 629 of the Criminal Code, which is essentially unchanged since 1892, to allow the prosecutor or the Crown to challenge the composition of the panel of prospective jurors, not only on the grounds of partiality, fraud or wilful misconduct, but also, I would propose, on the grounds of significant under-representation of aboriginal people or other disadvantaged groups that are overrepresented in the criminal justice system.

You've heard from the Criminal Lawyers' Association. They also propose a somewhat similar amendment to section 629. Although we don't agree on peremptory challenges, we agree on this issue. This would essentially set a higher standard in the Criminal Code than the Supreme Court had in the 2015 case of Kokopenace. It's well within Parliament's prerogative to set higher standards than the minimum standards that the Supreme Court sets. I would suggest that the Stanley case especially shows us the significant under-representation of indigenous people on our Canadian juries when they are so overrepresented among both accused and victims.

The language there picks up on other parts of Bill C-75, which makes specific reference to indigenous people and other disadvantaged groups that are overrepresented in the criminal justice system. This is not about a perfectly proportionate jury or jury panel that represents all, every personal characteristic, but it's about the people most affected by the criminal justice system.

Second, I would amend the disqualification of jurors, which in Bill C-75 would move from only forever permanently disqualifying those sentenced to two years' imprisonment. Right now it's one year. To me, I think that, for an otherwise qualified juror, it should not matter whether they had been sentenced to any time of imprisonment. Michael Johnston has also submitted a brief to you, and I'm in agreement with it in that respect.

This is in responding to concerns that some defence lawyers have raised about the abolition of peremptory challenges, that they will make our juries less diverse. I take those concerns seriously. I think one way to address that is to allow permanent residents of Canada to serve as jurors. You don't have to be a Canadian citizen to be a lawyer. I think a permanent resident of Canada shows enough attachment. Our jury system is designed so that judges educate jurors about the law.

● (1830)

As Justice Iacobucci discussed, I would also amend section 638 to allow otherwise qualified volunteer jurors from indigenous communities.

Moving on, the third amendment would be to give judges some more guidance and signals from Parliament about the need to screen jurors for racist bias. I propose, in my amendment number three, to amend section 638(b) in a way that is frequently done in the Criminal Code to encourage judges to pay special regard to the dangers of discriminatory stereotypes that may apply to aboriginal accused, witnesses and complainants, and those from other groups that are vulnerable to discrimination and to the difficulties of determining whether a prospective juror would act on discriminatory stereotypes.

I was counsel in the Williams case in 1998 that allowed the one blunt question. I'm a lot older now. Williams was decided in 1998. We know a lot more about racist bias, subconscious bias, implicit bias, but judges have been extremely conservative because of their concerns about efficiency and the privacy of jurors. I think Parliament needs to encourage the judiciary to allow more searching challenges for cause.

The fourth amendment I would propose is to amend section 633 where Bill C-75 will add to the judicial power to stand aside jurors, the ability to stand aside a juror to maintain confidence in the administration of justice. I agree with the Criminal Lawyers' Association that this is too vague as it is currently written, and I propose language with special regard to the fair representation of aboriginal people and other groups overrepresented in the justice system. Again, this would allow judges, as opposed to defence lawyers or Crowns using peremptory challenges, to try to ensure the representativeness of a jury in a more accountable way so we don't have a repeat of something like the Gerald Stanley case where, regardless of what you think of the verdict, the fact that five visibly indigenous people were excluded undermined public confidence for a significant number of the Canadian public.

Then finally I'm very happy that the government has recognized the growing problem of false guilty plea wrongful convictions, and is amending section 606, which applies before a guilty plea is taken, to require the judge to find a factual basis. I think this is a very warranted amendment to the Criminal Code. I praise the government for doing that, but I also think that subsection 606(1.2), which essentially says this is all optional for judges, must be repealed to make meaningful the factual basis requirement as well as the voluntary and knowing requirements for guilty pleas.

Thank you very much for your time and attention, and I look forward to your questions.

● (1835)

The Chair: Thank you very much for your presentation.

We're going to go to questions with Mr. Cooper.

Mr. Michael Cooper: Thank you, Mr. Chair.

I'll be splitting my time with Mr. MacKenzie.

Mr. Blaney, do you want to ask questions as well?

[*Translation*]

Hon. Steven Blaney (Bellechasse—Les Etchemins—Lévis, CPC): Yes.

[*English*]

Mr. Michael Cooper: In that case, I'll yield to Mr. MacKenzie.

Mr. Dave MacKenzie: Thank you.

Mr. Roach, you've done a great deal of study on the whole issue, not only on this particular case, but we're looking at the process of the Jordan decision as one of the major things. What do you see in this legislation that by eliminating preliminary hearings will speed up the justice system, or do you believe it will?

Prof. Kent Roach: Frankly, Mr. MacKenzie, I haven't been able to devote adequate time to study that issue, and that's why I have focused on the jury and the guilty plea issue. I do think it's complex because the Jordan guidelines make allowances for preliminary hearings, but I don't feel I'm in a position to opine strongly on that. I'm sorry if I can't be of any more assistance.

Mr. Dave MacKenzie: That's fair.

Aside from the table here, I did speak to one of the other witnesses. I'm curious to know how we dealt with civil juries. I understand the difference here, but we don't seem to have the complaints about civil juries that we have about criminal ones.

Is there something we can learn from that?

Prof. Kent Roach: Cases such as Stanley or Khill are very emotive issues, so I think that explains it. But we can learn...because in Ontario, following Justice Iacobucci's report, we have used volunteers from indigenous communities to sit on coroners' juries. In Saskatchewan, there is an ability to structure a coroner's jury so that it represents relevant groups. It seems to me we should think about using that in the criminal justice system.

I'm not saying we should put people who are partial on the jury. Jury selection, as you know, is a very complex system. But I do think we can learn something from experiments from coroners' juries.

● (1840)

Mr. Dave MacKenzie: Mr. Kettles, have you thought about the process of eliminating preliminary hearings?

Mr. Brent Kettles: I haven't. It's not my normal area of practice, and I agree with Mr. Roach that it's a complex one where you're, in one sense, sort of trading off the existence of the preliminary hearing against any streamlining effect it might have. I'm not aware of any research or literature that would definitively suggest one way or the other that it would save time.

Mr. Dave MacKenzie: Thank you.

Mr. Blaney.

Hon. Steven Blaney: How long do I have?

[*Translation*]

The Chair: You have the floor for three minutes.

Hon. Steven Blaney: Very well.

Mr. Roach, Mr. Kettles,

[*English*]

I feel privileged to be here tonight with experts who have a good reputation and whose intentions are very noble.

Mr. Roach, I was listening to your opening remarks. In my understanding, your amendment seems to be oriented toward your concern that there is overrepresentation of natives in prison. Am I correct?

Prof. Kent Roach: Yes. There's overrepresentation in prison and also among victims.

Hon. Steven Blaney: Do you feel the justice system is not properly serving those who are accused at this time? Is that why you are bringing those recommendations in that bill?

Prof. Kent Roach: I'm writing a book about the Stanley case, where the issue is not simply the indigenous accused but the indigenous victim. When I talk about overrepresentation, I talk about overrepresentation both in prison and among victims. The challenge for cause amendments that I have proposed deal with trying to eliminate racist stereotypes, not only with respect to the accused but with respect to witnesses and the complainant.

Hon. Steven Blaney: In your opening remarks, I didn't hear you mention the word “victims”. Now you refer to the accused and victims.

Through your amendment, are you suggesting that the current system we have with juries is biased and that we need to correct this?

Prof. Kent Roach: Certainly in the situation where there were five otherwise qualified indigenous people who could have served in the Stanley case, in a district where 30% of the adult population is indigenous. We'll never know what went on in the jury room. It's illegal, as you know, Mr. Blaney, to inquire about that. But I don't think there was an appearance of justice in the Stanley case, given the way the jury was selected.

Hon. Steven Blaney: Okay. You're suggesting that jurors are biased and there's a need for an amendment to correct this.

In your comments—and correct me if I'm wrong—you suggested that there be an overrepresentation of natives in the jury for native cases. Is that correct?

Prof. Kent Roach: Yes. I am suggesting a targeted form of affirmative action. As you know, this is consistent with the Canadian approach to equality. It's even part of the Constitution in subsection 15(2), which contemplates affirmative action. I'm saying that with respect to indigenous people or other people who are over-represented in the criminal justice system, we need to make sure those groups are represented among the jury pool.

Hon. Steven Blaney: So if I take, for example, a black person who is convicted of a crime, would you suggest that there be an overrepresentation of black people in the jury so that you would feel that their deliberations would be more accurate? Is that what you're suggesting?

Prof. Kent Roach: Yes, because we're all influenced by our life experience in drawing inferences from fact. In some ways, the beauty of the jury system is that we all have to listen to each other's perspective before the twelve reach a unanimous verdict. I actually think that we will benefit, and I don't think we would have seen the sort of protest that we saw in Mr. Stanley's case if the jury had been more reflective of the community.

Hon. Steven Blaney: Mr. Roach, I have an Irish background. Suppose I were convicted of a crime. Should I be with a jury with an overrepresentation of people with an Irish background?

Prof. Kent Roach: No, Mr. Blaney. That's a—

The Chair: Sorry, Mr. Roach, I'm interrupting you for one second, just to let Mr. Blaney know that this is his last question. He's trying to deal with you in his second language. He keeps saying "convicted"; he means "accused".

● (1845)

Hon. Steven Blaney: Yes. Thank you, Mr. Housefather.

Prof. Kent Roach: Mr. Blaney, to answer your question, Irish people would not fall within my definition because we're not looking for the slippery slope to a perfectly proportionate jury. I'm just saying that, regarding the Supreme Court, everyone recognizes that we have an issue and a problem with regard to indigenous people, so let's deal with that, and let's not fall off the slippery slope.

Hon. Steven Blaney: Thank you.

The Chair: Thank you very much.

Mr. Fraser, go ahead.

Mr. Colin Fraser: Thank you very much, Mr. Chair.

Thank you, gentlemen, for joining us today.

Mr. Kettles, I'd like to start with you. I appreciate the comments you made. You talk about being in favour of eliminating the peremptory challenges. We've heard from some witnesses that peremptory challenges allow the opportunity to actually increase diversity in juries, and in fact they're used for that purpose.

Can you comment on your experience and whether you believe that to be something that actually happens, or is this something that doesn't happen very frequently and therefore getting rid of peremptory challenges would actually be the better way to go?

Mr. Brent Kettles: Sure. The case law that I'm familiar with certainly suggests that peremptory challenges could be used in a given case to increase the diversity of a jury. The way that would work is that if you had an initial array of, say, 30 white male jurors, in theory someone could use some of their peremptory challenges to excuse those jurors in the hope that a more diverse group would come forward.

I think the balance of authority in the vast majority of cases demonstrates that it's actually been used in ways that reduce diversity and representativeness. The case of Colten Boushie and Gerald Stanley is certainly the most recent and, in some ways, the most visibly disappointing and shocking example, but it's certainly not the first time the peremptory challenge power has been used in ways that exclude entire groups or entire segments of Canadian society. It would be my overall view that in some ways, the mischief associated with the peremptory challenges outweighs any possible benefit.

I don't deny that there might be some anecdotal evidence that there are some cases in which it can be used to bolster diversity, but I think those don't outweigh the situations where it has been proven to undermine it.

Mr. Colin Fraser: Thank you.

Mr. Roach, I want to touch on an interesting point you raised in your brief and touched on again, and that's with respect to an amendment allowing permanent residents to serve on juries.

I'm from Nova Scotia, and I'm familiar with how they select juries there. Obviously, the administration of justice is up to the provinces, and in selecting their jury pools they take data from the health registration list. I don't know how it works in other provinces, but I believe that some of them may use the voters list, in which case you have to be a Canadian citizen in order to be on the list.

Do you see any problems with making the selection of jury pools available to permanent residents?

Prof. Kent Roach: That's a legitimate point. I think one of the things the committee should consider is making some of these amendments proclaimed in force in a province only when the province has had time to prepare for it. Our jury selection is a very complex system, so a number of the amendments that I make would have implications for the province. I gather that's why the government did not take a more robust approach to reforming the jury.

However, if we wait for each province and territory to get on board, it's just never going to happen. We need federal leadership. One way it can be accommodated is to say that if you use a voters list, as in Alberta and perhaps in Nova Scotia, obviously that's not going to work for a permanent resident, so you would give a kind of transition period, a couple of years for the province to adopt a better, more inclusive jurors list.

Mr. Colin Fraser: Okay.

Do I have a little more time?

The Chair: You have one more minute.

Mr. Colin Fraser: Can I just ask you to expand on your proposed amendment five?

> Repeal Section 606(1.2) in order to bolster the protection by adding the new requirements that a failure to determine whether the facts support the charge before accepting a guilty plea could affect the validity of the plea.

Could you explain that in a little more detail so I can understand it?

● (1850)

Prof. Kent Roach: Sure.

Guilty pleas are obviously important to the efficient running of the criminal justice system. I think it's out of an abundance of caution that Parliament has put in these requirements, but a judge not paying attention to the requirements does not affect the validity of the plea.

We've seen a number of cases, the Charles Smith wrongful conviction cases and others, for which courts have had to undo guilty pleas. It just seems to me a little inconsistent to say, on the one hand, that we should make sure there is a factual basis for a guilty plea, but on the other hand, that if you forget to do it, it doesn't affect the validity of the plea.

In reality, this is going to come up only in cases where the accused challenge the plea. In those cases, I think we need to be cognizant of wrongful convictions.

There was recently a case in Manitoba, Catcheway 2018, in which an indigenous accused with fetal alcohol spectrum disorder pled guilty to a break and enter, and then a couple of months later it was discovered that he was already in jail in a different part of Manitoba. That's an embarrassment. It's an embarrassment to the justice system. I think we want judges to take the time to ensure that there is a factual basis before someone pleads guilty.

Mr. Colin Fraser: Do you mean plea comprehension hearings, then, to ensure they understand exactly what's happening? That happens all the time, now. This would go beyond that, I assume.

Prof. Kent Roach: Yes.

Bill C-75, as it is, is going to add one more step to it. As I said, I'm very supportive of that, but you like to tinker and make things even better. I think that this one repeal would emphasize that we have to be very careful with plea comprehension to make sure it's voluntary and knowing, and also that there's a factual basis.

Mr. Colin Fraser: Thank you very much, sir.

The Chair: Thank you.

Mr. Rankin, go ahead.

Mr. Murray Rankin: Thanks very much to both of you gentlemen for appearing.

I'd like to drill down a bit into the brief that Professor Roach provided.

In connection with your proposed amendment number two, you talk about something I'm not, frankly, familiar with—the concept of volunteer jurors from indigenous communities. It says it's been used in Ontario and in New York and was recommended by Justice Iacobucci.

I wonder if you could explain a bit more how that would work.

Prof. Kent Roach: Sure. Just to be clear, Mr. Rankin, they have been used only in coroners' juries. They were used in the inquest into the deaths of students in Thunder Bay.

As Justice Iacobucci documented in his 2013 report, many indigenous people he spoke to were reluctant to be jurors. This was for a variety of reasons, including bad experiences in the criminal justice system, being excluded on the basis of peremptory challenges, and not feeling comfortable in an adversarial system. He said we should allow people who want to be on the jury and who are otherwise qualified. This is a form of affirmative action that departs from random selection. I think that could work in the criminal law, as long as that person could be screened on issues of impartiality if there was a realistic possibility that they were partial.

It really is a recognition that indigenous communities face a lot of challenges. There may be some people from the community who are willing to do this civic duty. That should be encouraged.

I think about the five visibly indigenous persons who came to Battleford. As you may know, Mr. Rankin, they summoned 750 jurors, and only 179 showed up. I think of those five people who were basically told to go home because of the way they looked. These were people who were otherwise qualified and were prepared to do their civic duty. I have to say that makes me ashamed.

● (1855)

Mr. Murray Rankin: Right.

I'd like to talk about another thing I don't know much about, which is the notion of stand-asides, which accompanies your proposed amendment number four. You have recommended that we add a section allowing judges to use stand-asides to maintain confidence in the administration of justice. They already have the ability to do that. You're simply suggesting that if we added the phrase, making sure we have fair representation of aboriginal people, that would give a further clue to the courts that this is what that section could already be used to address. So it's an abundance of caution, a clarification, an elaboration that you're talking about.

Prof. Kent Roach: Exactly. Mr. Rankin, I spent a lot of time this summer looking at all of the jurisprudence from the courts of appeal and the Supreme Court on jury selection. Frankly, judges are somewhat conservative on these issues. My worry is that, as the amendment is now written—which, as you noted, simply adds "maintain confidence in the administration of justice"—it doesn't guide the exercise of judicial discretion. Different judges will exercise the discretion differently.

Just as we saw with the sentencing provisions, and as we see in other parts of Bill C-75 relating to bail, it behooves Parliament to give judges a signal that we are concerned about the over-representation of indigenous and other groups in our criminal justice system.

Mr. Murray Rankin: In 1991, Senator Sinclair, then Justice Murray Sinclair, and Mr. Hamilton did a report on aboriginal justice in the Province of Manitoba. One of their recommendations, interestingly, was that the Criminal Code be amended so that the only challenges that you could make to prospective jurors be challenges for cause, and that both stand-asides and peremptory challenges be eliminated. I wonder what your take on the stand-aside part of that would be.

Prof. Kent Roach: Yes. In 1991 the Manitoba aboriginal justice inquiry wasn't talking about judicial stand-asides, but rather Crown stand-asides. At that time, I think the prosecutor had 48 stand-asides.

Mr. Murray Rankin: Oh, I see.

Prof. Kent Roach: One thing the Manitoba aboriginal justice inquiry recommended, in light of the Helen Betty Osborne case, where six visibly indigenous people were excluded by the defence, much as Mr. Kettles has already mentioned, was that we should get rid of peremptory challenges.

The other thing Justice Sinclair and Justice Hamilton recommended was that the judge determine issues of impartiality of prospective jurors. That's also what Bill C-75 does. The Criminal Lawyers' Association has a problem with this; I don't.

This is belated law reform. Certainly, people argue that this was a quick reaction to the Stanley case. I think that's unfair. The government is drawing on a 1991 report, both with respect to peremptory challenges and with respect to allowing judges, as opposed to the last two jurors or two random people taken from the jury pool, to decide whether a juror is impartial if he or she is asked questions on a challenge for cause.

Mr. Murray Rankin: Section 633 already contemplates this, but you're proposing we add the phrase to give greater clarity to it. Could that stand-aside provision have been effectively used in the Stanley case to avoid the embarrassment that occurred?

Prof. Kent Roach: We don't know how many indigenous people were left among the pool of prospective jurors, but it might have been used.

The other thing is that the Criminal Lawyers' Association and other groups propose that instead of getting away from peremptory challenges we regulate their discriminatory use. The problem is that the Americans have tried that for over 20 years without an awful lot of success. It has also been tried in a very few cases in Canada. I mention a couple in my brief, including the Lines case.

I just don't think that regulation has been effective all these 20 years, so I think the best thing is just to get rid of peremptory challenges.

● (1900)

Mr. Murray Rankin: Thank you.

The Chair: Thank you very much.

Mr. Ehsassi and Mr. Virani are going to share the next six minutes.

Mr. Ehsassi, go ahead.

Mr. Ali Ehsassi (Willowdale, Lib.): Thank you, Mr. Chair. As you indicated, I will be sharing my time with Mr. Virani.

Professor Roach, thank you for your testimony and for the very detailed brief you sent us.

Do you believe that Bill C-75 is a significant step in the right direction?

Prof. Kent Roach: Yes, I think the abolition of peremptory challenges could prevent a repeat of the Stanley case, especially in a jurisdiction like Saskatchewan or Alberta.

Mr. Ali Ehsassi: That's excellent.

You talk about abolishing categorical and unjustified restrictions. In particular, you talk about not excluding those with criminal records.

Just out of curiosity, could you tell us if any other jurisdiction has introduced such a change?

Prof. Kent Roach: That's a good question. I don't know.

Mr. Ali Ehsassi: The reason I ask is that when it came to voluntary jurors, you were good enough to tell us that New York and Ontario have been doing this.

Prof. Kent Roach: That's research I should have done, but, partly, it's also that we allow prisoners to vote. So I don't see why otherwise qualified jurors, just because they have been sentenced to three or four years, or whatever, shouldn't be allowed to serve on a jury, as long as they're not in prison. Certainly, a lifetime ban almost smacks of felon disenfranchisement, south of the border, which seems a bit unforgiving, in my respectful view.

Mr. Ali Ehsassi: Thank you. I understand.

The other proposal you had was to extend the right to sit on juries to permanent residents. Again, do we know of any jurisdiction in the world that allows that?

Prof. Kent Roach: Again, I'm not sure about that.

Mr. Ali Ehsassi: You believe that peremptory challenges are significant and it's imperative that we abolish them because any other changes that are brought could very much be defeated in the absence of getting rid of peremptory challenges. Is that correct?

Prof. Kent Roach: Yes, and that was also Justice Iacobucci's conclusion in his 2013 report.

Mr. Ali Ehsassi: Absolutely. Thank you for that.

I also have a question regarding the new public confidence ground for judges standing aside prospective jurors, which is section 633. You are saying, currently, as the change is proposed, that we would see judges having too much discretion, and that it should be more explicit.

Could you elaborate on that particular recommendation?

Prof. Kent Roach: Sure. If you look at some of the jurisprudence, such as Justice Moldaver's majority opinion in Kokopenace, it's pretty clear that Justice Moldaver thinks that random selection is the most important principle, whereas Justice Cromwell, in the dissent, with Chief Justice McLachlin, thinks that the significant under-representation of indigenous people on juries presents a really pressing problem. So instead of depending on whether I get a Justice Moldaver disciple or a Justice Cromwell disciple, I think Parliament should be clear about why it is adding this ground, and it shouldn't simply leave it to judicial discretion.

Confidence in the administration of justice is in the eyes of the beholder, and if this is about preventing another Gerald Stanley case, I think Parliament should be clear about that.

Mr. Ali Ehsassi: Thank you, Professor Roach.

Mr. Arif Virani (Parkdale—High Park, Lib.): Thank you for being here, Professor Roach and Mr. Kettles. Welcome.

I feel that both aspects of my legal career are represented on this panel: my life at MAG and my life at U of T.

With respect to what Mr. Blaney was questioning you about, I'll put it to you simply. Do we have a problem with the over-representation of Irish men in the criminal justice system or in corrections?

● (1905)

Prof. Kent Roach: No.

Mr. Arif Virani: Thank you.

Would you say that your comments and concerns about the overrepresentation of indigenous persons equally apply to the experience of black Canadians and South Asian Canadians?

Prof. Kent Roach: I think that's true.

Mr. Arif Virani: Okay.

I'm not sure whether you followed it, Professor Roach, but yesterday we had Jonathan Rudin here from Aboriginal Legal Services, and he talked about something that was intellectually curious to me. It was about the efforts we're making to address intimate partner violence and the reverse onus provisions on bail. He explained that they would actually have an unintended consequence with respect to indigenous women. He talked about the fact that mandatory charging provisions lead to convictions that we might not have foreseen, and that indigenous women who are already overrepresented could be hard done by these amendments.

Do you share that view, and if so, could you tease out your analysis?

Prof. Kent Roach: Certainly mandatory charge policies may be well intentioned, but they can also have disproportionate effects, and we know that the overrepresentation of indigenous women in prisons is even more extreme than the overrepresentation of indigenous men.

I would be concerned about anything that could potentially add to that issue. You have to remember that, at the bail stage, a lot of this really depends upon police charging practices. There's some evidence that police sometimes overcharge or regularly charge without perhaps evaluating all the equities.

The Chair: Thank you so much, Mr. Kettles and Mr. Roach, for your testimony.

Habitually, everybody would come up and shake your hand, but since you're not here, just know that we've all shaken your hand and we really appreciate the insight you've given the committee. Thank you.

I'd like to ask the people from our next panel, Mr. Friedman and Ms. MacDonnell, to please come forward so that we can move to the next panel as quickly as possible.

Thank you so much.

We'll take a brief, one-minute recess, so people can grab a drink or something.

● (1905)

(Pause)

● (1910)

The Chair: We are now resuming with our fourth panel of the day.

I want to thank you both for accepting the fact that we're running a little late. It's much appreciated.

We're joined by Mr. Solomon Friedman, who is a criminal defence lawyer here in Ottawa. Welcome, Mr. Friedman.

Mr. Solomon Friedman (Criminal Defence Lawyer, As an Individual): Thank you.

The Chair: Ms. Vanessa MacDonnell is an associate professor in the common law section of the faculty of law at the University of Ottawa.

Welcome.

Prof. Vanessa MacDonnell (Associate Professor, Faculty of Law - Common Law Section, University of Ottawa, As an Individual): Thank you.

The Chair: Mr. Friedman, you're up first.

Mr. Solomon Friedman: Thank you.

Mr. Chair, Vice-Chair and honourable members, thank you for inviting me to testify on the amendments to the jury selection provisions contained within Bill C-75.

I'll say just a few words about myself so you know where I come from. I'm a criminal defence lawyer in Ottawa. I've had the privilege of picking juries across the province, including in first-degree murder trials. I've picked juries. I've exercised peremptory challenges, and I've exercised the challenge for cause provisions. I also lecture part-time in the law of evidence and criminal trial advocacy at the University of Ottawa. It's a pleasure to be here tonight.

I want to begin with the following general, broad observation.

We all know that Canadians expect laws to be passed that are legislated on the basis of sound policy. That policy will be formulated upon the consideration of empirical research and verifiable evidence. This is particularly important in the criminal law context, where amendments to the code and related legislation have profound impacts on the rights and liberties of accused persons. But most importantly, when it comes to process and procedure, unwise amendments, of course, risk eroding the protections that have been put in place to avoid wrongful convictions or other miscarriages of justice.

With that in mind, I look at the peremptory challenge and the proposal by the government to abolish it in Bill C-75.

I go back to February 4, 2018. In the aftermath of the not guilty verdict in the Gerald Stanley case in Saskatchewan, the justice minister issued a statement to the media. She stated, among other things, that she is concerned with the under-representation of aboriginal persons on juries. As you'll hear, of course, I share the minister's concerns. But then she turned to the topic of peremptory challenges. She stated that changes to the use of peremptory challenges would need to be "carefully studied and considered". What are the results of that careful study and consideration? How careful and considered could that study have been, when two months later Bill C-75 was tabled, which proposes the wholesale abolishment of the peremptory challenge, most importantly without any meaningful substitute?

I note that the topic of juries, much less peremptory challenges, was not mentioned at all in the Justice Minister's criminal justice system review, conducted, pursuant to her mandate letter, between May 2016 and May 2017. Consider that among the dozens of suggestions for improvements to the justice system, there was not a word about the peremptory challenge.

The fact of the matter is that there is no empirical evidence whatsoever to suggest that the peremptory challenges used systemically exclude minorities or indigenous persons. The reality is this: There actually has been no objective research conducted by this government, or any other, on the use of peremptory challenges in the criminal justice system. There is, however, clear and convincing evidence that our criminal juries in general fail to represent the populations they serve.

Earlier this year, the Honourable Justice Giovanna Toscano Roccamo, a judge of the Ontario Superior Court of Justice, delivered her report to the Canadian Judicial Council on jury selection in Ottawa. It was about a jurisdiction that I'm very familiar with, right here. Her report was based on the statistical analysis of jury pools in Ottawa, and it compared them with the demographic makeup of the census tracks they were drawn from. In Ottawa, an individual living in Orleans Queenswood, a census track with a median income of $56,000, where 92% of the residents are homeowners and only 13% are visible minorities, is 10 times more likely to be chosen for a jury panel than is a person living in Ledbury—Heron Gate, where the median income is $24,000, fewer than 7% of people own their homes, and over 69% are visible minorities.

Her findings about aboriginal under-representation were even more stark. In her study of Hastings County, which includes both Belleville and the Tyendinaga Mohawk Reserve, she found that “not a single juror among prospective jurors on any panel list was drawn from the First Nations reserve.”

This is directly related to the way juries are chosen in Ontario and elsewhere in Canada. Bill C-75 does absolutely nothing to remedy that. Instead, this bill would abolish one of the few tools that counsel can actually use to improve the representativeness of the criminal jury.

I'm aware that the committee has heard some testimony. I heard it in the panel prior. I am more than happy to discuss my own experience.

You've heard anecdotal evidence about criminal counsel using peremptory challenges to exclude indigenous or racialized jurors in criminal trials. I'm here to tell you that the opposite is true.

● (1915)

Peremptory challenges are regularly used by counsel to improve the prospects of a more diverse jury. I have regularly used them this way, as have many of my colleagues.

Given the overrepresentation of aboriginal persons and racialized minorities as accused in our criminal justice system, at present the peremptory challenge is often the only tool counsel can use in order to ensure that the jury, even in some small way, is representative of the accused. Remember that in Canada we have struck a particular balance when it comes to jury selection. Unlike many other jurisdictions, we do not allow our jurors to be questioned extensively about their backgrounds or potential biases. Instead, a combination of the peremptory challenge and a very regimented challenge for cause process strikes this balance between juror privacy and the need to determine the impartiality of the triers of fact in a criminal proceeding.

Removing the peremptory challenge without any suitable substitute upsets this balance. To do so without any objective data as to how peremptory challenges are presently being used—or misused, as some would allege—flies in the face of the evidence-based decision-making we've heard so much about.

That's not to say that our system is perfect or immune to review or improvement. In my respectful view, there are a number of simple measures this committee should consider with respect to jury selection.

Number one, as recommended by the Law Reform Commission report on the jury in 1980, all potential jurors on the panel should be given a detailed, standardized questionnaire in order to provide the judge and counsel with substantive information upon which to justify the exercising of challenges or stand-asides.

Number two, this questionnaire could also be retained and anonymized in order to serve as the basis for academic research about the makeup and biases of our jury pools. Moreover, basic statistical research should be conducted about how peremptory challenges are being exercised. In other words, we need to answer the simple question: Are peremptory challenges being misused? The last time this matter was studied by the federal government was in 1980. Policy decisions about the trial process are too important to base on anecdote and innuendo. Real research and hard data should be the basis of criminal legislation.

Number three, in my respectful view—and I will correct Professor Roach—recommendation 15 of the Iacobucci inquiry does not call for the abolishment of the peremptory challenge. Justice Iacobucci calls for imposing a "modified Batson challenge", an American challenge modified for our system that requires individuals who appear to be exercising the peremptory challenge on a discriminatory basis to explain to the judge what their non-discriminatory basis for using it is. That was Justice Iacobucci 's recommendation.

Number four, section 629 of the Criminal Code should be amended to allow either party to challenge the jury panel on the ground of unrepresentativeness, as found by successive studies and judicial inquiries. This is in line with what was proposed by the Criminal Lawyers' Association and by Professor Roach.

I close with this thought. Peremptory challenges have existed in our common law for nearly a thousand years. They have been a constant in the Canadian jury selection process since the very first Canadian Criminal Code. They're part of this careful balance that's aimed at preserving the fairness and integrity of the jury trial, which is a right guaranteed to all accused persons charged with serious offences.

Jury selection can no doubt be improved. Bias and discrimination can be removed from the process. Juries can be made more representative, but nothing in Bill C-75 as presently drafted would accomplish any of that. Judges, lawyers, jurors, and all justice system participants deserve better.

Thank you very much for your time and your kind attention.

The Chair: Thank you very much for the presentation.

Ms. MacDonnell, you're up.

Prof. Vanessa MacDonnell: Thank you for having me here tonight.

As the chair said, I am a law professor at the University of Ottawa. I have taught criminal law, constitutional law and the law of evidence since 2010. I also practise criminal defence part-time. I've written extensively about the jury selection process. I've appeared before this committee, most recently on the question of mental health and other supports for jurors.

I'll begin by saying that I support the government's proposal to abolish peremptory challenges. I think it's important here to provide a bit of context, partly in response to Mr. Friedman's opening comments, to situate this legislation in the broader context of law reform around juries.

The important point to keep in mind here is that it's absolutely true that these proposed changes, the proposed abolition of peremptory challenges, did come about as a result of the acquittal of Gerald Stanley in a murder case in Saskatchewan. As you all no doubt know, Stanley was charged after he shot Colten Boushie, an indigenous man, on his property. There were no indigenous people on the jury that acquitted Stanley, and there was some suggestion that the defence may have exercised its peremptory challenges to exclude indigenous people.

It's undoubtedly true that this was the impetus for these amendments, but as Professor Roach said earlier, for decades there have been government reports recommending that these kinds of changes occur. I'll also say that there has been a sustained concern in the academic literature about peremptory challenges. It's important to distinguish between the impetus for the law reform and its overall wisdom. That case may have gotten the issue on the political agenda, but this is a long-standing concern and one that I'm very happy to see the government addressing.

As you no doubt know, peremptory challenges allow the Crown and defence counsel to exclude jurors without providing any reason for doing so. The reality is that when counsel exercise their peremptory challenges, they typically know very little about the potential jurors they're challenging. They know name, address, and occupation, and they know whatever they can glean about a potential juror's gender and race by looking at them. Because they know so little, inevitably the decisions counsel make about whether to challenge a potential juror are based on stereotypes, whatever conclusions they draw, based on where someone lives or what they look like, about whether they're likely to be partial or to favour the Crown or the defence. My concern about this type of approach, and about a system that allows that approach, is, as others have pointed out, that this can undermine the perceived legitimacy of our justice system, of the criminal process, and that it creates the potential for these challenges to be misused and to be based on stereotypes, racial and gender stereotypes in particular, about the way potential jurors are likely to conduct themselves or engage in decision-making.

My first submission to the committee would be that the abolition of peremptory challenges is justified by the concern for the legitimacy of our system, the impartiality of our system, and the fairness of the criminal process.

The other thing that's important to point out here is that peremptory challenges have the potential to harm accused persons as much as they help them. In the context of this proposed amendment, there has been a lot of discussion about whether abolishing peremptory challenges could disadvantage accused persons and whether that could disrupt important protections that exist for accused persons. In this way, again, it's important to contextualize the Stanley case, which gave rise to these proposed amendments. The Stanley case dealt with a white accused who was facing trial for murder of an indigenous man, but far more often what you're dealing with is a racialized accused who is on trial, and the potential that the Crown will exercise its peremptory challenges to exclude jurors of a particular race, indigenous people, women, or the like. It's important to recognize that these challenges have historically been, and can be, used against accused persons to their detriment.

● (1920)

We have to balance the perceived benefit of having the peremptory challenge in your pocket to challenge someone whom defence counsel doesn't feel quite right about against the very real risk, I would suggest, that these challenges are going to be used in a way that disadvantages the accused person. My view is that, on balance, the potential harm, not only to the system but to accused persons, is greater than any benefit that accrues.

Finally, and other witnesses have suggested this, it's important for the federal government to view this particular piece of law reform as part of a larger discussion about reforming the jury process across the country. Mr. Friedman and I agree here that there are serious concerns with the representativeness of jury pools in Ontario and elsewhere.

The difficulty here, of course, is that the federal government is limited in its ability to bring about significant changes to the way juries are composed. The early stages of this process, where the representativeness issues are most severe, fall within provincial jurisdiction, but there is no reason why the federal government can't take a leadership role in getting provinces together and talking in a serious way about how representativeness can be meaningfully achieved.

Certainly, in the province of Ontario, the current practice is to use municipal property assessment lists to select potential jurors, and it won't surprise you to learn that if you compile jury roles from property assessment lists you're going to end up overrepresenting property owners and people who can afford to purchase property, and you'll under-represent people who aren't meant to be on that list in the first place, because we're talking about a property ownership database.

This is a significant problem that I would suggest ensures that the process is flawed from the start. By the time you get around to exercising the few peremptory challenges you have or don't have, following the entry into force of this bill, assuming it's passed, my sense is that the horse has already left the stable. You can't fix fundamental problems with jury representativeness using the peremptory challenge.

What we really need to do, if we want to get to the root of this problem, is get the provinces together, and get all provinces that are not currently using health card lists as the jury source list to use those lists. They are by far the most accurate lists. More or less everybody has a health card. The privacy issues that might be associated with the use of health cards are actually easily addressed. You start with a good list, and then you build in measures to ensure that the representativeness of that list isn't eroded. The suggestion that somehow peremptory challenges can help increase diversity when you start out with a flawed list is, I think, a flawed argument.

I'll stop there. I agree with all of the proposed amendments that Kent Roach suggested earlier.

Thank you.

● (1925)

The Chair: Thank you very much.

We're going to move to questions.

Mr. Cooper, go ahead.

Mr. Michael Cooper: Thank you, Mr. Chair.

Thank you, Ms. MacDonnell and Mr. Friedman.

Ms. MacDonnell, I'm not sure if I heard you correctly, so maybe I could just clarify. Did you say in your testimony that Crowns are using peremptory challenges to limit the participation of indigenous or other visible minorities?

Prof. Vanessa MacDonnell: When you have a peremptory challenge, where there is no obligation to explain why you're excluding a juror, there is a potential for both Crown and defence to seek an advantage. In particular, if you're dealing with an indigenous or racialized accused, and you have the sense that perhaps a jury with fewer indigenous or racialized people might be a more favourable jury for the Crown—

Mr. Michael Cooper: But do you have any statistics? Do you have any data or any empirical evidence to back up that statement?

Prof. Vanessa MacDonnell: That is very difficult. This is actually one of the problems associated with peremptory challenges: to know why it is that the Crown and defence exercise their peremptory challenges. It's one of the reasons why the Batson-type challenge has been adopted in the U.S., where you try to determine if the pattern of challenges is such as to give rise to a potential or a perception of racially discriminatory use of the challenges.

It's been very difficult to get to this issue.

● (1930)

Mr. Michael Cooper: So there is no data.

What you're saying is inconsistent with what the Supreme Court has said in the Sherratt decision, that peremptory challenges can in certain circumstances produce a more representative jury.

What do you say to that?

Prof. Vanessa MacDonnell: As I said, if you start out with a flawed list, you're going to end up with a flawed list. If you draw jury lists from municipal property assessment lists, you start out with a list that represents only a fraction of the population. There's very good evidence.

The Toscano Roccamo report, which Mr. Friedman referred to, provides empirical evidence that if you start with a property assessment list to draw your jury lists, you will end up with jury panels composed predominantly of middle-class, white homeowners. There is data on that. My point here is that if you start with a flawed list, you'll end up with a flawed jury panel, and you cannot resuscitate that flawed list by exercising peremptory challenges.

In any event, even if there is a marginal benefit from the standpoint of equality or diversity, you have to measure that against the downside of having these challenges and the potential for their misuse. I think there is lots of scholarship to suggest that the potential for misuse is real.

Mr. Michael Cooper: Okay.

Mr. Friedman, you made mention of the Batson challenge process in the U.S. Could you perhaps elaborate a bit on how that works?

Mr. Solomon Friedman: Sure. That refers to the Batson v. Kentucky decision in the United States. It has to be modified for Canada, because in the United States jury selection process they engage in something they call “voir dire”. We call “voir dire” something completely different. They have sustained questioning of jurors about their backgrounds and their biases so there's more information to work with in respect of any challenge.

The way many lawyers foresee that working, and it appeared the Iacobucci commission did that as well, is that, for example, if you believe the other party is exercising the challenge in a discriminatory manner, they are required to explain to the judge what their non-discriminatory basis is.

I could speak from personal experience. If I see that the 20 members who have been called up using the lottery system from the body of the court are 12 white people, and then an aboriginal or a racialized person, and I want that jury to be representative, I will use some of my peremptory challenges, even though they are being used against people who all appear to have the same racial identity. If I'm asked about that, my explanation would be that I want a more diverse jury, not a less diverse jury. A Crown counsel, for example, may challenge two young black people and say that it's because of their occupations, or because they live close to where the crime was committed.

I also want to respectfully disagree with Professor MacDonnell about how limited the information is that we have now. Generally, the week before the jury trial you will get a full jury list that has the name and the general location, if not the address, of the juror. We live in the social media age. It's quite easy to go through those lists and find out all sorts of fascinating things about that jury pool upon which to make use of your peremptory challenge.

To say that it's just looking at the colour of the person's face, or whether they look at your client.... I will say this. Sometimes whether they meet my client's eyes is, indeed, an important consideration. The registrar says, “Juror, look upon the accused. Accused, look upon the juror.” If that juror won't look my client in the eye, I probably don't want them sitting in the jury box.

It's not a perfect tool; it's a flawed tool. If we put those constraints on it, like the Batson challenge.... We have to remember that the jury trial itself is like the parliamentary equivalent in the judicial system. It imports democracy into the criminal process. That's why judges don't make the findings of fact. But what we're going to do now is put in everything: the challenges for cause to be decided by the judge; the stand-asides, which would otherwise be peremptory challenges, to be determined by the judge. We want that element of democracy.

At the end of the day, when you're charged with a serious offence, you're constitutionally entitled to put your faith in the hands of your fellow citizens, and the peremptory challenge lets it remain, in my respectful view, democratic.

Mr. Michael Cooper: Thank you.

The Chair: That went by really fast.

We have Ms. Khalid, and then Mr. McKinnon.

Ms. Iqra Khalid: Thank you, Chair.

Thank you to the witnesses.

Mr. Friedman, in your opening remarks you mentioned that you have used peremptory challenges yourself in the courts. Can you give us a few examples as to how you have used them and for what purpose?

● (1935)

Mr. Solomon Friedman: Certainly. Last year, I was lead counsel on a first-degree murder trial. There were four accused. My client was a racialized young man charged with a fairly publicized homicide in a large urban area. There was a challenge for cause to address the publicity issue, but obviously I was extremely concerned that the generally overrepresented juror—that is, our white, older, affluent homeowner—not necessarily make up my 12-member jury. I used peremptory challenges to do everything I could to get young persons, to get minorities, to get immigrants, and to get people who might have different life experiences, or different experiences with the justice system, onto that jury. I used peremptory challenges, as my colleagues do all the time, to make the jury more diverse.

I agree with Professor MacDonnell that we're starting from a really bad situation. It is bad. It's funny that, until I read Justice Giovanna Toscano Roccamo's report, I'd always go back to the office after picking a jury in Ottawa and say, “Why are all my jurors from Orleans? It's unbelievable. What is in the water that produces Orleans jurors?” We now know it's because when you come from the municipal tax assessment rolls, that's where you're going to be overrepresented.

I have used peremptory challenges, and we do it all the time to get more diverse jurors. Is it the best tool? Of course it's not, but right now it's what we have, and Bill C-75 doesn't give us an adequate substitute.

Ms. Iqra Khalid: Have you seen your colleagues in the courtroom perhaps using peremptory challenges to have a more favourable outcome for their trial, as opposed to having a more impartial or a more objective jury?

Mr. Solomon Friedman: As a defence lawyer, I've sworn an oath to try to get the most favourable outcome for my client by any legal means necessary, so if I or any of my colleagues used peremptory challenges to get a less favourable outcome, I'd be calling up the law society probably, and maybe you guys want to do the same.

That's why I take issue when we hear about how the Crowns misuse them. Misuse that is discriminatory use should be prohibited and regulated. There are no perfect ways to do it, but there are ways.

One of the fundamental principles of our adversarial system is that you have two opposing adversaries, both with their own interests. Now, the Crown has a bit of a different interest, as the Minister of Justice is not exactly a fully partisan litigant, but the point is that you have two opposing interests and you're going to get a fair jury. I sometimes sit there when the Crown says, “Oh, I really wanted that person on the jury”, and the Crown probably feels the same way when I exercise a peremptory challenge. The point is that you have balance. I'm going to hope it's most favourable for my client. That is my ethical duty, and the Crown is going to do what it can to present the best case it can, and obviously present the evidence. It's that balance of the two adversarial sides that hopefully produces a fair result.

Prof. Vanessa MacDonnell: If I may, just on this particular point, the difficulty I have with what Mr. Friedman is saying is that the jury selection process, as the Supreme Court has said, is not actually intended to be adversarial. In the Yumnu case, the Supreme Court of Canada made clear that the collective obligation of Crown and defence counsel at the jury selection stage is to ensure an impartial jury. Really, at this stage it's not about the Crown trying to get the best jury it can and the defence trying to get the best jury it can. Peremptory challenges allow Crown and defence counsel to exclude jurors who they think may not be impartial, but the core of the adversarial process really only starts once the jury is selected. It's not appropriate for counsel to approach jury selection in an adversarial manner. They do it all the time. That's the reality of how things operate, which is one of the reasons why getting rid of peremptory challenges makes sense, because it ensures that one more tool for undermining the impartiality of juries is removed.

I'll just leave it at that.

Ms. Iqra Khalid: Ms. MacDonnell, are you aware of England having abolished peremptory challenges, I think in the late 1980s? Do you have any feedback as to how that worked out and whether we can take any lessons from what England may have learned?

Prof. Vanessa MacDonnell: I don't know what the impact has been of abolishing peremptory challenges in the U.K. What I do know is that through the uses of peremptory challenges that Mr. Friedman suggested he makes, we're really just chipping away at the margins of what is already, I think, a very flawed process. My sense is that if you can come up with a good explanation for why a juror should be excluded, then you have a challenge for cause available to you. The challenge for cause allows you to do that. What we're talking about is eliminating the ability to just exclude a juror without needing to provide any explanation. If you can articulate a legally justifiable reason for excluding a juror, use a challenge for cause. We're getting rid of that space where you might have a bad feeling about some person but it doesn't rise to the level of a legally defensible reason for excluding someone. That's where I become concerned, because what I see there is the ability to misuse these challenges. I am more comfortable with just not having them and looking to increase representativeness through other means.

● (1940)

Ms. Iqra Khalid: Do I have more time?

The Chair: You're hitting six minutes.

Ms. Iqra Khalid: Thank you very much. That was very interesting.

Mr. Murray Rankin: I'm tempted not to ask any questions and just invite you two to debate. I think you'd get a lot more out of it than my questions would elicit.

Some hon. members: Oh, oh!

Mr. Murray Rankin: I suppose I just want to clear one thing up, Mr. Friedman, because you challenged the good Professor Roach on his recall of recommendation 15 of the Iacobucci report. I'll read it to you, because I think you're both right. It says:

> the Ministry of the Attorney General discuss with the Implementation Committee the advisability of recommending to the Attorney General of Canada an amendment to the Criminal Code that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries.

It goes on to say:

> It should also be recalled that the Manitoba Inquiry report recommended the abolition of peremptory challenges to avoid the underrepresentation of Aboriginal people on juries.

In the middle of the recommendation, as I think you suggested, there's a reference to the American practice of using this specifically in order to address the discrimination head on. I think you're both right, but I just wanted to clear the record because I think that's fair.

Professor MacDonnell, you acknowledged the difficulty for the federal government to do much where the real issue is the rolls—how they are generated and so on. You said at the end of your remarks that you agreed with each of the recommendations made by Professor Roach. One of the ones I found provocative was his recommendation that in order to deal with this problem we allow people who are merely permanent residents of Canada to be jurors. Do you have any thoughts on that?

Prof. Vanessa MacDonnell: My first recommendation would be that all provinces use the health card lists, because those are the most comprehensive lists available in the provinces for drawing jury rolls. That's more representative than voter lists and property assessment databases. Those lists include permanent residents, and I think this is one way of increasing diversity. Residency status is another axis to diversity, and this would get us closer to the goal, which is to have juries that represent the full diversity of the community.

I agree with Professor Roach that there's nothing about the fact that permanent residents aren't citizens that should meaningfully exclude them from jury service. They're part of our communities.

Mr. Murray Rankin: Practically speaking, the federal government could nudge the provinces at federal-provincial meetings of attorneys general, but really, they can do whatever they want in terms of best practices. I'm very persuaded personally, by the way, about using the health card. Should the federal government perhaps be giving seed funds or starting a pilot project, something to get the provinces to do the right thing?

What happened in Saskatchewan is an abomination, and Justice Iacobucci had serious problems with what happens in Ontario, too. This is a national problem.

Prof. Vanessa MacDonnell: It's a national problem, and I'll tell you, it's a national problem that goes back 30 years. This is not a new discussion, but there are challenges for the federal government. I think the federal government has ways of bringing governments to the table and can certainly deal with those areas of law reform that fall under its jurisdiction. A lot of this is contained in provincial juries acts. That's the reality.

● (1945)

Mr. Murray Rankin: I want to go to Professor Friedman in the time available.

Mr. Solomon Friedman: I'm just "Mr." The "professor" is on my —

Mr. Murray Rankin: Yes, but you're a part-time professor, so I'm giving you the benefit of the doubt.

Proposed subsection 629(4) was suggested as an amendment by the Criminal Lawyers' Association of Ontario that would allow the accused or the prosecutor to challenge the panel on the basis that it is not representative of the community from which it was drawn. Both the Crown and the defence would have that opportunity. What's your take on that?

Mr. Solomon Friedman: I think that's the full answer to the argument that this is really a provincial matter. If you were to enact that, I know I would exercise that challenge, and every jury trial would get held up until the provinces passed their legislation. It wouldn't take very long at all. I don't think we need to bring people to the table and have a discussion about this. If you import a minimum standard of representativeness into the Criminal Code, of course the provinces are going to follow, because people have a constitutional right to a jury trial. If you can't get a representative jury trial in a given province, that process is constitutionally flawed.

Mr. Murray Rankin: I think that's very fair. Thank you.

The Chair: I think that will give us more Jordan problems for at least a period of time, but I understand.

Mr. McKinnon, you're next.

Mr. Ron McKinnon: I'll defer to Mr. Fraser.

The Chair: Mr. Fraser, go ahead.

Mr. Colin Fraser: Thank you. I'll be sharing my time with Mr. Boissonnault.

Thanks to both of you for being here. This has been a very interesting presentation. I appreciate it.

Mr. Friedman, my understanding is that for a crime such as first-degree murder, there are 20 peremptory challenges available for both sides.

Mr. Solomon Friedman: That's per accused.

Mr. Colin Fraser: But the Crown has—

Mr. Solomon Friedman: —as many as all the accused put together.

Mr. Colin Fraser: Then for other crimes, there are 12.

Mr. Solomon Friedman: That's correct, or four for an offence that falls below those two thresholds.

Mr. Colin Fraser: Can you explain to us how that actually works in a real jury selection process? Is it often that all of them get used, or just a few?

Mr. Solomon Friedman: I've had cases where I've selected a jury and advised the judge at the outset that I didn't intend to use any of my peremptory challenges, that I wanted the first 12 people who were ready to serve. I've done that. I've also had cases where I've exhausted my peremptory challenges. The way it works is that the challenges rotate between the defence and the Crown. Each one is permitted to say "Challenge" or "Content" with respect to each juror, but that's only after they've passed the challenge for cause.

That's also something interesting. I wanted to explain how that works, how the challenge for cause precedes the peremptory challenge. Sometimes you get an answer on your challenge for cause. We're talking about what information you have. Professor MacDonnell says, and I respect that view, that you're going to be looking at their faces or using some discriminatory assumption. I can tell you that I had a challenge for cause where the question about publicity was asked. The question was, “Notwithstanding anything you've read about this case, could you be impartial between Her Majesty and the accused?” That's the standard question. The juror thought for a really long time about that and said, “I hope so”, and the juror was ruled acceptable. I'm sitting there and I just heard a juror say, “I hope so” to the question “Could you be impartial?”

We have to remember that juries are unlike judges, who are legally presumed to be impartial. Obviously, judges are appointed and have legal training, so we make all these assumptions about them. We don't get to ask challenges for cause to a judge. In California they do, and they get to exercise one peremptory challenge per judge. Any lawyers looking for a judge shopping jurisdiction should hightail it to California.

With juries, we don't quite have those presumptions. Where we have a concern about challenge for cause, we ask it. The peremptory challenge is also a useful tool when you get a slightly less than satisfactory or a lukewarm answer on your challenge for cause. That's how the process works.

Mr. Colin Fraser: If there are 20 of them available, can you give us some idea of what a typical situation would look like? Is it usually just a few, and there are all kinds left over?

Mr. Solomon Friedman: Any defence lawyer will tell you that there's no such thing as a typical criminal case. I don't want to give you answers. Here's the thing. I don't want to come to this committee and say that peremptory challenges are only properly used or they're never properly used. That's why I say we actually need statistical research. Mind you, it's very easy to do.

You take sample juries and take actual statistics from them, such as their racial makeup. You take a sample that's diverse enough across the country, 1,000 of them. You'll know who is being challenged peremptorily, and you'll know which side is using the challenges and for what purpose. It's not difficult to do, in my view. I don't think there's a typical number of peremptory challenges that are used.

Mr. Colin Fraser: Professor MacDonnell, can you weigh in on that? What's your view of how many peremptory challenges are ordinarily used, if I can use that term? Have there been any studies on this?

● (1950)

Prof. Vanessa MacDonnell: I don't have anything to add to what Mr. Friedman said. I think he's been involved in lots of jury selections.

Mr. Colin Fraser: Fair enough. I'll pass the rest of my time to Mr. Boissonnault.

Mr. Randy Boissonnault: Thanks very much, Mr. Chair and Mr. Fraser.

Thank you, both. I'm wondering if you can return next week, same time, same place. We'll need the intellectual stimulation, six panels or 20 panels from now.

I love the health records idea. I will suggest it to the minister at a future federal-provincial-territorial meeting, and I'll raise it with the Alberta minister, the attorney general. It's smart and it's there.

Prof. Vanessa MacDonnell: There are provinces that are currently doing it with great success. I also agree that Mr. Friedman makes a great point, that if you can challenge the array based on an absence of representativeness, that would hold the provincial government's feet to the fire.

I think the concern is still the kind of foot-dragging potentially. The provincial governments have known for 30 years that the current mechanisms are flawed. I hope that this would speed things up. It's a terrific suggestion, one of Professor Roach's suggestions. It's actually a really easy fix.

Mr. Randy Boissonnault: I like it a lot.

In typical Supreme Court fashion, there's balance in the judgment. One of my colleagues across the way talked about R. v. Sherratt, which said that peremptory challenges have proper uses but also "can be used to alter somewhat the degree to which the jury represents the community." Would you agree with that part of the Supreme Court judgment?

Prof. Vanessa MacDonnell: Yes. I will also say that there is Supreme Court case law. I didn't come prepared with it, but it's possibly the Bain case, where the Supreme Court itself acknowledged that sometimes the Crown misbehaves. You give the Crown the power, and as with any power, sometimes it will be misused.

The Supreme Court of Canada, which is quite judicious in its criticism of anyone, has acknowledged that, because these powers can be exercised with essentially no accountability, there is a potential for misuse. Therefore, we need to read the Supreme Court statements around juries and jury selection in their entirety.

Mr. Randy Boissonnault: Yes. Thank you.

Mr. Friedman, you described the way you would go about collecting the data. Thank you for that. I heard there is no data, and then questions about how to collect the data, so that's very helpful.

Mr. Solomon Friedman: Knowing that I am not a data scientist, that's just how I—

Mr. Randy Boissonnault: That's how you would see it. That was the model you built.

Mr. Solomon Friedman: Yes. I don't think it's difficult.

Mr. Randy Boissonnault: Okay.

I was intrigued by your idea of the jurors questionnaire. Paper or electronic, how much time would that add to the court process?

Mr. Solomon Friedman: That's a great question.

First of all, the Law Reform Commission, in 1980, found that some judges in Canada actually use a jury questionnaire. I've done a murder trial where the trial judge did use a jury questionnaire. Usually the way the jury selection process works, especially in a big case such as a murder case, is that you have hundreds of people. We had 700 people. Think of the Gerald Stanley case. You have a lot of people and they are sitting around. There is no reason they can't be filling out five or six pages, which, by the way, assists in efficiency because the judge takes a look at them and if he sees that some people have put a reason why they can't serve, he stands them aside. There's no need for that to even go to the lawyers for litigation or a challenge for cause.

Mr. Randy Boissonnault: It was useful the time you saw it used.

Mr. Solomon Friedman: It was useful, but it should be standardized. There's no reason why it couldn't be mandated in regulation, as a form to the Criminal Code.

Mr. Randy Boissonnault: Thank you both very much.

The Chair: Thank you.

This is exactly the type of panel of witnesses we hope to get, because we have two incredibly intelligent, articulate, dynamic people with opposite points of view.

Even though you generally agree, you have divergent points of view on the issue itself. It was great. Thank you so much.

I'd ask the next panel to please come forward.

● (1950)

(Pause)

● (1955)

The Chair: I will reconvene the meeting and present the next panel.

We are joined by Mr. John Muise, volunteer director of public safety at Abuse Hurts.

Mr. Muise, welcome back to the committee.

Mr. John Muise (Volunteer Director of Public Safety, Abuse Hurts): Thank you.

The Chair: We have Mr. Daniel Topp, barrister and solicitor.

Welcome to the committee.

Mr. Daniel Topp (Barrister and Solicitor, As an Individual): Thank you, and good evening.

The Chair: Good evening.

As well, from Legal Assistance of Windsor, we have Ms. Marion Overholt, a barrister and solicitor and the executive director of Community Legal Aid.

Welcome, Ms. Overholt.

Ms. Marion Overholt (Barrister and Solicitor and Executive Director, Community Legal Aid, Legal Assistance of Windsor): Thank you.

The Chair: The floor is yours. Please go ahead.

Ms. Marion Overholt: Thank you.

We appreciate the invitation to appear before you on this important piece of legislation. It is an honour to do so.

I am the executive director of two legal clinics affiliated with the University of Windsor law school and Legal Aid Ontario. Both Community Legal Aid and Legal Assistance of Windsor have provided legal services to the low-income residents of Windsor and Essex County for over 40 years. Community Legal Aid services include representation on summary conviction offences. Legal Assistance of Windsor services include representation on immigration and refugee matters.

We have reviewed the briefs submitted by the Association for Canadian Clinical Legal Education and the Student Legal Aid Services Societies, and we support and endorse their recommendations.

There are three issues we would like to address with the committee today. First is the ability of law students to continue to represent financially eligible clients on summary conviction offences.

Second is the impact of increasing the maximum sentences for summary conviction offences on refugee applicants and permanent residents.

Third is the impact of increasing the maximum sentences for summary conviction offences on our communities.

The first issue I'd like to address is that the current maximum sentence for a summary conviction offence is six months, and the proposed legislation would increase the maximum sentence to two years less a day. As a result, and by the provision of section 802.1, law students would no longer be able to represent clients charged with summary conviction offences. The impact would adversely affect clients in accessing legal representation and would prevent law students from gaining important experience and training in the criminal justice system.

Our law students work under the close supervision of staff lawyers. Every aspect of their work is reviewed and approved. Clients who are denied legal aid because there is no likelihood of a jail sentence are referred to our clinic for representation. The accused are often first-time offenders who have made a mistake that results in criminal justice engagement.

Our clients are young mothers who have been charged with shoplifting—usually diapers and food from a grocery store—or they are the neighbours or family members whose breakdown in relationship has resulted in assaults or threats, which are often fuelled by mental health issues. Our students have the time to uncover the backstory that led to this behaviour. They can reach out to community agencies and professionals for appropriate support and intervention. A criminal offence does not occur in isolation, and addressing the intersectionality of poverty, housing, mental health and addiction issues allows our students the chance to develop professional and effective advocacy skills.

Last year, this committee's report on legal aid noted that students in legal clinics, when supervised by staff lawyers, provide appropriate and low-cost services to community members. This committee has recommended that the role of law school clinics be expanded to increase access to justice.

Without our participation, these clients will have to represent themselves, which will cause more delays in the criminal justice system, increase the probability of guilty pleas, and put more pressure and strain on Crown attorneys, judges and court staff. The results would exacerbate the problems you are trying to solve. Therefore, we request that the provisions of section 802.1 be amended to correspond with any amendments that you make to the definition of a summary conviction offence.

The second issue I would like to address is the impact of redefining summary conviction offences on permanent residents and refugees. The Immigration and Refugee Protection Act defines serious criminality as the conviction of an offence "for which the term of imprisonment of more than six months has been imposed". Under Bill C-75, all non-citizens of Canada would be at risk of a finding of inadmissibility, regardless of whether they are convicted of a summary or indictable offence. This appears to be another unintended consequence of Bill C-75.

● (2000)

We can certainly understand why Parliament would want to give Immigration the tools to consider the impact of granting residency where serious criminal acts have resulted in significant periods of incarceration. However, it has been our experience at Legal Assistance of Windsor that our clients sometimes brush up against the criminal justice system in their early years in Canada during periods of personal crisis and adjustment to Canadian society. Post-traumatic stress disorder is often a factor, and proper treatment of the condition removes the risk of repeat behaviour. The criminal justice system is capable of addressing those concerns without triggering the imposition of a loss of immigration status and residency. The proposed change also impacts the permanent residents' ability to appeal a loss of their status in Canada and any subsequent removal order. An amendment, therefore, is required to avoid these consequences.

The third issue we wish to address is the impact of increasing summary conviction sentences on the clients we serve. The increase in sentence would be a signal to the bench that it is the will of Parliament to increase sentences for summary conviction offences, and it would indicate that greater periods of incarceration are required. We all understand the importance of deterrence in sentencing. However, this change throws the balance between deterrence and rehabilitation out of sync.

Our communities are struggling with serious issues of homelessness and addiction. In Windsor, we have 4,700 people who are on the subsidized housing waiting list. If every person who is currently housed in subsidized housing moved out tomorrow, we would still have people on the list.

We have a mental health court and a drug treatment court that are able to help only a fraction of eligible clients/candidates because of a lack of resources. We have significant wait times for treatment centres, and often on discharge, the lack of secondary housing means that clients are forced to return to the same rooming houses and shelters where their addictions flourished. Therefore, they are placed at risk of recidivism. Longer jail sentences aren't going to address these problems. Indeed, we've seen the medical reports of clients who have been incarcerated, and the difficulty they have in receiving a consistent diagnosis and treatment only exacerbates their unemployability, and does not assist them in their return to being productive members of our community.

To conclude, our law students at the University of Windsor also have the opportunity to study at the University of Detroit Mercy, in Detroit, Michigan, and the stark contrast between the American and Canadian justice systems is poignant and provides an opportunity for us to learn from their mistakes. Longer incarceration periods for our marginalized populations are not productive, cost-effective or just.

We'd like to thank you for the opportunity to make this presentation this evening, and I would be pleased to answer any questions you have.

● (2005)

The Chair: Thank you very much.

Mr. Muise, go ahead.

Mr. John Muise: Thank you.

Good evening. My name is John Muise. I am the volunteer director of public safety at Abuse Hurts, formerly the Canadian Centre for Abuse Awareness. It's a charitable NGO dedicated to the eradication of child abuse. Abuse Hurts provides support for survivors and victims. It does not accept government funding.

My professional experience is relevant to the topic at hand, so I'll note it briefly. I was a police officer with the Toronto Police Service for 30 years. I retired in 2006. I was a detective sergeant. I spent six of those years seconded to the Ontario government's Office for Victims of Crime, where we tried to help crime victims and, as an arm's-length advisory agency, provide policy advice to members of cabinet at the time. In 2009, I was appointed to the Parole Board of Canada as a full-time board member in adjudicating numerous parole decisions.

It's been a long day for all of you, and time is short, so I'll get right to the point. I want to address three areas of serious concern that Abuse Hurts believes are likely to potentially diminish public safety. I won't be talking about peremptory challenges.

First, I will address the proposal to hybridize a large number of indictable offences, thereby allowing for a Crown summary election option. There are a large number of serious crimes set for hybridization, including certain serious driving offences, terrorism-related crimes, and a criminal organization offence. I note that the government just appointed a new member of cabinet to address organized crime, and that's a good thing. However, for Abuse Hurts, the very last one on this long list jumps off the page, and that is the breach of a long-term supervision order. Most of you know what an LTSO is, but I would like to explain how an offender gets one of these orders.

He—and it is most often a “he”—must receive a sentence of two years or more, and there must be a substantial risk of reoffending. The court can make this determination if the offender has been convicted of one of a number of very serious sexual offences and has displayed a pattern of repetitive behaviour that shows a likelihood of causing death or injury to a person, or a likelihood of inflicting severe psychological damage, or by conduct that shows "a likelihood of causing injury, pain or other evil". The word “evil” is not my word; that's the word that's contained in the Criminal Code.

Many of these offenders are also identified by the court as having met the standard to be declared dangerous offenders; however, if the court determines there is a reasonable possibility of managing risk in the community, the offender must be sentenced as an LTSO.

An LTSO is a post-sentence supervision order for up to 10 years, replete with multiple conditions, federal parole officer supervision, and more often than not, particularly in the early years of an order, a residency condition. All of these conditions are imposed by the Parole Board of Canada.

Clearly, the legal bar to receive this designation is high, and with good reason. These are very serious sex offences, and serious offenders who pose an ongoing risk to innocence even while out on these LTSO orders, so when these kinds of offenders appear before a court for an LTSO breach—usually an early warning of a return to their serious offence cycle—they must be dealt with appropriately. In the view of Abuse Hurts, that should be by way of indictment.

These are the kinds of offenders for whom incapacitation through further incarceration safeguards innocents in the community. We all know that Crown attorneys work hard and constantly manage significant workloads. It is not appropriate or fair, for that matter, to allow this offence to be included in the basket of offences where a decision to proceed summarily might be taken because the Crown is under intense pressure from on high to reduce the number of trials in the Superior Court.

Abuse Hurts proposes to the committee to reconsider some of the serious offences on the list I noted earlier and consider removing them. Please, if you see fit, remove breach of LTSO from the list of offences to be hybridized.

Second, I'd like to speak to the judicial referral amendments. If you work in the criminal justice system, one thing is apparent. It's a well-known axiom that a small number of offenders commit a disproportionately large number of crimes, and many of these offenders routinely violate release conditions, fail to appear in court, and reoffend while out on one or more conditional releases or while at large on a warrant.

I think of the young man who, for all intents and purposes, executed a St. Albert police officer not that long ago in Alberta. He was this kind of offender.

● (2010)

These are the offenders who offend the sensibility of many Canadians, drawing criticism about the “revolving door” nature of our justice system. These circumstances can and sometimes do bring the administration of justice into disrepute, yet Bill C-75 proposes an alternative mechanism to deal with many of these offenders that I believe is less public safety-oriented. Anybody involved in the criminal justice system knows that there is very little coordinated information both within and outside jurisdictions to track criminals. Even critical documents, such as criminal records and CPIC entries, are routinely, and sometimes woefully, not up to date.

What's going to happen with these judicial referrals? At best, they might end up written out in court-stored information. How would that help anyone identify the real risk associated with a given offender?

As a former member of the Parole Board of Canada, I can confirm how difficult it is to get even the most basic police record information that is missing from an offender's file. Even if you are able to obtain this information, will the court view it in the same way as a criminal record? Obviously, it won't. As well, a possible unintended consequence of this extensive and detailed new judicial referral plan is that it might use up more court time.

In my opinion, these amendments will varnish the truth about offender behaviour, with important information no longer entered on the official record. How would this reinforce the public's faith in the administration of justice? How does it help quality decision-making? How is it good for public safety?

Abuse Hurts is aware that the federal government consulted a number of people and organizations about this proposal. We know there was significant support among a number of participants in the criminal justice system for an alternative to the charges of fail to comply and fail to appear.

Abuse Hurts proposes creating a mechanism to ensure that judicial referral entries appear on the right side of the criminal record, allowing for use when future decisions to release, refer or detain are being made by police, courts and parole boards.

There's policy that goes along with legislation, so if this committee is interested in looking at that, that might be the route to travel, coupled with regulations.

Third, Abuse Hurts would like to address proposed section 493.1. I'll just refer to it as the principle of restraint section in the new bill. The proposed section reads as follows:

> In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest...opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

It's important to know what's in those two sections.

Subsection 498(1.1) instructs police officers about what to consider when releasing, either on the street or from the police station by an officer in charge. Considerations include establishing identity; securing evidence; preventing continuation or repetition of the offence or commission of another offence; ensuring the safety and security of a victim or witness; and considering whether the accused is likely to attend court.

Section 515 sets out the grounds a court must take into consideration when determining whether to release or detain. Grounds include, again, ensuring attendance in court; whether detention is necessary for the protection or safety of the public, including any victim or witness; and whether there is substantial likelihood that an accused will commit an offence or interfere with the administration of justice. An accused can be detained if it is necessary to maintain confidence in the administration of justice based on the apparent strength of the case; the gravity of the offence; circumstances surrounding the offence, including whether a firearm was used; and where the accused is liable on conviction for a potentially lengthy prison sentence.

It's pretty clear what all of those points speak to: public safety and the need for a properly and carefully administered justice system so as to ensure it doesn't fall into disrepute and lose the confidence of Canadians.

I believe that this new proposed principle of restraint in section 493.1 as written is going to trump well-established and, for the most part, long-standing safeguards. This section gives the principle of restraint primary consideration. The dictionary defines "primary" as "of first rank, of importance or value, of chief importance."

● (2015)

I accept that this section was written with the best of intentions, but with the greatest of respect, I believe it overreaches. Abuse Hurts is particularly concerned about the risk it poses to public safety. Courts are already required to employ the principle of restraint in their release decision-making. The charter, criminal law and case law all tell them to do so. I believe it is wrong to give the principle of restraint primacy.

Abuse Hurts proposes including that principle of restraint section in your bill as written, but removing one word, the word "primary".

Thank you for this opportunity. I look forward to answering any questions you might have. It's the first time I've appeared before a committee when I didn't have a brief prepared, and I apologize for that. There were circumstances beyond my control, but I've provided my speaking notes electronically to the clerk.

Thank you, sir.

The Chair: Thank you very much.

Mr. Topp, go ahead.

Mr. Daniel Topp: Thank you.

Good evening. I'm also honoured to be here. I know the hour is late and, brevity being the soul of wit, I will get straight to the point.

I'm here to speak primarily on the issue of law students, dealing with section 802.1 in the code. I'm on the board for Community Legal Aid in Windsor, Ontario, as well as the amicus curiae in the 672 Court in Windsor, Ontario. That's the mental health court. We've had that court for about eight or nine years now. I act primarily as duty counsel in that court, so I deal with a lot of mentally ill accused, as well as, more importantly, a lot of people who do not qualify for legal aid.

I'm sure you've heard that, at one point, legal aid had a period of time when certificates were given to people with mental health issues. Unfortunately, due to financial constraints, that has really gone by the wayside. That's why the students are present in our court system and are able to assist people charged with relatively minor offences. Most of the people who come into the mental health court and do not qualify for legal aid are first-time offenders who have no real history in the criminal justice system. It's the perfect opportunity for students to work on these matters.

The recommendation that's available in CLA's memo deals with the amendment to section 802.1 by adding wording essentially dealing with the agents and the articling students being allowed to appear even with the change in the amount of time for the offences being dealt with. I'm not here to speak on the issue of maximum potential penalties for summary offences. Whatever you do with that, you still have to deal with the issue of the law students being there.

I'm asking you to allow the articling and law students to continue in this area of law, because they're under the direct supervision of a lawyer. This is different from a paralegal. Legal Aid's approach is to ask you either to enumerate a number of sections of the code that they should be allowed to act on, or to exclude them.

However, having been a criminal lawyer now for 17 years, I know that these nice tiny little boxes into which things fit just don't exist in criminal law. Every case has its difficulties, even if it's something as small as a theft under a certain amount or an assault in a bar fight or something like that. There could be issues in that case that a student might have a problem with, but because the student has an articling principal and all the clinics have staff lawyers who review all the files, they will have the ability to look at the individual case and give the student some direction on what to do.

It's much like doctors and residency, because our students are in law school. Before doctors go into residency, they have medical training. Our students have legal training. That's why I'm asking you to consider that. I'm sure there's a big issue with the paralegals. I'm not here to speak for or against the paralegals, but I think there should be some kind of exemption for the students. They're in a different class because of the training they've had: Either they're in law school or they're articling.

With the direction of an articling principal or one of the staff lawyers, there is someone there to see the problems in each individual case and to sound the alarm. If you do it in the way Legal Aid is asking, with the enumerated sections or the excluded sections, there's still potential for danger. That's why I'm asking you to deal with that amendment by adding those words to it.

Under a program approved by the lieutenant governor in council of the province.... I don't want to put too much on the table here, but I think we could cross that out. This is a federal statute, the Criminal Code, and I think that with direction, if you intend to allow the students to do that, it should be across the board instead of having each province do that. More importantly, if you leave it to the province to do this, there's going to be a gap for the people who are most vulnerable in the system, marginalized people as well as mentally ill people. As I said, dealing with the 672 issues, I have a real passion for the mentally ill accused.

I'm a lawyer who donates some of his time as amicus, but there's not a lot of me, if I can put it that way. The students fill a big part of the problem of dealing with the people who otherwise would be alone in the system.

● (2020)

Furthermore, getting rid of the students would cause further delay, because self-represented accused will cause delay in the system. There's empirical data that points to this.

I've dealt with people who have come to me in the 672 Court who weren't even notified by duty counsel that it existed. Once they came to me, essentially, I found out they had been trying to plead guilty for four or five months. They had been sent to a mandatory pretrial because the Crown position is that if you're going to have a self-represented trial, you have to have a pretrial in front of a judge. This causes delay and burdens the system.

There's always this caveat that there's a direction, that there's a lawyer present to watch the students. Allowing this would facilitate the marginalized people to still have representation in the system.

On preliminary hearings, I want to tell you that, being a lawyer for 17 years, I've read the material. A very small percentage of court time is used for preliminary hearings. As a criminal defence lawyer exclusively, I find them to be very valuable.

I'm not sure if anyone has said it before, but I would like to tell you that sometimes, even though I know things are not going to go well for my clients at trial in superior court, we have a preliminary hearing so they can see the evidence. They can see the Crown's case against them.

What happens in these cases is that a lot of times these matters resolve. We have preliminary hearings to test the evidence, and it doesn't take up much court time. Take the example of a sexual assault case. A preliminary hearing will last perhaps two hours. If it's a strong case, I sit down with my client after that, and then we alleviate a week-long superior court trial.

Also, sometimes the Crown doesn't really know what they have, and when I ask them to test the evidence after the preliminary hearing they see the frailties. The lawyers see it. It's the other players who don't, and they are the ones who need to see it at times. What happens at that point is that, again, there is resolution.

I would ask you to consider keeping preliminary hearings.

Finally, I would like to speak briefly about victim fine surcharges. Kudos to the committee for dealing with this issue. Again, being amicus and dealing with a lot of mentally ill accused, it's almost comical at times when I have somebody homeless or mentally ill in court. Guess what: They don't come to court. They get charged with failure to appear. They are not a danger to the public, and with the Antic decision and the new bail system, they keep getting released. Then you have them back in court with seven or eight separate pieces of information—breaches for not going to probation, not being at the residence where they are supposed to be, and failure to appear. Say, there are seven or eight charges. They plead to five. It's victim fine surcharge upon victim fine surcharge.

My clients, in some senses, become the victim of the victim fine surcharge. In that example, it is going to be $500 or $600. They don't have the money. They will never have the money, so I don't see the point of piling it on. I'm very happy to see the committee has wrapped its mind around that. I'm obviously in support of adopting your recommendation dealing with the victim fine surcharges.

Thank you, unless you have any questions.

● (2025)

The Chair: We will have some questions for everyone.

I just need you to know that this is the draft law. It's before the committee. The committee has made no recommendations yet on victim fine surcharges or anything else.

Mr. Daniel Topp: It's there.

The Chair: It is in the law that we're considering. Yes, exactly. I just want to correct the record on that point.

Mr. Daniel Topp: I'm sorry. I just meant to say that I'm supporting what's in the draft.

The Chair: You supported that position in the bill. Absolutely, I understand completely.

Mr. Cooper, go ahead.

Mr. Michael Cooper: Thank you, Mr. Chair.

Thank you to the witnesses.

Mr. Muise, it's good to see you back. You touched on the issue of hybridization. You made submissions to record some of your concerns about hybridization. Would you elaborate?

As you noted, there are a number of offences, including participating in a terrorist organization, kidnapping a minor, and impaired driving causing bodily harm, that under Bill C-75 would be hybridized.

Mr. John Muise: Part of this bill is about creating efficiencies. One of the ways to create efficiencies, clearly, was this hybridization section. As you said, Mr. Cooper, there are a whole lot of very serious criminal offences. I focus on the most serious of the bunch, breach of an LTSO, but there are other serious ones in there.

I think this is not the way. I'm all for making the system more efficient, but there are other ways to speed up the justice system. I'm not going to editorialize; we all know what they are.

I'll focus on what is important. Public safety is important, and my three points were all about public safety. If we set up Crown attorneys and add another bunch of serious criminal offences to the basket of offences that they have to get off their plates, some Crown attorney at 700 Bay Street, if we're talking about Ontario, who is a manager inside the tower, will be pushing them hard. I know this for a fact. I know it from when I was in the system, and I know it from talking to people outside of the system. This is not the way to create an efficiency.

I get that this bill is going to pass in some way, shape or form. I'm trying to identify some parts of it that I think need to be reconsidered, and one that.... Please just don't do it. LTSOs are the worst sex offenders. I mean, there are dangerous offenders. It's the same basket of people who do bad things. They created a record that is just "evil", according to the Criminal Code.

This is not the way to create efficiencies, and it's not the way to enhance public safety.

● (2030)

Mr. Michael Cooper: Absolutely.

In terms of efficiencies, all it would do, it seems to me, is download cases onto already overstretched provincial courts, which take up 99.6% of criminal cases in Canada, according to Statistics Canada. Would you agree with that?

Mr. John Muise: There's no doubt that this hybridization would further download onto a system that's already strained to the limit. If you're talking about provincial courts, yes, I agree.

Mr. Michael Cooper: Perhaps you could respond to the statement of the Minister of Justice. When I posed questions to her about the basis for hybridizing some of these very serious currently indictable offences, she said that it had nothing to do with sentencing, even though we're taking a 10-year maximum and reducing it to a maximum of two years less a day.

How would you respond to the minister?

Mr. John Muise: Two years less a day, if you proceed summarily, for certain.... This would influence how Crown attorneys make their decisions. Crown attorneys are already under significant pressure to move things.

I call it the sausage factory. Have you ever been in a butcher shop? They're driven down this little funnel, and they're pushed down in the funnel with a hunk of metal. That's our current criminal justice system. It's a sausage factory, good people working hard to do the best they can in a very difficult and poorly resourced system.

That will be the end result. It'll get more efficient, all right. Cases will be dealt away in ways they shouldn't be, in my estimation. I've seen that already, and things haven't gotten any better.

Mr. Michael Cooper: Thank you.

The Chair: You have a minute left.

Mr. Michael Cooper: Thank you, Mr. Muise, for both submissions.

Mr. Topp, in terms of section 802.1, you suggested an amendment that would allow for law students and articling students, who are under the supervision of a lawyer, to continue to act, assuming we maintain the two years less a day for a summary conviction, in terms of maximums.

How do we deal with paralegals, and what is your comment on the suggestion made by a witness earlier to simply replace six months with two years less a day, under section 802.1?

Mr. Daniel Topp: That is one option. My amendment deals specifically with the law students, because either the law students have an articling principle or they have someone at the clinic who is a licensed lawyer to look at each individual file. I think that even if you change it to two years less a day, at least there's someone there to oversee the problems that could happen in a case. Admittedly, some of these cases with the two years less a day may be too serious for students. There's that extra level of watching, and that's why I go back to the example of the doctor and the resident looking at the charts and saying, "Maybe this isn't for you."

I can't speak to how that would deal with paralegals, because paralegals don't have that framework with someone to watch over them. That's why I'm asking for the amendment, just with regard to the students.

The Chair: Thank you very much.

Mr. Boissonnault, go ahead.

Mr. Randy Boissonnault: Thank you, Mr. Chair.

Ms. Overholt, did you take a look at the administration of justice provisions in the amendments? How would that speed things up for the people you're working with at Legal Assistance of Windsor?

● (2035)

Ms. Marion Overholt: No, I haven't. I'm not able to address those points.

Mr. Randy Boissonnault: Okay, thank you very much.

Mr. Topp, we as members of the committee don't draft the legislation. We inherit what comes to us in the House and then we review it. I'm going to hope that this provision that seems to be cutting out the law students and the paralegals is an oversight, so we'll be recommending that to people in the justice community.

I was interested in your comments about preliminary hearings. We travelled to many parts of the country talking to people in the sex trade and police officers about what happens during preliminary hearings from their perspective. When they are about to charge a person who's been in a criminal gang trafficking people, they have to come to not one, not two, but sometimes three hearings. It revictimizes the person every time, and by the fourth time that person isn't showing up. It's simply not going to take that case to trial. Way too many cases simply don't go to trial because of the overburden of preliminary hearings. Then you get into Jordan issues.

I think in your experience maybe they worked well, but what we're hearing on the other side is that it simply doesn't work for a lot of people. Would you have any comments on that kind of heaviness of the preliminary hearings?

Mr. Daniel Topp: They are heavy, but with what's in the newly proposed legislation, with the control of the preliminary hearing justice, it seems they have the power to get to the real meat and potatoes of the issue. Preliminary hearings historically may have been trial part one, if I can put it that way. As you said, it may cause somebody not to want to come back. I can't speak to that method of acting as criminal defence counsel because that's not the way I do things.

You're asking specifically about sexual assaults—

Mr. Randy Boissonnault: No, it could be human trafficking. We see victims being revictimized because of multiple preliminary hearings.

Mr. Daniel Topp: Right, I understand that. I harken back to one example, which happened within the last year, when my client didn't understand the issue of drunkenness and the person not being able to consent. We had a preliminary hearing, and I said he needed to hear her evidence on this point of law, because he said it was consensual, essentially. As many times as I tried to explain it to him, he didn't get it. Once he heard that, the preliminary hearing was over after about an hour. I don't have a recollection exactly, but it wasn't long. Then we met in my office; the matter was resolved and it was done. That's an example where they work differently.

Again, you're dealing with different lawyers, different personalities. I agree with you that it could be a problem. With the judge having control over essentially getting right to the point, if I were to say to the judge that I was having the preliminary hearing for these reasons—because obviously he's not the final decision-maker at this point—it would be an effective use of time. It may be that as part of the trial management or the preliminary hearing management there's a pretrial where that is undertaken. Obviously that's not going to be codified. It would turn into a practice based on the directions of the judges.

Mr. Randy Boissonnault: I appreciate that. Thank you.

Mr. Muise, I see from the website that Abuse Hurts helps to counsel people who have been victims of human trafficking.

Mr. John Muise: Yes.

Mr. Randy Boissonnault: With regard to the amendments in Bill C-75, many provisions deal with people who faced human trafficking. Did your organization have any comments on those provisions?

Mr. John Muise: No.

Mr. Randy Boissonnault: Thank you very much.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Boissonnault.

Mr. Rankin, go ahead.

Mr. Murray Rankin: Thank you very much.

Thank you to all of you.

I would like to start with you, Ms. Overholt, if I could. You had a couple of recommendations, starting with section 802.1. I think you summarized by saying that, number one, you would amend it to correspond with any amendments to the summary conviction offences. You will know that Ms. Jillian Rogin testified here earlier. She noted that by increasing the scope of hybrid offences, combined with raising the maximum penalty for summary conviction offences, the Crown attorneys would be electing a lot more summary conviction charges for things that are currently indictable, more serious offences.

Although I totally understand the concerns about under-represented people not having any kind of legal help, does it concern you at all that we might be visiting rather inexperienced people on now often much more serious offences?

● (2040)

Ms. Marion Overholt: We can look at the experience in Ontario. If there's an indication that the Crown attorney is seeking a jail term, when that information becomes known there's an opportunity to apply to Legal Aid Ontario for a certificate. The client could then obtain representation from a practising lawyer. That would be the protection there, that if a more serious matter was now proceeding by summary conviction and there was an indication of a jail term being sought, then there would be that opportunity to seek a certificate from Legal Aid Ontario.

Mr. Murray Rankin: You'd obviously want that process to be continued, no matter what.

Ms. Marion Overholt: Yes. Part of the difficulty, as Mr. Topp said, is that we have seen changes over time in terms of when a certificate would be issued and when it would not. Behind our concern about the effectiveness of the criminal justice system is the availability of adequate funding for legal aid, which is really critical to that piece.

Mr. Murray Rankin: That goes to the question that I was going to follow up with. We have what we call the “gap” population, those who often don't qualify for legal aid but are too poor to pay for lawyers. That's the so-called gap population.

Ms. Marion Overholt: Absolutely.

Mr. Murray Rankin: I don't know what you would recommend we do for those people.

Ms. Marion Overholt: Part of what's happening in Ontario is that we're seeing, over a 10-year period, an increase in the financial eligibility of Legal Aid Ontario, recognizing that the income cut-offs are so low that we do have the gap. As that system is addressed and those income levels are increased, more people would qualify, but it is dependent on the continued adequate funding of legal aid to address those issues.

Mr. Murray Rankin: The second point you made, which was brought to our attention earlier today, was about the impact of what we're doing here on the immigration system. You made, I think, an excellent point that we may want to consider, if we have the jurisdiction to do it: making a consequential amendment to the Immigration and Refugee Protection Act. If you're eligible for a penalty of over six months in prison, that could render you inadmissible. That may not have been what the Government of Canada intended either in these circumstances.

Do I understand that your second point was that we ought to consider seeking an amendment to IRPA to address that?

Ms. Marion Overholt: Yes, because I think that when you look at that provision, it's talking about serious criminality. Just by changing the definition now of summary conviction, you are increasing the possibility that far more people who have been convicted of lesser offences and who receive a sentence of over six months are now considered to be an issue of serious criminality. That doesn't seem to be the intention of that section of the immigration act. They were looking at protection, really, and addressing people's ability to seek residency. That change needs to be implemented in the immigration act.

Mr. Murray Rankin: Thank you very much.

Do I have a minute or am I done?

The Chair: You have exactly one minute left.

Mr. Murray Rankin: Mr. Muise, thank you for your testimony. Please boil down what you are actually recommending the committee do with respect to breach of the LTSO. What is your bottom line?

Mr. John Muise: Take it out of the list of hybridized offences. Subsection 753.3(1), or whatever it is—take that one out of the list of offences.

Mr. Murray Rankin: It should not be hybridized, period.

Mr. John Muise: Exactly.

Mr. Murray Rankin: It's too important. It's for very serious things. It should be left there. It should not be subject to hybridization.

● (2045)

Mr. John Muise: Correct. It should not force a Crown attorney to make the kind of decision that he or she might have to make. Do not include it in that long list.

Mr. Murray Rankin: I wanted to be clear. Thank you.

The Chair: Thank you very much.

Mr. Ehsassi, go ahead.

Mr. Ali Ehsassi: Thank you, Mr. Chair.

I'll keep it short, given that it is getting late in the evening.

My first question is for Ms. Overholt, to follow up on the question Mr. Rankin was asking.

We heard from the Law Society of Ontario yesterday, which also had serious reservations about section 802.1. Most people might think that the Law Society objected because its mandate is to maintain its independence. As I understand it, you have a very different perspective on this issue. You're concerned about access to justice.

I'll use the expression Mr. Topp used, that there are little boxes that people fall outside of. Who are the people coming to your legal clinic? Are they mostly people who don't qualify for legal aid, as Mr. Rankin suggested? Who is the bulk of the clientele that comes to your clinic, for whom students do amazing work?

Ms. Marion Overholt: In terms of our criminal law, it is clients who are charged with summary conviction offences where the Crown is not seeking a jail term. They would not be eligible for a certificate. We're able to represent those clients and act on their behalf.

Mr. Ali Ehsassi: Thank you.

Would you like to add anything to that, Mr. Topp, given that you also work with students?

Mr. Daniel Topp: I agree.

Mr. Ali Ehsassi: The second question is for Mr. Muise. Given your area of expertise and the nature of the clientele that you deal with, did you have any comments on the reverse onus provisions in this bill? Would they impact things?

Mr. John Muise: I requested to come to the committee. I wasn't contacted by the sponsor of the bill or by the Liberal Party. Normally, when that happens you'll get contacted. I write letters to the justice minister; I don't get responses. I didn't come here to go through the bill and say, "Hey, what do you think about this?"

There are things in the bill that are good. I came here to point out my objections, so that's what I've done.

Mr. Ali Ehsassi: Fair enough. Thank you so much.

That's it for me.

The Chair: Thank you to this panel of witnesses. We very much appreciate your joining us today.

Ms. Overholt, I know it's always difficult to appear by video conference because you can't see everyone's face, but it's a pleasure having you. It's not exactly like being in the room, but technologically it's as close as we can get.

Mr. Muise and Mr. Topp, thank you so much.

Colleagues, we have an in camera session. I'm going to suspend so that we can prepare the room for in camera. We're going to try to start in about five minutes, so please stick around.

[*Proceedings continue in camera*]