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Chair

Mr. Anthony Housefather

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I call the meeting to order. Good afternoon, everyone. It is a great pleasure to welcome you all here as the justice and human rights committee continues its study of Bill C-75.

Today we have an incredible group of witnesses. For our first panel, I am very pleased to welcome the Canadian Bar Association, represented by Tony Paisana, the L and LR coordinator.

Welcome. You'll have to tell me what L and LR stands for.

Mr. Tony Paisana (L & LR Coordinator, Canadian Bar Association): Law reform and.... I can't even remember.

The Chair: Law and law reform...?

Mr. Tony Paisana: It's legislation and law reform coordinator.

The Chair: Fantastic.

Ms. Kathryn Pentz is the vice-chair.

We also have Mr. Michael Johnston, barrister-at-law.

Welcome.

Mr. Michael Johnston (Barrister-at-Law, As an Individual): Thank you so much.

Good afternoon, everyone.

The Chair: As you all know, each group will have approximately eight to 10 minutes, but I won't cut you off until you reach 11 minutes.

The Canadian Bar Association, you're up.

Mr. Tony Paisana: Thank you for the invitation to present the Canadian Bar Association's views on Bill C-75. The CBA is the national association of 36,000 lawyers, students, notaries and academics. An important aspect of our mandate is seeking improvements in the law and the administration of justice. It's that aspect of our mandate that brings us to you today.

Our section's membership represents a balance of Crown and defence lawyers from all parts of the country. Personally, I predominantly practise in criminal defence in Vancouver. I have become particularly interested in issues affecting court delays after acting as counsel for Barrett Jordan at the Supreme Court of Canada. I am joined by Kathryn Pentz, a chief Crown attorney from Nova Scotia who also acts as vice-chair of the criminal justice section in our organization.

We have provided the committee with an executive summary of our comprehensive 40-page submission. It can be found by clicking on the hyperlink included in our executive summary. I commend this larger document to you. Its thorough analysis of the 300-plus pages in the bill could only be briefly summarized in the 10 pages of the executive summary. This larger document includes detailed references to source material, statistics and explanations for our 17 recommendations.

My opening statement will focus on two overall perspectives that have informed aspects of our position on Bill C-75. First, we say that evidence-based reforms are far preferable to hurried, or what some may even characterize as knee-jerk, criminal law policy. Second, omnibus bills like Bill C-75 hinder the ability of important bodies like this one to investigate and study each proposal. They also negatively impact the public's ability to understand and participate in this important debate.

Let me begin with evidence-based reforms. For any practitioner or experienced committee member, it becomes fairly clear fairly quickly, I would suggest, when a proposed amendment is evidence-based as opposed to hurried in response to a public outcry. As you will see from our submissions, we applaud the government for making meaningful reforms to several areas, including in particular the bail process and the administration of justice offences regime. These reforms are connected to empirical study, they are consistent with recent case law, and they are logical.

Other proposed reforms, however, such as nearly abolishing the preliminary inquiry and introducing police evidence by way of affidavit, are very different. They are different and largely indefensible because they are not evidence-based, they are inconsistent with case law, and they lack internal logic, in our respectful view. For example, watching the testimony of officials earlier this week, it struck me as rather remarkable that no meaningful data could be offered to justify the curtailing of preliminary inquiries. Similarly, no study or evidence could be cited to explain why or how the introduction of what has been suggested to be routine police evidence is causing delays currently. These sorts of reactions to Jordan, with respect, do not pass the smell test, and quite rightly have been criticized by various stakeholders who have come before you.

The second general point I will address concerns the omnibus nature of Bill C-75. As we did with the previous government, the CBA is critical of this government's use of omnibus legislation. The bill is quite large. In our brief we address no less than 14 different areas of the system affected by this bill. There are substantive and procedural changes to various topics, ranging from abolishing peremptory challenges—a subject that on its own is so important that you might expect a bill devoted to it alone—to simple changes related to technology in the courtroom. Some reforms are front and centre. Others are buried in the bill, such as the coming into force of a highly problematic rebuttable presumption in human trafficking cases.

The other problem we've identified with omnibus legislation is that it does not allow for incremental implementation and change, something that might be very useful in trying to reform court delays without unduly eroding protections afforded to the accused.

There are indeed great reforms in this bill, which, if correlated with ongoing efforts to resolve delay, may well alleviate the pressure on the system without having to cast aside important tools that have proven their worth over time and that, if cast aside, will only lead to further and new charter challenges and pretrial applications—in other words, more delay. There are smart, focused reforms available to address delay that do not require the wholesale removal of procedural protections.

● (1535)

We offer two such suggestions here in our submissions on Bill C-75 related to elections in murder cases and electronic appearances for non-contentious hearings.

We are happy to address other proposals the CBA has offered, most recently on the Senate study on delay, and we have brought with us our brochure or pamphlet of the top 10 ways to reduce delay that was offered to that committee. These included proposals related to reforming sentencing law, suggestions regarding whether Crown approval standards should be implemented nationwide and other practical solutions that can address the problem at hand.

With that general introduction, I now turn to my colleague to address some more specific concerns that we have identified with respect to Bill C-75.

Ms. Kathryn Pentz (Vice-Chair, Canadian Bar Association): Thank you.

As my colleague mentioned, we've made 17 detailed recommendations. Some are suggestions to slightly improve existing proposals and others reflect our more serious concerns. I'd like to focus my comments on two areas: the curtailment of preliminaries as well as the admission of what is called “routine police evidence”.

The restriction on preliminaries is said to be justified as a means to achieve court efficiencies, yet research has shown that at most 2% of all court appearances are used for preliminary inquiries. From the perspective of front-line practitioners—both Crowns like myself and defence counsel—we do not see a system overburdened with preliminary inquiries.

Further, the proposed amendment arbitrarily limits preliminary inquiries to those charged with offences carrying a maximum of life imprisonment. We say this is arbitrary because some offences that carry maximum penalty of life, like robbery, for example, are extremely broad and can encompass conduct far less serious than other offences precluded by this criteria, like aggravated assault, some firearms offences and offences related to organized crime. These offences can be far more serious than those that happen to carry a maximum of life imprisonment, particularly those that carry mandatory minimum penalties.

There are those who argue that in the era of full disclosure, preliminary inquiries are unnecessary. But the reality is that even with full disclosure, the viability of a Crown's case is not always readily apparent. What a witness says in a statement to the police or in a meeting with the Crown is not necessarily what that witness will say on the stand. The other reality is that accused often believe that witnesses will not testify, particularly if that witness is a close associate. There's no possibility of any discussion of resolution until the witness takes the stand.

To illustrate the value of preliminary inquiries, I have two examples. Recently in my jurisdiction, a preliminary inquiry was held in a sexual assault case. The victim was the only witness and her evidence was very strong. Defence counsel have now opened discussions for a guilty plea. The preliminary took about an hour and a half and now has a potential of resolving the case, saving a trial in Supreme Court, which would have taken in excess of a week.

In another case, again of sexual assault, the case rested on DNA evidence because the complainant could not identify her assailant. At preliminary inquiry, the defence cross-examination of the forensic evidence exposed some irregularities in the report. The problems did not preclude the admissibility of the report at the preliminary, but could well have been fatal if the Crown had only discovered it at trial. As it was, the Crown was able to correct the deficiencies and was successful in obtaining a conviction.

The preliminary inquiry is an important tool that makes an invaluable contribution to the effective and efficient operation of the criminal justice system. For example, it provides an opportunity to explore pretrial motions like section 276 applications and O'Connor applications that otherwise would be litigated mid-trial, running the risk of delays.

A second major concern we have is that Bill C-75 proposes to allow for routine police evidence to be introduced by way of affidavit or solemn declaration. If an accused wishes to cross-examine the police officer, then an application must be made.

We see this section as fraught with difficulties. The definition of “routine police evidence” is so broad that it would potentially allow the Crown to call virtually any aspect of an officer's testimony by affidavit. If the accused wished to cross-examine, as undoubtedly they would, they would have to give notice of intent. In the absence of an agreement, the court would then be called upon to adjudicate. In this process as well, the defence would necessarily have to expose aspects of its strategy in order to justify calling the witness.

Such a process would expend more court resources than simply calling the officer, and will have the exact opposite effect of what Bill C-75 hopes to achieve. It would add more delay.

There are also some practical problems with this proposal, which we highlight on page 13 of our full submission. Who will draft the affidavit? Will it be the already overburdened Crowns and police officers? How will the trier of fact weigh affidavit evidence that conflicts with viva voce testimony? How will juries be instructed to deal with affidavit evidence?

To conclude, the CBA recognizes the need to streamline aspects of the criminal justice system in response to Jordan. We believe that such reforms must be evidence-based and must be presented in a way that allows for meaningful debate by this committee, practitioners and the public. We offer slight improvements on existing proposals and oppose other proposals altogether.

● (1540)

With respect to some non-delay-related amendments in the bill, such as the jury selection process, we encourage further study.

Thank you for the opportunity to present. We will be happy to respond to any questions.

The Chair: Thank you so much.

Mr. Johnston.

Mr. Michael Johnston: My name is Michael Johnston. I am a citizen and a barrister-at-law and, as often as my clients' cases and causes permit, I am a jury lawyer.

Before speaking about Bill C-75 and jury selection, I did want to take a moment to thank you for extending to me this incredible democratic opportunity. Not every country gives its citizens a voice in the legislative process. Not every political system is prepared to hear evidence that may call into question the wisdom of a proposed course of legislative action. Providing citizens with a voice and providing citizens an opportunity to be meaningfully involved in acts of government bespeaks a vibrant democracy.

In spirit, Bill C-75 seeks to give citizens more of a voice. Bill C-75 seeks to put more citizens in the jury box, to have more citizens involved. Insofar as that spirit is in Bill C-75, it's to be acknowledged and celebrated. However, it takes more than good intentions to make good legislation. I think we all know that there's a saying about where good intentions alone might sometimes take you.

Bill C-75's measures with respect to jury selection seem a bit perfunctory. They require, in my respectful submission, greater deliberation and calibration to achieve the stated objective, and most importantly, in some cases outright elimination, because if you're going to do something, you must have evidence that there's a problem and have evidence that this is going to achieve the solution.

Trial by jury needs to be better understood in terms of how the provinces and the federal government interplay to achieve a representative jury role. There needs to be a better understanding of how challenge for cause informs and works with peremptory challenges.

Ultimately, trial by jury isn't something that just happened overnight. In many ways, trial by jury started before the Norman Conquest, with trial by compurgation. Over the last thousand years, trial procedure has slowly evolved through trial and error. The provisions that have persisted over time, I would suggest to you, aren't there just as historical vestiges, but stand the testament of time.

Bill C-75 with respect to jury selection comes along 48 days after the government's very public declaration of disagreement with a verdict. Forty-eight days to study provisions and otherwise come up with solutions, from my most respectful perspective, simply isn't enough time.

As a result, in my respectful submission, much of what Bill C-75 proposes in terms of jury selection is a legislative rush to judgment, and while the bill lacks a rational connection between its noble objectives and its actual measures, there nevertheless are some things that can be advanced here today, in my most humble opinion.

We know that there is unfortunately a great problem and a tragic problem of overrepresentation of aboriginal people in our criminal justice system. Correspondingly, there is under-representation in the jury boxes. What is the correlation there? It is criminal records. Criminal records are used to exclude tax-paying citizens, citizens who have a right to vote in federal and provincial elections. Criminal records that don't disqualify them from those civic responsibilities and duties do disqualify them from sitting on a jury. Up to 3.8 million Canadians have a criminal record. Criminal records are used both by the provinces and by the federal government to exclude up to 10% of the population.

Now, if Bill C-75 wants to rid itself of discrimination in the jury selection process, this is the lowest-hanging legislative fruit. Get rid of criminal records as a vector for excluding citizens, and if you want to exclude citizens because you think they're biased, produce the evidence. We have provisions already in place to deal with that under paragraph 638(1)(b) of the challenge for cause provisions.

That being said, Bill C-75 is noble in its spirit. It already contemplates modifying paragraph 638(1)(c) to narrow the exception. It wants people who have gone to jail but who have served only one year of jail to be eligible for jury duty, thus changing it, obviously, from the one year that it currently is to two years.

Parliament wants people with criminal records to be involved. It wants to give these people a voice, but remember what I said about this interplay between the provinces and the federal government. Unfortunately, Parliament's intention to have people with a criminal record who have served one year in an institution, for example, is going to be frustrated by the fact that almost every province excludes people with a criminal record, for much lower reasons.

● (1545)

In Ontario, if you've been convicted of an offence that was prosecutable by indictment, that leads to automatic exclusion. Those are easy areas for the government to come into and create a basis whereby it says that across the country you can only be excluded for this reason.

Justice Iacobucci, in his report, actually appreciated the interplay between the two levels of government. He made a recommendation that I submit you can adopt and take one small step further. I'm suggesting that section 626 of the Criminal Code say that nobody in Canada—or no citizen—is subject to exclusion from jury duty merely because of a criminal record, or simply say that the criminal record exclusion should parallel that of the federal government. They did that with respect to provinces that were excluding spouses of doctors or other people who were otherwise ineligible.

I appreciate that I am almost at the end of my time. I have two other areas that I want to briefly address. Most importantly, I want to speak about challenge for cause in section 640 of the Criminal Code. This is a small provision that has otherwise been tucked away in this omnibus provision, and perhaps not many people have even spoken about it, but this is a criminal law provision that has existed almost in its exact form since 1892. Jurors who are either unsworn or sworn have been entrusted to decide if a challenge for cause is true.

This is also important in terms of giving citizens a voice and encouraging citizen involvement. Jurors pick themselves. When they ultimately determine that a juror can sit on a jury, the jury that ends up sitting is a reflection of the choices of the litigants and the jurors themselves. This piece of legislation proposes to have judges completely overhaul that situation and be the sole people to make that determination. There's no evidence that there was ever a problem with this challenge for cause procedure. There's no evidence that this is going to actually provide any form of meaningful solution or that it will even expedite matters at all.

In my most respectful submission, there is no good reason to interfere with the challenge for cause procedures. They fulfill a very important role in terms of ensuring for a defendant—for whom the right to trial by jury exists—that the body is an independent, impartial and representative one. I would most respectfully submit that this idea to change the challenge for cause procedures is totally unsubstantiated and without merit. It should be eliminated unless there's some reason offered in terms of continuing on with section 640 being modified.

Finally, l want to say something about peremptory challenges. As a jury lawyer, I'm somebody who is often in a situation where I'm facing unrepresentative jury pools or jury panels. There are many situations. Most recently, I ran a four-week judge and jury trial where my client was an Ethiopian Muslim, and his co-accused was a Muslim. There were not many blacks or Muslims on Ottawa's jury panel, I assure you. We had to exercise, almost to the full extent of our abilities, the challenge for cause and the peremptory challenges in order to get the 12th juror, who was the only visibly racialized juror.

I say that because peremptory challenges are important to protect the rights of the accused. Often what seems to be lost in all of this conversation is that trial by jury is a benefit that exists for the accused person. There are two reports that have been cited by the ministry of the Attorney General, when this legislation was tabled, seeking to justify this legislation. As a lawyer, however, I always like to look at the actual source. I commend to you to look at the Manitoba inquiry report, which is being cited as the basis for this removal.

In 1991, it was suggested that these peremptory challenges should be eradicated because of the discrimination that they allowed. At the time, however, it also made an additional recommendation. The additional recommendation was to change the way in which juries are selected so that there could be some greater questioning of potential jurors. You can't just nitpick, and I respectfully ask this committee to consider that.

If you are going to go so far as eliminating peremptory challenges, I would say that Justice Iacobucci, when he studied this in 2013, came to a non-partisan, determined and decided conclusion that it was good to keep them but to provide some oversight by way of something akin to an American-style Batson challenge.

I'm sure I've exceeded my time at this point, but I'm happy to answer any and all questions with respect to jury selection or anything else.

I thank you kindly.

● (1550)

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

We're going to move to questions.

Mr. MacKenzie.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Mr. Chair.

Thank you to the panel for being here today. I found all of your opening remarks remarkable because they hit the nail on the head for most of what we've been hearing during the last few days.

Mr. Johnston, you mentioned one issue, one trial that turned out to be controversial perhaps because of the jury pool. We also recognize that it was not a long time ago. To make the massive changes that we're trying to make, you're right that it does take a whole lot more research and looking into fixing the problem rather than addressing it in a quick manner.

I think that's where your comments are coming from. Would I be right in that? You believe it needs to be changed, but we need to spend some time to do it.

Mr. Michael Johnston: We absolutely need to calibrate the system at all times. A system such as our trial-by-jury system requires modernization. It requires analysis to ensure that it's achieving what it's supposed to achieve. But of course we need a better understanding of it. It has been since 1980 when the Law Reform Commission made a comprehensive study of this.

We need a non-partisan understanding of trial-by-jury because, while trial-by-jury exists in our democracy, it isn't informed by democratic decisions. It's not subject to, let say, public opinion. In fact, it's supposed to guard against the exact opposite. Therefore, I very much agree with you. We need a non-partisan understanding of the system before we start pulling planks away.

Mr. Dave MacKenzie: Sometimes common sense seems to be lacking and it's more important that we do things in a hurry in this place. I think you're absolutely right. We need to take our time and do it right as opposed to making wholesale changes in a hurry.

Mr. Michael Johnston: I agree, sir.

Mr. Dave MacKenzie: As to the other area that I'm interested in, Ms. Pentz, I think you made mention of the preliminary inquiries.

I spent a little time in law enforcement and preliminary hearings are not common. They're very few. I don't think we've had anybody give us any statistics on it, but I would suggest that far more often a preliminary inquiry results in a trial not taking place. There's an adjudication by the Crown and the defence that takes place before it gets to the court and it's frequently resolved in the manner in which you've indicated. One side or the other will say, "We needn't go to trial."

Would that be your experience, or am I alone in that?

Ms. Kathryn Pentz: No, that certainly has been our experience.

As I mentioned, the statistic that we could find said it was less than 2% of court time. I gave an example of a case where the witness was very strong and the case is now in resolution, but there have certainly been cases where the Crown has put a key witness on the stand and that witness has just been so vague and equivocal that it's quite apparent we have no realistic prospect of conviction. Just by looking at the statement we've received from the police, or even meeting with the witness, that's not always evident. Putting the witness on the stand and finding out what they're going to say can be key to resolving matters, whether it's withdrawing a charge or having a guilty plea.

● (1555)

Mr. Dave MacKenzie: Sometimes it's the reverse. You'll end up with a very strong witness where they may not have appeared to be so strong on paper.

Ms. Kathryn Pentz: In some cases, yes, sir.

Mr. Tony Paisana: If I can just add one thing to that discussion, on page 14 of our main submission, we do cite a study that was conducted of legal aid cases in Manitoba. It showed about a 75% clearance rate after a preliminary inquiry.

Mr. Dave MacKenzie: Again, just on the ground, I would have said that would be accurate.

My other area is the one about police evidence by affidavit. From my background, I don't honestly see the need to put that into legislation. I've been gone from it for 20 years, but in the past, the Crowns and the defence would sit at pretrial discussions about what both sides wanted to see, so the elimination of police witnesses by that process, where the evidence may or may not be included in this, would be accepted at trial. It may be something very minute, but by putting this in, I think—correct me if I'm wrong—we're putting something in legislation that could very well end up derailing a court hearing and taking far more time than trying to eliminate it by this process.

Would your experience be that Crowns and defence will sit and make those decisions?

Ms. Kathryn Pentz: Yes, sir, exactly, and that saves a great deal of time. As we mentioned in our report, that evidence is now admitted often and regularly by way of admissions. For instance, if it's an officer who had minimal contact with an accused in terms of a statement, the defence will concede you don't have to call that witness, or if it's an officer who peripherally touched or handled an exhibit, you don't need to call that witness. Those admissions are made every day.

In this procedure that's being recommended, defence would then have to make the application. As we say, that's just another step in the proceeding that's going to clog the system.

Mr. Dave MacKenzie: Thank you.

Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Chair, how much time do I have?

The Chair: You have 30 seconds left.

Mr. Dave MacKenzie: Oh, sorry.

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

The Chair: Hopefully we'll have a chance for a short snapper for you at the end.

Go ahead, Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thanks very much.

Thank you all very much for being here. I appreciate your presentations and the briefs that you submitted.

I understand that, from the CBA's point of view, the way this bill deals with administration of justice offences in combatting court delays is well received. Having a diversionary sort of process that administration of justice offences could go through seems like a good idea, and I appreciate your submissions on that.

One thing I'm wondering about, though, is that you recommend a change to that to allow flexibility to the Crown when dealing with situations.... You propose basically that, if there's physical harm to a person, that would not be allowed. Then you talk about emotional harm, and that's not really known, so delete that, or if there's property damage, take that out and just leave it up to the Crown for flexibility.

Am I reading that correctly, that basically what you're saying is, unless the breach is associated with physical harm to a person, you think the Crown should have the ability to put it through diversion? Is that right?

Mr. Tony Paisana: Yes, you're right. We do applaud the government for introducing a measure to divert these sorts of cases. As we cite in our main brief, there are about 78,000 such cases every year. Not all of those are related to bail and failure to appear, but many are.

Essentially the way we see it working with this bill is that there are four disqualifiers: if the breach caused physical harm, emotional harm, property damage, or.... The last one's escaping me now, but in any event—

Mr. Colin Fraser: Economic loss.

Mr. Tony Paisana: Economic loss, yes, thank you. What we propose is eliminating all except the physical harm, because there are other ways you can address those other issues, should they be so significant that they do not warrant this sort of response. We can't lose sight of the fact that this is totally discretionary in the hands of the police or Crown. They're the ones who are going to decide either up front or at some point after the person has been charged whether to afford that person the benefit of diversion. If the emotional harm or the economic loss or property damage is significant, they can opt not to use the diversionary regime.

There may well be cases where those sorts of things are present but are the very types of things that you want to get out of the system. The example we provided in our submission is this: Two friends get into a fight and one is put on a no-contact order and he phones and is sort of drunk and, in an apologetic state, tries to apologize to the person, and this upsets the victim. That's understandable, but those are the sort of low-level administration of justice offences that could very well benefit from being diverted into a system where conditions can be tinkered with.

● (1600)

Mr. Colin Fraser: Right, thanks for that answer.

Ms. Pentz, I'll ask you a question. One of the things we heard dealing with preliminary inquiries is that it takes up very little court time, and I think you put it at 2%. Some other witnesses have said 3% of court time. Isn't the problem the delay that's caused by having to set a hearing and then that hearing not having to proceed, and then having to set a trial date, and it pushes back or stretches out the length of time that a matter goes to trial?

It's not so much the court time, but it's the length of time that it requires to set all these things in place. Oftentimes there are large delays as a result, because the court schedules are so busy. Wouldn't you agree with that?

Ms. Kathryn Pentz: One of the things that we noted in our brief was that there isn't a large.... Although you've quoted the percentage of court time, I believe it was 75% of offences that were eligible for preliminary inquiries did not opt for preliminary inquiries. Certainly, it does sort of push the envelope back, but since the other provisions have been put in place in terms of streamlining preliminary inquiries, there has not been, in our experience, a major issue in terms of the timeline.

We also have to remember that there are other mechanisms that the Crown can use to speed things up. In a worst-case scenario, if we feel there will be timeline problems or if it's being abused, we can certainly prefer a direct indictment. The Crown can admit statements by way of paper copies, and the court can certainly curtail what it considers to be a vexatious cross-examination.

There are certainly cases where preliminary inquiries are set and then they don't go ahead, but those are not what we have seen as the bulk of the cases.

Mr. Colin Fraser: Thank you.

I want to turn now to victim fine surcharges. I appreciate that you support giving discretion back to the judges, which was changed in 2013, making it mandatory for the imposition of victim fine surcharges.

You talk about making a change, though, to the bill, to allow the court discretion to not impose them for administration of justice offences. Why would that be needed if we're going back to giving the judges the discretion to not impose them if they create hardship anyway?

Mr. Tony Paisana: This point is in response to this secondary discretionary feature that's been built into the regime, whereby administration of justice offences are stacking up and creating a large fine. There is specific discretion to reduce the fine in light of that stacking, but there exists no equal mechanism for non-administration of justice offences.

I agree with you that it might be redundant if we expand the discretion generally to everything and get rid of this one specific example, but if you're going to extend this secondary discretionary feature to administration of justice offences, then we see no reason why it should not be expanded to substantive offences that are stacking up in the same way.

The Vice-Chair (Mr. Murray Rankin (Victoria, NDP)): Thank you very much. It's my turn.

I want to say thank you to all three of you for your excellent presentations and your great briefs. I want to, in fact, help drill down on a couple of recommendations that, understandably, you didn't have a chance to get to.

I would first like to say, to the Canadian Bar Association, that page one of your executive summary has quite a succinct summary of where you stand. You say, “other proposals, including those to curtail preliminary inquiries and introduce 'routine police evidence' by way of affidavit, would exacerbate, rather than alleviate, court delays, while simultaneously sacrificing important procedural protections”. I thought that was a very good summary.

In fact, to you, Ms. Pentz, your anecdote about preliminary inquiries in the province of Nova Scotia was precisely what Mr. Star, a defence lawyer in Nova Scotia, said to us yesterday. I thought that was very helpful.

As I said, I would like to talk about things that you didn't have a chance to talk to. The Canadian Bar Association has given us 17 recommendations. I'd like to talk about number 15, in which you recommend that the choking and so-called supermax penalties be deleted from Bill C-75. You say those are, “particularly unnecessary”. I wonder if you could elaborate.

● (1605)

Mr. Tony Paisana: With respect to the choking, what we understand Bill C-75 will accomplish is to create a third route of liability for assault causing bodily harm and/or assault with a weapon—that's the way it's defined—and sexual assault. Instead of proving bodily harm and/or assault with a weapon, those offences would be made out by an act of choking, regardless of whether or not there was bodily harm, or a weapon used. It would be treated in a way akin to the way in which those offences are treated.

We say it's redundant because choking is already a form of assault. If the person has been assaulted by way of choking, they will be convicted of that offence under section 266. That will be deemed an aggravating factor at sentencing, just given the way the assault took place. Therefore, it is redundant to create a whole new offence at a time when we're trying to streamline and simplify the Criminal Code.

The Vice-Chair (Mr. Murray Rankin): Thank you.

Mr. Tony Paisana: With respect to supermax offences, it's a similar problem. Choking someone, domestic violence, and multiple convictions are already considered aggravating factors on sentencing, and will be taken into account on sentencing. There is no need to create a supermax penalty regime.

The Vice-Chair (Mr. Murray Rankin): Do you wish to add to that?

Ms. Kathryn Pentz: In relation to the choking aspect, I would note—it's fairly dated now, from May 2006—that the Uniform Law Conference of Canada also looked at this issue in terms of making choking a distinct offence. They concluded, as we have now, that it's encompassed under section 266. They also noted that it can be encompassed under section 268, aggravated assault, in terms of endangering life, if the choking is extreme.

Their conclusion was the same one we reached: It did not necessarily need to be a separate offence.

The Vice-Chair (Mr. Murray Rankin): I'll get to Mr. Johnston. I would just like to ask one more. Your recommendation 16 is that clause 389, which enacts the rebuttable presumption in human trafficking cases, be deleted from this bill. Why?

Mr. Tony Paisana: We made submissions in 2014, regarding the first incarnation of this, which was Bill C-452. You will see that some parts of that brief are reproduced in our brief here. The rebuttable presumption is vulnerable under paragraph 11(d) and section 7 of the charter, as a violation of the right to be presumed innocent.

We do not think it will be saved under section 1, because there does not exist enough evidence to show that the section 1 test will be fulfilled. If you are habitually in the company of someone who is exploited, it does not necessarily follow that you are responsible for the exploitation. In fact, you may imperil various people who are in the company of people who are exploited but who are not themselves exploited but who happen to be in the area.

We provided an example in our original brief about a worker who was being paid but whose co-worker is not being paid and is being exploited. That person could be at risk of a human trafficking conviction because of this rebuttable presumption.

The Vice-Chair (Mr. Murray Rankin): Thank you.

Mr. Johnston, you were passionate about trying to expand the jury pool and we heard a lot about that yesterday as well, regarding the representativeness issue. Yesterday, we heard a suggestion that health cards are preferable to property rolls because, by definition, those that don't own property wouldn't be brought in. Today, you've suggested that criminal record holders should be added to the list in order to expand the pool, thereby adding 10% of the population, which is quite remarkable. We also heard yesterday that permanent residents ought to be included, as they have a sufficient connection to the community to be included.

Would you agree with those other suggestions?

Mr. Michael Johnston: I would agree with the other suggestions. I know that some people talk, for example, about increasing juror participation by allowing jurors to volunteer, as opposed to mandating them by way of subpoenas or juror notices.

That being said, there are many ways that we could create or encourage greater juror participation and I would adopt all of those.

The Vice-Chair (Mr. Murray Rankin): I only have 30 seconds.

On challenges for cause, section 640, you're very clear. We've had it since 1892. Essentially, you're saying that if it ain't broke, don't fix it. However, we've heard a lot of people, although you're not one of them, who say we ought to agree with the bill and abolish peremptory challenges. Yesterday, Professor Roach said that if we remove peremptory challenges, maybe we need to beef up challenges for cause. If we chose that route, would you agree?

● (1610)

Mr. Michael Johnston: I would not agree because peremptory challenges provide an accused person with the ability to challenge the fairness of what is transpiring. We know that the jury pool and panels are constituted by the provincial governments. They are randomly constituted and they ought to be randomly constituted. The accused has to have some say in who ultimately ends up in the pool. Just by looking at the individuals, there could be any number of reasons why someone can feel it proper to challenge a person peremptorily.

More importantly, there is a residual ability for prejudice to surface during the challenge for cause process. As potential jurors are being challenged and they're being asked if they're racist.... These are situations in which people who may not have been acrimonious to your cause or your opponents cause actually develop that level of prejudice. It would provide an opportunity to use a peremptory challenge in a proper way.

The Vice-Chair (Mr. Murray Rankin): Thank you.

Go ahead, Ms. Khalid.

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

Thank you to the witnesses for coming in today and for your very detailed briefs.

I'd like to ask the Canadian Bar Association a question. You talk in your brief about video conferencing and technology and the amendments to that. The idea behind Bill C-75, in my opinion, is to reduce delays in the court system.

You're recommending two amendments to those provisions. Can you explain your rationale behind that?

Mr. Tony Paisana: Yes. These can be found at page 18 and forward in our brief. We have recommended two changes. One is about the provision that has been put in to suggest that reasons should be offered by the judge to decide not to use technology. We think this is unhelpful because it provides a confusing paradox with the other provision in the bill, which suggests that the presumption should always be in-person attendance.

What does that look like practically? You have an application for someone to appear by teleconference and then there's a suggestion that this might not be appropriate and that we should stick with the presumption of in-person testimony, yet the judge is now required to give reasons to justify that, although that's the presumption. It's a bit confusing and conflicting, so we suggest that you remove that provision, as it appears at various parts requiring reasons to not allow for video conferencing or teleconferencing.

The second suggestion is that these various proposals about video and tech should be limited, generally speaking, to non-contentious hearings. We do not want to unduly erode the right to face one's accuser and to have in-person hearings. This is meant to be a fix for remote communities and communities that would benefit from this sort of thing, where there is no other alternative.

Ms. Iqra Khalid: Mr. Johnston, do you have any comments on the use of technology and video conferencing, as you have experience in running trials by jury and trials in general?

Mr. Michael Johnston: I do, but I'm generally opposed to the use of technology where people want to have trials and have witnesses attend by teleconference or telelink. I'm often in opposition to such a method, because for me a criminal trial is a slow and deliberative process where I believe it's important for jurors, for example, to have a real feeling and appreciation for what a witness is testifying to. I respectfully feel that the ability to assess the witness is just better in person, in the flesh, viva voce, as opposed to by video link.

Perhaps I'm a relic of a bygone era, but it's just my personal preference for witnesses to be there in person.

Ms. Iqra Khalid: That's interesting. Thank you.

I want to touch on CBA's note on intimate partner violence. We've heard evidence before that instead of promoting or really protecting women who are being abused, the reverse onus provision would take them a step back, because they will not be reporting crimes as much.

What is your take on that? I know you've really detailed it out, but could you please speak to that?

● (1615)

Mr. Tony Paisana: With respect to bail, we oppose the reverse onus predominantly for two reasons, but we don't disagree with the evidence you've heard, and there was testimony from earlier witnesses about the fact that this may encourage under-reporting, which is a troubling feature that we obviously take issue with.

Our primary consideration in opposing that amendment is that it's redundant, because the other amendment that Bill C-75 brings in is a mandatory consideration by the justice of whether or not that person has a record for this sort of thing already, and whether or not the allegation involves intimate partner violence. What that practically means is that the judge will be forced to turn his or her mind to those issues already, without the need for a reverse onus to highlight the particular importance of intimate partner violence.

We also say it's constitutionally vulnerable, because the cases that have upheld reverse onus provisions in bail have focused on different contexts, like drug trafficking, which encourages the accused—if they are legitimate drug traffickers—to violate the terms of their bail because it's very lucrative and sophisticated and hard to get out of immediately. That's not to say there aren't other considerations in the domestic violence context, but it's not an even fit in terms of trying to rely on those cases to justify this reverse onus.

Ms. Iqra Khalid: Thank you.

Under-reporting is really a big issue in the context of gender-based violence, and it's something that's really difficult to tackle. Do you have any proposals within this framework that would encourage more support for women in our justice system?

Mr. Tony Paisana: From my personal perspective, money allocated to victim support services is never wasted. As much as we become a bit desensitized to acting in criminal courts and cross-examining and seeing these tragic stories, we can't lose sight of the fact that victims are often going through this process for the first time. They need that support, and the easier it is for them to get that support, the more people over time will be encouraged to come forward.

We are obviously worried about the presumption of innocence and measures that infringe upon that, but there's lots of room for improvement outside the courtroom that won't require those sorts of compromises. That's where the focus should be, and the criminal court should not be the answer to all of society's ills, in my respectful view.

Ms. Iqra Khalid: Thank you.

The Chair: However, because we have the Canadian Bar Association and it's not yet 4:30 p.m., we have a chance to do some very short snapper questions for the next 10 minutes. Who on the committee has a short question they'd like to ask?

I see Mr. Nicholson and Mr. Cooper.

Anybody on that side? Mr. Fraser and Mr. McKinnon.

They need to be very short questions. If you have more than one, do them all at once so they can be answered. No longer than two minutes per question, back and forth.

Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Ms. Pentz, you were talking about preliminary inquiries, and you gave the example of a case where it was a sexual assault and the preliminary inquiry actually speeded up its resolution.

I have spoken with people who have gone through this process. Sometimes these victims of sexual assault and abuse find that having to go through the preliminary inquiry and then the trial makes them feel that they themselves are, in a sense, put on trial twice. This increases their suffering.

Have those people approached you as to how difficult it is?

Ms. Kathryn Pentz: There is certainly that concern, and there are certainly those cases where the victim has come forward and said that they found testifying twice had been stressful for them. In some cases some witnesses find it's almost a rehearsal for the trial and they find it useful.

When a witness is testifying I think it's important for the Crown and for the court to make sure that witness is not abused during their testimony, that the questioning is not abusive, and that they stick to the relevant points. If that is done, then certainly it can make it an easier process for the victim, but there's no denying that testifying on sexual matters is traumatic. The more you do it, certainly, the more difficult it is. There is that concern, but from our perspective it's a "throwing the baby out with the bathwater" type of thing. There are pros. Yes, we can't deny there are those people who come forward—

● (1620)

Hon. Rob Nicholson: Just one subquestion, with respect to getting rid of the peremptory challenges, you think this will hurt, ultimately, indigenous and racialized people. Is that your stand?

Mr. Tony Paisana: It is. It is our view that racialized accused can use the peremptory challenge to create a more representative jury. We appreciate the position that has been taken on the other side of things, but I do want to mention one thing. This debate, quite rightly, has focused on the overrepresentation of indigenous people in the system and under-representation on juries. However, peremptory challenges have a far more practical application in some cases.

The one anecdote I can think of is the example I had in a recent jury selection, where I had an accused who was facing a charge where the defence was going to be reasonable alternative inference, a fairly complicated instruction for a jury, where you have to explain circumstantial evidence and the difference between speculation and inference. I was concerned that jury members who were not that proficient in English would not be able to understand the instruction that well, and that it may harm the truth-seeking function. Even though I had a racialized accused, I was using the peremptory challenge to pick off some people who showed that they did not have a very strong grasp of the English language, even though they were of the same race as my client, because I expected that they would not be able to understand the instruction to the extent that I would hope they would. These sorts of considerations are sometimes being lost in the analysis.

The Chair: Got it.

We'll have Mr. Fraser, Mr. Cooper, an then Mr. McKinnon.

Mr. Colin Fraser: Thanks very much.

Just to the CBA again, I note that in your brief you support the reclassification of offences provisions, but you note as well what appears to be an almost unintended consequence that we've heard in regard to law students and articling clerks appearing in court for summary offence matters, which they're allowed to do right now so long as they have maximum penalties of six months. You make the suggestion that this could be remedied by just amending the section to reflect the new maximum of two years less a day. Do you have any concern with law students and articling clerks taking on cases that have maximum penalties now of two years less one day?

If you do, how do we grapple with that or make a change that perhaps doesn't have that unintended consequence of having, perhaps, inexperienced counsel handling cases that could see somebody going to jail for two years?

Mr. Tony Paisana: I appreciate the concern that you've identified. That being said, almost every summary conviction offence will now have two years less a day, so that number is somewhat misleading in that sense. We've offered a second recommendation in respect to sentencing. I think this is one thing that provincial law societies should be looking at, as opposed to the Criminal Code. This is a thing that can be regulated in terms of what provincial law societies permit articling students to do, what sorts of offences they should be permitted to work on, separate and apart from restrictions in the Criminal Code. I think it might be something that's not necessarily a problem, but I take the point.

I also take the point from a previous witness about the maximum sentence, that if it's used too often there may be collateral consequences. It's something else that we agree with. It should be considered if this is to be passed.

Mr. Colin Fraser: "Collateral consequences" meaning inflationary sentences.

Mr. Tony Paisana: Inflationary sentences, immigration consequences, and U.S. border....

Mr. Colin Fraser: Got it. Okay, thanks.

The Chair: Mr. Cooper.

Mr. Michael Cooper: Thank you.

To the CBA, on page 8 of your brief you note that the reclassification of offences could result in further delays in provincial courts. Could you just elaborate on that point?

Mr. Tony Paisana: Summary conviction offences can only take place in provincial court. Of course, 99% of all criminal cases already take place in provincial court. With the elimination of preliminary inquiries, you can expect more judge-alone trials in provincial court. There's a stacking of problems that may create an overburdened provincial court system. I appreciate that appointments are not in the jurisdiction of this body but we have identified that as a concern, and all the more reason not to tinker with preliminary inquiries, frankly.

The Chair: Thank you very much.

Mr. McKinnon, you have the last question.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): I was going to ask Mr. Fraser's question, but I have a related question to hybridization offences.

This bill classifies more than 115 offences as hybrid offences. Do you think that's an appropriate list? Do you think it should be increased or reduced? What do you think in terms of the process of hybridizing these offences?

Mr. Tony Paisana: We support the hybridization of offences because it offers greater discretion to Crown counsel, and also widens the scope of particular sentences that may be available with certain offences.

The conditional sentence order, in particular, is an important example of that. Conditional sentences are often unavailable for an offence where there has been bodily harm and a 10-year maximum, for example, or where the maximum penalty is 14 years. When you reduce the maximum sentence by way of summary conviction to two years, the CSO becomes available. That could be a very important negotiating tool when speaking to the Crown.

Also, I have heard in my personal experience of Crown counsel not wanting to go the summary route because they feel six months is too low and they don't think it appropriately reflects the seriousness of the offence. We support the hybridization because it provides that flexibility. However, we have recognized the inflationary ceiling problem that might exist and we have recommended a "for greater certainty" clause to make sure that does not happen.

● (1625)

The Chair: I saw Ms. Khalid put up her hand.

Mr. Rankin, we didn't get into your questioning this round. Are you okay?

Mr. Murray Rankin: I'm fine.

The Chair: Ms. Khalid, you have time for one short question.

Ms. Iqra Khalid: Thank you so much, Chair. It is a very short question.

You mentioned also in your brief the vagueness around the term "dating partner" in the context of the definition of "intimate partner". I haven't been able to see if you've provided recommended wording for the definition.

If that's possible, could you please send us some wording?

Ms. Kathryn Pentz: You're quite correct. We didn't recommend any wording. Our concern with it is, what is a dating relationship? If you went out on one date with someone, does that constitute a relationship? If you dated someone 10 years ago, is that a dating relationship?

Our concern was that it doesn't necessarily establish the trust relationship that we feel is integral to a spouse or a common-law. We did not consider alternate wording, but it is certainly something we can discuss.

Ms. Iqra Khalid: Thank you kindly.

The Chair: For clarity, my understanding of your brief is that you propose that we strike the words "dating partner"—

Ms. Kathryn Pentz: Yes.

The Chair: —from the definition. Got it.

Thank you so much for your testimony today. It was very helpful and incredibly appreciated.

I'm going to call a very short recess and ask the members of our next panel to please come up. We're going to want to start, because we have a vote right after.

● (1625)

(Pause)

● (1630)

The Chair: We will bring this meeting back into session.

We are joined by our second panel. By agreement of the witnesses, they're going to go in the following order. We will start with Cheryl Webster, who is a professor from the University of Ottawa. We will then go to Tony Doob, who is professor emeritus at the centre for criminology and socio-legal studies at the University of Toronto. We will finish with Jane Sprott, who is a professor at Ryerson University. Then we'll have questions. Welcome, everyone.

Ms. Webster, the floor is yours.

Dr. Cheryl Webster (Professor, University of Ottawa, As an Individual): Thank you, Chair.

Over the last decade there have been multiple studies conducted on the bail process and pretrial detention. Their conclusions have virtually all been in one direction, that bail is in urgent need of attention. As such, the government should be applauded for proposing legislative reform. Indeed, any attempts to fix our broken bail system are a good thing, and the current legislative proposal targets several of the key concerns. My worry is simply that they address the symptoms rather than the underlying causes of the problem. As such, they are unlikely to fix what might reasonably be seen as a genuine crisis.

In my eyes, here is what I think has happened. Our current state of bail is the product of the adoption over the last 20 or 30 years of a risk-averse mentality, which has slowly permeated the entire bail system, ultimately redefining the very notion of what it is that we are trying to accomplish.

In 1971, bail was envisioned as a summary procedure to expeditiously determine the liberty of the accused until trial and ensure, above all, his or her attendance in court. Within our current risk society we have for all intents and purposes abandoned this primary grounds of detention and elevated the secondary grounds as the principal focus in determining whether an accused should be released. The principal role of the bail process has become one of limiting to the greatest extent possible any risk to public safety that accused persons might represent.

However, given that we have yet to perfect a means of distinguishing with complete reliability those who will in fact offend once released on bail, our heightened concern with risk management has translated in practice into a strong reluctance on the part of all criminal justice players to exercise discretion to release.

Release decisions are now conceptualized in terms of being either right, the accused doesn't commit a criminal offence while on release, or wrong, the accused commits a crime while in the community, rather than simply the best decision made at the time with the information available. Decisions about release are now seen as a product of a particular individual who, in the case of a tragic incident, will be personally held responsible.

Not surprisingly, the principal decision-makers in the bail process have chosen to play it safe by either opposing bail, passing along the decision to someone else, or eventually releasing the accused, albeit with multiple constraints.

At the front line, police are laying a greater number of charges despite declining overall and violent crime rates. Further, they are detaining a greater number of cases for a bail hearing. Once in court, the bail process is taking longer, with a greater number of adjournments, a greater degree of case processing, and ultimately requiring a greater number of days spent in remand awaiting a determination of bail.

Of those eventually granted bail, more onerous forms of release are being preferred and a greater number of conditions are being imposed, often with the need of a surety. Not surprisingly, a greater number of accused persons are violating bail conditions, predominantly committing acts that would ordinarily constitute non-criminal behaviour rather than new substantive offences, and the police are laying a greater number of administration of justice charges in response.

With reverse onus provisions for accused persons who have violated a court order while on bail, the likelihood of being granted bail a second time is significantly reduced. Even in those rarer cases in which the accused is re-released on bail, additional and even more onerous conditions are often imposed, further enhancing the likelihood of another return to bail court on a breach. With the accumulation of an even lengthier criminal record, the likelihood of being granted bail for a future offence, even for a minor crime, is further reduced. We've effectively enhanced the proverbial revolving door of the criminal justice system, this time with individuals who began the process still presumed innocent.

Don't misunderstand my position. I'm not suggesting that no one should be detained until trial. On the contrary, detention is in many cases the appropriate response in order to ensure that an accused will appear in court or provide public or individual safety.

● (1635)

My point is that we're presently defaulting to detention, or at least delayed release, rather than ensuring that we're putting the right people in prison while quickly releasing those for whom we simply worry about reinvolvement without any substantial basis, or those whose risk will not substantially affect public safety. In brief, we've lost the correct balance between the rights of still-innocent people and the rights of the community at large. The cost of our current risk-averse practices are not trivial. Fiscally, the enormous financial costs of operating an increasing number of bail courts rival only those of housing all of these accused in pretrial detention for longer periods of time.

Institutionally, the effective management of this population has become a serious challenge for remand centres, particularly with regard to prison overcrowding and the corresponding risk of prison disturbances. Administratively, their increasing numbers and lengthy processing times have significantly contributed to widespread court delay issues. For the individuals accused, even short periods in remand have devastating effects, limiting their ability to defend themselves, maintain employment, provide for family dependents, etc. Morally, a greater number of people being held in custody before rather than after being found guilty is clearly problematic.

Even in terms of public safety it's—ironically—difficult to argue that we're better protected. Violent crime has been declining since the early 1990s. A non-trivial proportion of accused sent to bail court have committed minor, non-violent offences or have simply breached a bail condition for non-criminal behaviour. Further, most research shows that federal offenders on conditional release are very unlikely to commit new offences, much less violent offences. There is no reason to believe that those released on bail would be any different.

In terms of remedies, solutions will need to be transformational. Our current bail system is a result of a particular mentality, driven largely by a climate of risk aversion and risk management. The problems are both endemic and systemic in nature. In fact, they are feeding off of each other in what amounts to a vicious circle. What is needed is an approach that will break this feedback model by challenging the underlying mentality. Here lie my concerns about the proposed legislation. In my mind, they can be loosely characterized as tinkering with the current bail system, and are synonymous with other recent and even large-scale efforts to reduce the remand population.

These initiatives have shown some success, but the magnitude of improvement has been small and, in some cases, short-lived. To bring about systemic change, a different mindset is needed that will force all key players to reconceptualize bail as it was originally intended.

Let me use the legislative proposal to expand police discretion as an example. I applaud that attempt to reduce the number of cases detained by police. In Ontario, almost half of all criminal cases start in bail court. Notably, only 30% of them have any violent charges. This is a serious problem, and any reduction in the strain on bail court would be positive. The challenge is to change the culture of police decision-making. My concerns are twofold.

First, I'm not convinced that police will regularly use this expanded discretion, given that there continues to be no real attempts to reduce individual or institutional risk if the case goes south. I see little that will encourage, if not force, police to behave differently from the past.

Second, even if police decide to release, I worry that they will impose multiple conditions to minimize their own risk. Given that the conditions at their disposal are very broad and most accused will accept anything to avoid prison, and particularly with no lawyer present to counsel them at this point, I also worry that the latter approach will not always be reflected. With many, potentially very onerous conditions, breaches will still be the norm and the vicious circle continues.

Both police responses strike me as completely understandable within our current risk culture as no one wants to be caught holding the proverbial hot potato. Until we address the cause rather than the symptoms of our broken bail, current legislative changes, at least as they are presently crafted, may simply not be enough.

● (1640)

Thank you.

The Chair: Thank you very much.

Mr. Doob.

Dr. Anthony Doob (Professor Emeritus, Centre for Criminology and Sociolegal Studies, University of Toronto, As an Individual): Thank you very much.

In 1997 there were about 3,800 youths serving custodial sentences in Canada. By 2015 this was down to about 500. There are lessons to be learned from the changes in Canada's youth justice system that have relevance for the areas of Bill C-75 that you've asked us to speak about—namely, bail and the administration of justice charges.

In the mid-1990s, it was broadly accepted that we incarcerated too many youths, but it took us 20 years to get to where we are now. The goal in part was to screen minor cases out of the court system. It meant that the courts and youth corrections could deal more effectively with the more serious cases.

I suggest that one of the goals of the proposed changes in bail and administration of justice charges contained in the bill is to be more selective in the manner in which we deal with cases.

How did we do this with youths? First, there was a broad and growing consensus in this case about what the system should be all about. Second, the consensus was reinforced by legislative changes. Third, the legislative language in youth justice changed from what might be called “aspirational” provisions, where the intent was clear but the decision-maker was not required to change. It shifted toward what might be called “operational” directions, where more firm guidance was given. Fourth, governments reinforced the importance of changes in the legislation by instituting educational processes that ensured that people knew that a real change in approach was required—in other words, that the behaviour on the part of those in the criminal justice system had to change in order to comply with the intent of the change in law.

My concern regarding the proposals in Bill C-75 on bail and administration of justice offences is not that I don't agree with what I believe are its goals. It is that I don't think these goals will be achieved.

As you probably know, we have not been as successful in controlling the use of pretrial detention for youths as we have been with sentencing. The original restrictions in the Youth Criminal Justice Act on the use of pretrial detention were not as directive as the restrictions on the use of sentenced custody. Even though the legislation relating to pretrial detention for youths was improved in 2012, no apparent change in the decision-making process actually occurred. The law changed, but practice did not. In 2003 about 41% of the youths in custodial facilities were in pretrial detention. By 2015 this had increased to 56%.

Let's turn now to the proposed changes in the handling of administration of justice charges and bail. I read the proposed changes to section 16 of the Criminal Code with one question in mind: Will it be necessary for anyone to change what they're currently doing as a result of these changes?

Obviously, there are some sensible principles. It is useful to state clearly that primary consideration should be given to the release of the accused at the earliest reasonable opportunity and so on. But such a statement is not dramatically different from the current provisions. What in this legislation will force or at least strongly encourage police officers, Crowns or judicial officials to change the manner in which they determine what constitutes best practices?

I say this in the context that the police officer is encouraged to place conditions on an accused person that are reasonable to prevent the continuation or repetition of the offence or the commission of any other offence. This would seem to encourage extra conditions that are likely to lead to something discouraged in the legislation—namely, additional administration of justice charges when extra conditions are not followed. At the moment, the arrest and bail laws are complex and do not give clear direction.

My reading of the Supreme Court's decision in Antic was that the justices simply restated, in plain language, what the Criminal Code says. Plain language is good, but subsequent court decisions suggest that it may not be sufficient.

Proposed section 493.2 says that a judge or justice shall give attention to the circumstances of aboriginal accused and other vulnerable or overrepresented accused people. Later, in proposed changes to section 515, restraint is again mentioned. Clearly, the idea is that all people, especially indigenous and other disadvantaged accused, should be beneficiaries of restraint. Why not require that reasons be given for escalating the restrictiveness of release orders beyond a simple undertaking without conditions?

● (1645)

Similarly, if it is deemed necessary to impose conditions or a surety, why not require reasons? For indigenous and other disadvantaged people, why not require those suggesting or imposing the conditions to indicate why such conditions are both necessary and possible for the person to follow? In other words, if you want to focus the decision-maker's mind, say so. Require justifications for restrictions on freedom.

There's another problem, however. The Criminal Code, as amended in Bill C-75, would be giving directly contradictory messages. On the one hand, legislation would state that innocent people should not be imprisoned unless there is good reason to do so. However, at the same time, the list of the so-called “reverse onus” offences is being expanded in the bill.

When the current bail laws were put in place in the early 1970s, there were no reverse onus offences. The expansion of the list since the mid-1970s has been gradual, and I would suggest, without empirical evidence of the need for change. Most, if not all, of the reverse onus offences are ones that you would expect courts to take very seriously anyway. The problem in expanding the list, especially at this point, is that the message is clear. A decision to detain is the preferred and safest choice in the short run for those concerned about risk, notwithstanding sections such as the proposed statements concerning restraint.

These two areas of the Criminal Code—administration of justice charges and bail—clearly need attention. My most important worry about the current set of proposals is that they won't be effective in creating the intended changes.

I'll finish with some statistics that illustrate the importance of this issue.

In Ontario, in the year ending this past June, 46% of the 208,000 cases that were completed in Ontario's provincial courts started their court lives in bail court. As Professor Webster has just pointed out, bail cases are not necessarily all serious cases. In fact, only 31% of these bail cases involved crimes against the person.

Another indication that these cases are not necessarily serious is that 40,000 of these bail cases, or 42% of them, in the end had all charges withdrawn or stayed at or before trial. How serious could these cases have been if all charges are withdrawn or stayed?

I'm not confident the changes in Bill C-75 will make much of a dent in those numbers. I hope I'm wrong.

The Chair: Thank you. That was perfect.

You finished on such a note that I wasn't sure if you were going on to another page or not.

Dr. Anthony Doob: Do you mean that I hope I'm wrong?

The Chair: I thought you were going to say something about hoping to be right.

Professor Sprott.

Dr. Jane Sprott (Professor, Ryerson University, As an Individual): Thank you.

I've been asked here to comment on Bill C-75 and the amendments related to bail and administration of justice offences, or failing to comply. Much of my research over the past decade has been around the Youth Criminal Justice Act and issues around bail and bail release conditions.

With respect to the amendments focused on the YCJA and bail within Bill C-75, the focus appears to be both on conditions placed on youths and on responses when a youth fails to comply with such conditions. Similar to my colleagues here, I think both issues desperately need to be addressed, and I applaud any efforts to try to address these problems.

The research tends to find that there are numerous broad-ranging conditions placed on youths, and many times those conditions appear to be crafted with broad social welfare aims that go far beyond the purpose of release conditions. Girls may be especially likely to be subject to such conditions.

The use of these broad welfare or treatment-based conditions is problematic for a variety of reasons, one of which is that the accused is legally innocent at this stage and very little is known about him or her, so however well intended these broad therapeutically focused conditions are, they're unlikely to achieve their desired goals and can actually do more harm in a variety of ways, one of which is setting the youth up for failing to comply. Not surprisingly, the more conditions placed on a youth and the longer the youth is subject to them, the more likely failing to comply charges will occur.

The thrust of the amendments within the YCJA is in the right direction. Bill C-75 aims to prohibit the imposition of bail conditions as a substitute for mental health or other social welfare measures. Bill C-75 also attempts to remind justices that bail conditions can be imposed only if it's necessary to ensure court attendance or for public safety, or if the condition is reasonable having regard for the circumstances of offending behaviour, or if the young person will reasonably be able to comply with such a condition. Bill C-75 also attempts to address responses to failing to comply with conditions, such that various alternatives to charging have been presented within proposed section 4.1.

This is all in the right direction, but again, similar to what both Professors Webster and Doob have said, I fear this may not achieve much change in practice. Learning from the successes of the YCJA, we see that for change to occur, as Professor Doob has mentioned, there needs to be education and training around the changes, and the changes need to be operational or directive, rather than somewhat vague aspirational goals. For local on-the-ground practices to change, people need to know about the changes and understand the intent of them.

Part of the reason why the YCJA has been so successful in selectively using court and custody was undoubtedly due in part to the fact that it was an entirely new piece of legislation. A new act signalled new practices. In effect, it forced a new mindset. In addition, there was considerable education with considerable training for those administering the law years before the act came into force. This was likely indispensable not only in ensuring broad buy-in for the act. It also likely helped ensure operational support from those on the ground administering the law. The same needs to be done here, or nothing is likely to change.

Moreover, although it's all in the right direction, the amendments are still somewhat vague, with little directive guidance. Again, learning from the success of the YCJA, the greatest successes have been linked to the sections that have the clearest operational directives, rather than aspirational goals. Assuming, for example, that police and Crowns already believe they're engaging in best practices and pursuing charges for failing to comply only when necessary, it's not clear if the proposed alternatives to charging within proposed section 4.1 will be enough to change those current practices, especially if there's little by way of education or training about the changes and the intent of them.

Similar issues arise with respect to the imposition of conditions. It's not clear if the proposed amendments related to the imposition of release conditions will lead to greater restraint. There's actually very little guidance or direction.

● (1650)

In this case the entry point for much of what has been happening with respect to release conditions is through the Criminal Code and the ability to add on any other reasonable conditions as the justice considers desirable. It's not entirely clear how the proposed YCJA amendment—with yet another statement that conditions be reasonable, having regard for offending behaviour—will reduce the number or range of conditions placed on young people. If there is a desire to restrain the imposition of conditions placed on youths, then Bill C-75 should probably directly address that.

Moreover, I share the same concerns as my colleagues with respect to the expanded police discretion. It's a question mark if they use it, but if they do, it may well lead to an increase in the use of conditions, the very thing that at another level there's an attempt to restrain.

I suppose my points are then threefold. First, if there's any hope of changing release conditions there has to be education and training. Do not think that if you pass law everything will necessarily change to fall in line with what Parliament intends. Second, if the desire is for restraint in the number and range of conditions placed on youths, then that should be directly addressed, rather than additional aspirations to be reasonable. If expanded police powers to impose conditions are provided for, they may actually be used. Building in more procedures around responding to “failing to comply” offences seems to me to be focusing a little more on the symptom of the problem rather than the problem itself, and that's the use of conditions.

Finally, as Professor Doob has mentioned, the limits put on bail conditions are much more specific for youths than that for adults. If putting on broad-ranging sometimes intrusive therapeutically based conditions is seen as inappropriate with respect to youths, I question why that's not also the same for adults. If it's important for justices to consider whether a youth can actually comply with a condition that's going to be imposed, why is that not also relevant for adults?

Similar issues exist in the adult system, but the problems are profoundly more difficult since the Criminal Code legislation is far less directive than the YCJA and, indeed, more ambivalent and at times, as Professor Doob has pointed out, contradictory with respect to bail.

There are very valid arguments that, again, following the YCJA example, it may be time to completely rewrite adult bail laws. That may necessitate the change in mindset and practice more so than the continued tinkering with amendments. Perhaps it's time to rethink what we want to accomplish with the use of conditions and engage with the evidence to date on the impact and collateral consequences of these conditions, but more generally you might want to learn from the success of the YCJA, which suggests if you really want to see change you need to be directive and you need to educate those administering the law about the change.

● (1655)

The Chair: Thank you very much.

Mr. Cooper.

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

Thank you to the witnesses.

I'll begin with Professor Doob. Perhaps I didn't hear you correctly. I sort of half heard you. Perhaps I could just get your clarification at the outset on your submission that perhaps written reasons should be provided with respect to the imposition of conditions.

Dr. Anthony Doob: If conditions are being put on—we're in the bail process generally—one of the concerns is that conditions lead to administration of justice charges. When we're putting restrictions on people's freedom of action when they are legally innocent people, I think we should be able to justify them.

Reasons need to be given. I think that this shouldn't be seen as too onerous a requirement on the justice who's doing it because, presumably, the law should require them to know why they're doing it.

My concern, from having sat in on many bail cases, is that it seems as if any good-sounding, therapeutically sensible condition that people can think of is put on the person. Why not have this? Why not have that? They're all good-sounding things. There's the standard, almost stereotypic requirement of saying, “He was charged with an offence at the time that he apparently was drunk, so why don't we put an alcohol prohibition?” We know that's not likely to be very useful. Why doesn't he seek treatment? Why doesn't he do various other kinds of things? I think we need to say restrictions should be minimal. They should be put there for a good reason. If we don't have a good reason, we won't be able to provide it. If we do have a good reason, it's not very onerous for the justice.

● (1700)

Mr. Michael Cooper: Do you not see that with the backlog we already have in our courts, it's going to result in even more of a backlog from a practical standpoint? You cited a large volume of cases that go through bail courts. How is that practical?

Dr. Anthony Doob: It's practical for two reasons. You'll have a witness in the next section who has probably sat in bail courts and done systematic observation of bail courts more than anybody else in this country, but I think that when you do sit in on bail courts, you realize that bail courts are not well run.

I did some work on bail courts a very long time ago, in the 1970s. What was interesting about the bail courts in the 1970s compared to now is that the bail provision was really a summary process. The person would go in. The Crown would indicate why conditions needed to be put on somebody. Those conditions would typically be agreed to. It was typically a single appearance. What we know now is that it is relatively rare for it to be a single appearance.

What we see in the bail process is an elongated process that wasn't contemplated and didn't exist in the 1970s when, essentially, the present bail laws came in. I understand your point, but I think that the problem of congested bail courts is more complicated than just saying that it will be necessary for the justice to justify the reasons.

Mr. Michael Cooper: Speaking more broadly on the issue of administration of justice offences arising from orders issued by bail courts, do any of you have any data as to how much court time is actually consumed by administration of justice offences? This is not necessarily directed to Professor Doob but to anyone on the panel who wishes to answer it and shed some light on it.

Dr. Anthony Doob: I don't think of any of us have data on the actual time.

Mr. Michael Cooper: A lot of these are really tag-alongs, in terms of how they are dealt with.

Dr. Anthony Doob: That's right. I think that's an important thing.

As Professor Webster said, in terms of bringing somebody back who has been released on bail with an administration of justice charge, I think that there is often a substantive charge, so the administration of justice charge is an add-on and probably isn't going to add that much to the process.

I think that the problem is more those cases where the only new offence that's coming in late is an administration of justice charge. I don't know offhand. We did some work on that for the Ontario government, but I just don't remember offhand what the number of those was. It was non-trivial, but I think that you're right to say that most of them would be associated with a substantive charge.

Mr. Michael Cooper: Thank you.

The Chair: Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you very much.

Mr. Doob, thank you for making the law accessible to somebody who didn't go through law school. I really appreciate your briefing, and I wish I could have audited one of your classes, audited some of your work. I really appreciate your comments.

When it comes to LGBTQ people who are overrepresented in the justice system, or indigenous people, or racialized people, in terms of your recommendation of requesting that the bail provisions be both necessary and possible for the person to follow, and your other recommendation of requiring that the reasons be given for any escalation, how would that work practically?

Dr. Anthony Doob: I would go back to the presumption of innocence and that it's the responsibility of the Crown to demonstrate why conditions should be necessary. It's relatively easy to see, for example, that somebody should not contact the person who they apparently victimized. It's easy to say we have a victim and it's important for us to protect that person and, therefore, you have this restriction.

I think the problem happens when those restrictions become very broad. I remember a case in Toronto, this is years ago, where a person was apprehended by the police and their concern was that he was basically a predator against young children. One of the pieces of evidence they had was that he had a map with locations of various schoolyards and playgrounds. The problem was that the restrictions that he had on him was that he shouldn't be within a certain number of metres of the playground or schoolyard. If you look at that and start looking at a city that has a fair number of schools and playgrounds, you see how restrictive those kinds of things are. I think that a justice who addressed him or herself to a condition like that might see the problem.

The other anecdote I'll tell you about is that I've sometimes seen, especially in small town courts, somebody get up and really question the need for particular kinds of conditions on somebody, a member of the family or somebody for whom they were going to be a surety, because they knew that it was going to be very difficult for that person to comply with them.

We have mechanisms to question things, informal mechanisms. Those informal mechanisms don't work in court. I think that the responsibility is that if we're putting conditions on people, we should know why we're doing it. Remember that there is a presumption, it seems to me, as a non-lawyer, that people should be released without conditions.

The starting point in the ladder that the Supreme Court described in Antic is that a person should be released without conditions. Probably most of the time when that happens, that's sufficient. The problem is that we load up the person with conditions and set them up for failure.

● (1705)

Mr. Randy Boissonnault: I think Mr. McKinnon and I feel in esteemed company with you as the non-lawyers on this side of the bench.

Is your issue with the reverse onus provision or the fact that the list is now becoming larger?

Dr. Anthony Doob: It seems to me that the list becomes longer as a concern about a particular problem becomes more salient. If I were aware of data—and I am not aware of any such data—that suggested that it was necessary to be more restrictive on people of a particular kind who are charged with particular kinds of offences because they're less likely to show up for court or they're more likely to commit other kinds of serious offences and so on, I would be more sympathetic.

The list as it has developed is sometimes because of individual cases and sometimes because of a simply broad concern about this being a serious thing, so one of the things we're going to do is we're going to show how serious it is by making a reverse onus offence. It seems to me that we do have to go back to first principles. The bail laws as they came in in the early 1970s were there to change a very serious problem that we had then. There are people who were studying the bail laws before 1971 like Professor Friedland, who has gone back into court and looked at things and said that we need to start again.

I think the three of us can start taking positions that are consistent with that. We've made it complicated. We've given the message that any time a person commits an offence while on bail, it necessarily means that the wrong decision was made. It's easy to say that after the fact, but if you said that in medicine, there would never be an operation carried out on an individual person because sometimes there are terrible consequences that are unforeseen.

What we want to do is correct wrong decisions. We want to address the decision-making process. The outcomes, we have less control of.

● (1710)

Mr. Randy Boissonnault: I have a quick question.

Ms. Sprott, you said we should be looking at training and looking at education. Are you suggesting we legislate that or is it a clear message to us that the funding...and a clear message from Justice has to be that this will be undertaken?

Dr. Jane Sprott: Yes, I would think that it's a message that the funding...and that it has to be undertaken by Justice, very similar to what happened with the Youth Criminal Justice Act. It just seems spectacularly successful in that.

Mr. Randy Boissonnault: Thank you.

The Chair: Thank you.

Mr. Rankin.

Mr. Murray Rankin: This is a really eminent panel. I'm really grateful to all of you for being here. I'm well aware particularly, Dr. Doob, of your eminent career in criminology.

You started, Professor Doob, talking about your experience with the youth justice legislation, and moving it from aspirational to operational. You then said that you agree with the goals of Bill C-75, but you're not sure that it's actually going to change the behaviour. You said that we have to change the behaviour if we're going to make any difference, and then you said in some cases the bill simply restates what the case law is, for example Antic.

How do we do that in a meaningful way? You gave one example of how we could do that when you said that we could require reasons to be given if we're going to use more sureties, more conditions, or more onerous conditions. Isn't it, however, likely that will just amount to a judge checking a form or there will be some standard rote language, like what we have with jury charges and so forth? You check a box, you feel good, but nothing really changes.

I'm just giving you an example of one of your suggestions, and I'd love you to elaborate.

Dr. Anthony Doob: I said when I finished my comments that I hoped I was wrong.

Voices: Oh, oh!

Dr. Anthony Doob: I think the reasons are a good start. It may be an inadequate start, but we're talking about the legislation that's before us now rather than talking about education, large education processes or starting anew. My preferred solution to this would actually be to start over with bail. We've been modifying the bail system since a couple of years after the amendments came in in 1971. One of the advantages of being old is that I can remember that. We started changing that, and I was impressed with the success that we had with the Youth Criminal Justice Act.

The Young Offenders Act before that act had been changed a number of times, most notably in the mid-1990s, to say all the sorts of things that everybody seemed to agree upon. The Conservative, NDP and Liberal members all together seemed to agree on the general principles of what it should be doing. That was changed a number of times before that, most recently in the mid-1990s, and things didn't change very much. I remember when the government announced that it was going to bring in the Youth Criminal Justice Act. My first feeling—and, again, here I was wrong—was that it was not really necessary because what the government wanted to accomplish could be accomplished under the Young Offenders Act. The government of the day went forward with a new act and everybody realized that this was a new game and it was a new set of rules. There was the education that went along with it.

Going back to really answering your question, I think that if we really want to change what is occurring with bail, we would start from scratch. Not today, because we're not going to do it today, but we'd start with a process—and it wouldn't have to be a big royal commission-type process—through which we'd say, "What do we do with these sections of the Criminal Code and how do we accomplish what we want to accomplish?", which would be to detain people who are risky people and to release the rest of them. Let's start from there with the general principles, and let's think about how to do it and come up with something new, and then do a good job of making sure that those in the criminal justice system know about it.

● (1715)

Mr. Murray Rankin: Thank you.

Professor Webster, I'm hoping you don't mind my doing this, because we have the benefit of having you here, but your name was taken in vain yesterday by the Criminal Lawyers' Association—

Dr. Cheryl Webster: Yes.

Mr. Murray Rankin: —regarding some research that you did on preliminary inquiries. In their brief, they referenced it. I'm going to read two sentences that you allegedly wrote and see if you still agree with them.

Voices: Oh, oh!

Mr. Murray Rankin: They said this, quoting you:

> Within this context, it is notable that our data—while somewhat dated—suggest that the preliminary inquiry appears to change the "trajectory" of cases in ways that help to reduce the use of expensive court resources.

Then you go on:

> ...preliminary inquiries do not appear to account for a large portion of the courts' business and, as such, are unlikely to contribute substantially to the problem of court delay.

Are those your words, and do you agree with them still?

Dr. Cheryl Webster: They are my words. I'll skirt the question in this sense: Do I still believe it? Those words were written based on a study that Professor Doob and I did.

Dr. Anthony Doob: In the early 2000s....

Dr. Cheryl Webster: Yes.

It was 15 years ago, if not more. In terms of the data we had at the time, keep in mind that it was a national dataset. It was very complete, with 2.2 million cases and so on, so it did give us some confidence. Our analyses did suggest exactly as you've described. I was just thinking about the first one, about changing the trajectory of cases. We saw, for example, that in nine of the 11 jurisdictions for which we had data, cases with a preliminary inquiry were resolved in provincial court, avoiding that need to proceed to superior court, which we know to be more costly, more resource-intensive, etc. They were being rerouted through either a discharge, a guilty plea, or a re-election back to provincial court.

We also found that in two of the four jurisdictions for which we had data, there was a non-trivial number of cases resulting in at least one of the charges in the case being dismissed following a preliminary inquiry, again suggesting that it still has a weeding-out process, weeding out the weak cases.

In terms of the second statement, which was about cost, obviously the preliminary inquiry has some cost in terms of time and court appearances. The prior speaker indicated that very few cases take advantage of the preliminary inquiry. It is used very rarely. It's hard to imagine how it would be very costly in terms of appearances—

Mr. Murray Rankin: It's designed to deal with the Jordan principle and court delay. Your conclusion was that it's unlikely to contribute substantially to the problem of court delay.

Dr. Cheryl Webster: Yes.

Mr. Murray Rankin: You looked at 2.2 million. That's a large study.

Dr. Cheryl Webster: Absolutely.

Mr. Murray Rankin: I acknowledge that it was earlier. That's why I wanted to take the opportunity to check it out with you today.

The Chair: Mr. Rankin has to finance you to refresh the study.

Mr. Murray Rankin: Sure. I have a cheque right here, Mr. Chair.

Voices: Oh, oh!

The Chair: I interrupted you with a little joke only because you're at seven minutes and I have to go to the next questioner.

Ms. Khalid.

Ms. Iqra Khalid: Thank you, Chair.

Thank you to the witnesses. I don't have a lot of legal experience, but I'm finding this study to be very fascinating.

We've heard again and again over the past three years I've been on this committee that our bail system needs reform. As it's outlined right now in Bill C-75, do you think it will address at least some of the challenges faced by our bail system? Will it reduce delays? Will it unclog the system in any way?

Mr. Doob.

Dr. Anthony Doob: No, I really don't think so. You know, raising consciousness about the presumption of release is a good idea. This process does that and so on.

The problem is this. Most of those people who are making decisions in the criminal justice system are making them in good faith, I assume, according to what they think is the best thing to do. I don't think these are people who are doing things for bad reasons or who have any kind of bad motive. They have difficult jobs, and they're looking to do the best thing.

I agree with Professor Webster about the risk problem. If I were a young police officer, I think I would tend to push things up and let other people make difficult decisions as well, but I don't see anything that's going to change all of that. People are trying to do the best possible. I mean, obviously they have their own personal concerns in terms of releasing somebody who might commit a serious offence, so why not let somebody further along do it? That's my worry. I think it's very optimistic to think that this will make much of a change.

I go back to the change that was made by the previous government to the Youth Criminal Justice Act bail provisions. I happen to agree with a number of other people that the changes made in 2012 by the previous government to the youth bail laws were an improvement. If I took those two things and said, "Which would I choose?", I would take the ones with the changes put in by the previous government in 2012. Did those make a difference? The answer is no. I mean, that's fairly clear. The data are fairly clear on that. Could they have made a difference if they had been sold in a different way, if people had been educated, if the importance of them had been told? Probably—or maybe—but they didn't.

I'm afraid that these provisions, as part of a huge bill, will get lost in the shuffle. These are not things that people really have to learn. They can continue doing exactly what they did before.

● (1720)

Ms. Iqra Khalid: In what way, then, would we enforce a bail system that would bring all the players onto one page and say, "We all need to get with the program here"? How do you do it?

Dr. Anthony Doob: I don't think you can do it solely by making minor modifications to legislation. If we want to change something, we should take the whole section and say this is what we want to do.

I don't want to make your work more difficult, but there are a number of areas of the criminal justice system that are like this, where we had some pretty good ideas in the beginning and then they either haven't worked out the way we wanted them to or we have changed things in a way that we need to start from scratch. This would be one of them. I would look at this one.

Another one would be conditional release from penitentiaries. I don't think anybody is happy with the way in which conditional release from penitentiaries works. There are lots of problems in that.

You start and look at it; you study it. Again, it doesn't have to be a big process. It can be a focused process on those things.

The three of us have looked at various sorts of things historically. We used to be able to do that. We used to be able to take a problem, study it, come in with a new set of provisions, and with serious agreement across all parties, change things. That would be what we'd want to do in these areas.

Ms. Iqra Khalid: I'll turn a little to the reverse onus provisions and intimate partner violence. We have heard testimony over the past number of days that this would lead to under-reporting of violence by partners who are being abused. Do you agree with that?

Any one of you can comment.

Dr. Anthony Doob: To be honest, I don't think most people involved as victims or as offenders in most offences, maybe even particularly intimate partner violence, know whether something is a reverse onus or not. I don't think it is going to make much difference at the point of reporting or the processing of the case. I also am not confident that it would actually lead to what I presume is the intent of this, which is to detain more people, because Crown attorneys and judicial officials are very aware of the concerns about intimate partner violence. This one seems to me to be a gratuitous change that gives the wrong message.

Maybe it again goes back to the fact that I'm not a lawyer, but I think if I talked to people and said, "Who is the onus on, on release of somebody who is charged with a violent offence against an intimate partner?", people wouldn't have a clue what I was talking about. Then if I explained it, they wouldn't have a clue as to what the answer was.

I have lots of worries. That's not one of them.

● (1725)

Ms. Iqra Khalid: Thank you.

The Chair: Thank you very much.

We're going to have bells ringing in about three minutes, so we'll have a very short question.

Mr. Nicholson.

Hon. Rob Nicholson: What do you mean? I can't understand why you say it sends the wrong message. The message of the reverse onus is to try to protect the victim. I think that's the message of the legislation we're sending out, that we want to better protect this victim of domestic violence.

You say it sends the wrong message out. What is that?

Dr. Anthony Doob: It sends the message that, first of all, we've been lenient in the past on these cases. It suggests that the courts have not taken them seriously. However, more generally, the reverse onus provisions undermine or challenge the presumption of innocence. I'm worried that the belief is that these are people who should be detained simply because they have been charged with an offence involving an intimate partner.

My concern in general with that list is that I don't see it as coming from a careful analysis of the changes to the Criminal Code that are necessary. That's all.

Hon. Rob Nicholson: Okay, thank you.

The Chair: Are there any other short questions?

If not, I want to thank this panel very much. As always, you've been incredibly helpful.

Now we're going to recess, I guess, until right after the vote. If everyone could come back after the vote, that would be amazing.

● (1725)

(Pause)

● (1830)

The Chair: We are reconvening with our third panel of the day.

It gives me great pleasure to welcome to this panel Ms. Nicole Myers, who is a doctor in the Department of Sociology, Queen's University. Welcome.

We also have Ms. Rebecca Bromwich, director, conflict resolution program, Department of Law and Legal Studies at Carleton. Welcome.

From the Society of United Professionals, we have Mr. Garrett Zehr, external relations committee member, and Ms. Kendall Yamagishi, external relations committee member. Welcome to you both.

We also have the pleasure of moving Stephanie Heyens, senior criminal litigator, York Region, Legal Aid Ontario, into this panel from the fourth panel because she has a flight she needs to catch.

We'll hear from all four, we'll do a round of questions, then we'll get to our next panel.

I am sorry that we are late. It couldn't be helped unfortunately, with votes, but we're pleased to finally begin.

Ms. Myers, you're first.

Professor Nicole Myers (Department of Sociology, Queen's University, As an Individual): Thank you, Mr. Chair and fellow committee members, for inviting me to speak to you today about the bail provisions as well as about shifting the process for administration of justice offences.

As we've heard from other people before, but I will reiterate, since 2005 in this country, we have had more people in pretrial detention than in sentenced custody in our provincial and territorial institutions. The rate at which we've held people in pretrial detention has more than tripled in the past 30 years. If we look at the overall proportion of those who are in custody across Canada federally and provincially, 37% of that population is in remand. However, looking only at those in provincial institutions, you'll see that this climbs to almost 59%. That means 59% of people in our provincial jails tonight have not been convicted of a criminal offence.

In an effort to understand this problem, I have been studying the bail system in Canada since 2005. I have spent hundreds of days observing bail court, watching thousands of bail appearances happen. I've done this mostly in Ontario; however, I have collected data across the country. I've also examined completed case files and conducted interviews with people who have gone through the bail process as accused persons, as well as people who have acted as sureties. I've also interviewed members of the defence bar, Crown attorneys, Justices of the Peace, judges, and representatives of community agencies that are involved in the bail process. It's from this position that I offer my comments today on the proposed changes.

I'd like to start by saying that I do agree with the comments that were made by my colleagues in the previous session, Professor Doob, Professor Webster, and Professor Sprott. Today I'm going to focus my comments on three different parts. One is around codifying the principle of restraint and the use of sureties, restraint and imposition of conditions of release, and creating a new process dealing with charges against the administration of justice.

Before I lead into those comments, a bit of background is required. It's important that we recognize that most accused people are ultimately released on bail. Most of the accused people who are released are released with the consent of the Crown attorney, meaning this is not the result of a contested show cause hearing. The Crown is consenting to the accused's release. However, that release is rarely unconditional. In Ontario, 76% of people released on bail require a surety in order to be released. This practice is not consistent across the country. Indeed, Ontario is a bit of an anomaly in the frequency with which it is relied on as a form of release.

Surety requirements can lead to a variety of delays in the bail process as it can take some time to find somebody who is deemed appropriate and is also willing to come to court and to take on this particular role. A surety requirement may be especially problematic for marginalized folks who may not have someone who can come forward in this role. The surety requirement may also delay the bail decision. It takes more appearances and more nights in remand, and may ultimately result in an individual being detained if they have been unable to find an appropriate individual.

Sureties are also generally required to be physically present in court. This is so they can hear the allegations. They may be called up to the stand to give evidence at a bail hearing, but they may also be questioned during a consent release.

I encourage and support the codification of restraint and the ladder principle and encourage a restrained use of sureties. That said, I do have some concerns, not only with the continued use of sureties but also with the lack of structuring around that discretion about making this kind of decision, as well as with other kinds of conditions of release. I'll come back to that in a moment.

With regard to other kinds of conditions of release—not supervision in terms of sureties—we don't really know how well these conditions of release attenuate risk. Some likely do, but we do know that there are some problems with the number of conditions that are routinely imposed. Some of them may be problematic on their face; some may be difficult to comply with, especially for extended periods of time; and some conditions may be setting the accused up to fail.

Each condition of release creates a new criminal offence, increasing the risk that this accused person might be brought back into the bail process. On average in my work, I have seen 7.8 conditions of release imposed on accused people, and that has ranged from as low as one. I have never seen anyone released unconditionally. I've also seen an individual who had 34 separate conditions imposed on their release order. That means 34 new criminal offences for that particular individual.

The most frequently imposed conditions are to be amenable to the rules and discipline of the home, not to possess weapons, to reside with your surety, not to contact the victim or witness, to observe boundaries or no-go zones, to attend treatment or counselling, to abstain from the consumption of drugs or alcohol, and to abide by curfew or house arrest. Not all of these conditions are problematic. Some, however, are.

Even if the conditions are not problematic as an individual, they may be as a collective. We may be packaging a group of conditions that are incredibly onerous, restrictive, and difficult to comply with for an extended period.

● (1835)

In my work, I've seen that a great deal of conditions have no clear or logical connection to the allegations or the grounds on which the accused may otherwise be detained.

We also know that the more conditions that are imposed and the longer an accused is subject to them, the more likely it is that the accused will be charged with failing to comply. An average time of case completion is around four months. This is a long period of time to be subject to a variety of conditions.

I again here support the codification of restraint in the imposition of conditions, but I would suggest that more needs to be done about structuring discretion on how conditions are going to be imposed.

I would suggest that there should be a clear and rational connection between the condition and the allegations or grounds for detention. We should also be thinking about people's reasonable ability to comply with those conditions for the duration that they're subject to them.

To this end, in terms of the use of sureties as well as conditions, I think more needs to be done to guide the discretion of the decision-makers: of the police in deciding to hold someone for a bail hearing; of the Crown and the judicial officer in deciding to release, consent-release, or after a show cause; and about the kinds of conditions that are going to be imposed.

If we're really interested in shifting bail practice, we have to start with the police as the gatekeepers to the court process. More needs to be done to figure out how we can encourage police to exercise their powers of release and also to ensure that any conditions police are imposing are also reasonable.

I'd also suggest that some thresholds should be established that might help guide the decision to release or to impose conditions. For example, we might want to think about this: if it's unlikely that an individual would be sentenced to a term of custody, perhaps that individual should not be detained at the front end of the process.

With regard to the release decision, if possible, we should be making this decision faster, with fewer restrictions placed on the accused.

Again, most people are ultimately released. The faster we make that decision, the less time people will spend in pretrial detention with the negative consequences that come from that. We can also improve the efficiency of the court by not having the same people coming back over and over again before a bail decision is made. I would encourage you to consider structuring the discretion more closely to the proposed amendments to the YCJA and how conditions for youth are going to be considered.

I'll shift lastly to responding to the administration of justice offences. As you've already heard, despite overall declining crime rates and declining violent crime rates, charges against the administration of justice have been steadily increasing over time. Our criminal justice system expends considerable resources in policing, in incarcerating, and in processing these kinds of charges in court.

We have to remember that bail conditions largely criminalize behaviour that outside of the bail order is not a crime. By this I mean, for example, talking to a particular individual, coming home after a certain time, or consuming alcohol.

Sometimes conditions that are imposed are clearly and closely related to concerns around public safety. However, this is not always the case. Restraint in the imposition of conditions is the starting place; it is what is most important if we want to see significant change.

My concern is that what we're doing with the judicial referral hearing is suddenly a parallel process that may end up reproducing the very challenges and problems that we are currently seeing.

As it stands, it's unclear how and when the police are to make the decision to charge somebody versus send that person forward for a hearing, and the circumstances in which a judicial referral hearing cannot be used are so broad as to impact the meaningfulness of this new process.

Here again, I would invite you to look at what's being proposed for youth for those who are then found not guilty or have the charges withdrawn around failing to comply, and look back at what that has meant in terms of their case processing.

The way bail is currently operating is an important problem that must be addressed. What is being proposed is a cautious start, and in some ways it does little more than codify what was there in R. v. Antic. I would say that those are important things—this codification—and I've made a number of recommendations in my brief for areas that I think should be considered to avoid creating the very difficulties that this bill is trying to address.

I think we need to step back, think very carefully about what we are trying to achieve in the bail process, and work towards shifting practices. The problems with bail are not new, and over time a culture has developed in the bail court. This culture is risk-averse; it is a nervousness or reluctance to be the one to make the release decision. Providing additional structure or guidance on how these discretionary decisions are to be made may inspire a shift in current practices and help promote consistency in decision-making. However, clear guidance and education will be required if we're going to shift the way that bail has been being decided in the last number of years.

Thank you.

● (1840)

The Chair: Thank you very much.

Ms. Bromwich is next.

Dr. Rebecca Bromwich (Director, Conflict Resolution Program, Department of Law and Legal Studies, Carleton University, As an Individual): Thank you, Mr. Chair.

Honourable members of this committee, I want to begin not with numbers, but by reading an excerpt from a letter to the editor published in the Moncton Times & Transcript on November 2 of the year 2005. It reads:

> Dear Editor: I'm writing this letter because I believe the community should know. I'm currently at the New Brunswick Youth Centre serving a rather long sentence for petty crimes. When the judge sentenced me, the community went way to go! One less troublemaker on the streets. Do they not realize this place makes youth worse not better? Since I have been here, I've become a more angry person. I have learned way more about how to commit crimes and not get caught…

That letter was written by Ashley Smith, who less than two years later died at Grand Valley Prison by self-strangulation in a death that was later ruled a homicide by the inquest verdict in 2013.

I start with her voice because she can't bring it to you. She was in custody as a youth for primarily administration of justice offences. That's what kept her in prison. That's what kept her in youth facilities, and that's what led, on her 18th birthday, to the transfer application being made to bring her into adult corrections custody, at which time she entered as maximum security.

As you may recall, the index offence that brought her into custody was throwing apples at a postal worker, but through the journey of the correctional process in the youth system, she got over 800 disciplinary infractions that would not necessarily have constituted crimes had she not been in custody. One example is failing to return a hairbrush in a timely fashion. As a result of these 800 disciplinary infractions, she ended up with over 150 convictions for administration of justice-related offences.

I'm here to support in principle provisions that simplify processes in order to prevent the continuation of these kinds of administration of justice offences being disproportionately levied, particularly against marginalized, vulnerable girls, as Professors Doob's and Sprott's 2009 book, *Justice for Girls?*, has articulated statistically.

The case of Ashley Smith has been brought to national attention because it has become associated with issues of mental health in custody and with issues of solitary confinement. In my own Ph.D. research, I contend that the missing piece of what the public has failed to appreciate in that case and failed to understand is that the foundation of the bridge between throwing apples at a postal worker and dying in adult prison is laid by these administration of justice offences.

Accordingly, the idea of codifying the principle of restraint for release and bail decisions, proposed section 493.1, which is in the legislation for your consideration, is something I would support. I support the idea of requiring special consideration for indigenous people, and I note also that "vulnerable groups" is worded expansively there, and I like that. Ashley Smith was not an indigenous person, but she was vulnerable. She was a child in care. She was in social services custody and rendered vulnerable as a result.

I support the alternate process for dealing with some alleged breaches of bail, and I'm particularly interested in and support the creation of the proposed section 4.1 of the Youth Criminal Justice Act that allows, where there's a failure to comply, to deem extrajudicial measures to be adequate.

This legislative proposal that you're considering, I agree, is not perfect. I agree that it is tinkering; however, I don't think that's a reason to not do it. I think this is today's step right now, and I think broader and greater systemic change is necessary, but in the spirit of making bail and making administration of justice offences fairer and simpler, this is exactly one of the things that needs to happen as a result of the death of Ashley Smith.

Thank you.

● (1845)

The Chair: Thank you very much.

Now we will move on to the Society of United Professionals. I'm not sure who's going first, but please go ahead.

Ms. Kendall Yamagishi (External Relations Committee Member, Society of United Professionals): Thank you very much for the opportunity to speak to you today on behalf of our union, the Society of United Professionals, which represents more than 350 legal aid lawyers in Ontario.

Garrett and I are both duty counsel criminal defence lawyers. Today we hope to bring you our perspective as lawyers who work every day on the front lines for vulnerable and low-income accused persons.

We have decided to focus our submissions on police and judicial releases, as well as offences against the administration of justice. I'll begin by talking about the over-imposition of release conditions and how we believe that Bill C-75 could actually exacerbate this problem.

Section 11(e) of the charter guarantees the right to reasonable bail, and the Supreme Court of Canada has said that a key component of this right includes the conditions of release. Jurisprudence has established that there must be a nexus between the allegations and the conditions and that conditions should not be punitive, since everyone on bail is presumed innocent. We must keep in mind that individuals who are presumed innocent are often on these conditions for many months, if not years, while they wait for trial.

I'd like to recount a story that Garrett told me about one of his clients. This young man was released by the police and put on a curfew despite the fact that he didn't have a record and the allegations actually took place during the day. He was subsequently arrested for breaching the curfew condition and brought to court. With the assistance of duty counsel advocating on his behalf and the oversight of a trained justice, this arguably unconstitutional condition of a curfew was removed, but not until after he was forced to spend an extra night in jail and face a new charge for breaching his bail. Clients will agree to almost anything to get out of custody. In moments of desperation, I've literally had clients say to me, “Miss, I will do anything you ask me to; just please, I need to get out.”

Unfortunately, the relationship between the police and our communities is often one of a gross power imbalance. Our clients are people with brain injuries, addictions issues, mental health issues, and developmental disabilities, which means they bump into the law more than others do.

Within the law of bail, jurisprudence has developed that constrains the ability of the court to impose unreasonable and inappropriate conditions, but this bill, as it reads now, moves away from those standards. It allows police to impose conditions that could not be lawfully imposed by a judge or justice of the peace according to current jurisprudence. What’s worse is that police can impose these conditions without the same scrutiny that the courts are subjected to. There’s no lawyer standing beside you when an officer is typing up the undertaking they are going to hand to you to sign.

Police can already release a person on an undertaking, and they should be doing more of this. The proposed changes in Bill C-75 don't give police expanded release powers that they don't already have. They already have this power. Bill C-75, however, expands the power to impose additional conditions.

Our concerns about the over-imposition of conditions also extend to elements of Bill C-75 that deal with bail in the courtroom. As I mentioned previously, Supreme Court of Canada case law makes it clear that terms of release may “only be imposed to the extent that they are necessary to address concerns related to the statutory criteria for detention and to ensure that the accused is released.”

As Bill C-75 reads now, it appears the courts may no longer be limited by this principle when the accused person is facing a reverse onus situation. In our line of work, reverse onus is not a rare occurrence. It occurs, for example, when my client, who was out on bail for stealing a case of beer, is charged again with entering the same liquor store, thereby breaching his bail conditions. Bill C-75 states that when an accused is released on a reverse onus bail, “the new release order may include any additional conditions described in subsections (4) to (4.2) that the justice considers desirable.” This makes what the justice considers desirable the new legal standard. This, of course, is a far cry from the current standard in the jurisprudence, which is “only to be imposed to the extent they are necessary”.

While the amendment may not have intended to deviate from the standard of necessity, the language must be written in a way that does not invite an overly broad application of conditions. We've outlined some of our proposed amendments in our written submissions.

When it comes to reverse onus on domestic charges, we join the Barbra Schlifer Commemorative Clinic. In their submissions, staff expressed their concerns about the consequences this might have on female accused. I should note that Barbra Schlifer Commemorative Clinic is a clinic that provides services to women who themselves are survivors of domestic violence.

● (1850)

Domestic violence is about power and control. It therefore becomes dangerous to craft legislation around assumptions about who has power and control without accounting for who can leverage the power of the state.

We need to consider the over-prosecution of women whose voices are often forgotten: racialized women, indigenous women, those who are not in heterosexual relationships. As duty counsel, we frequently see women who are charged with domestic assault. Many of them are themselves survivors of domestic abuse.

I personally have had dealings with a female accused person whose abusive partner charged her as a means of psychological control. In shifting the onus onto the accused to justify why she should not be detained by the state, we're only exacerbating the power imbalance that she faces. While the reverse onus provision only applies when the accused has been previously convicted of an offence related to intimate partner violence, in our experience, unfortunately, self-represented false guilty pleas are common. There are many women who have convictions for domestic assaults from relationships in which they were not those in a position of power.

Courts are already required to consider an accused person's criminal record, including past convictions for domestic assaults and the surrounding circumstances, when making a determination about bail, namely through the consideration of the secondary ground of detention. However, expanding the reverse onus provision is overly broad and inconsistent with the presumption of innocence. The burden should always lie on the state to deny a person's liberty. Rather than expanding the reversal of onus on the accused, we advocate for further reduction of the reverse onus provision.

The reverse onus provisions have particularly punitive effects on our clients, who often, due to disabilities and other vulnerabilities, incur frequent charges for minor offences and for drug possession for the purpose of trafficking for reasons that we have expanded on in our written submission.

I'll turn it over now to my colleague.

● (1855)

Mr. Garrett Zehr (External Relations Committee Member, Society of United Professionals): Thanks, Kendall.

For the final part of our submissions, we'd like to address the proposed regime to deal with the offences of the administration of justice, particularly when there's no harm involved in those offences.

Now, as I believe this committee has heard, these types of offences do play a considerable role in clogging up the courts. I know this committee heard earlier this week from Jonathan Rudin of Aboriginal Legal Services, who specifically talked about the grossly disproportionate impact that these kinds of charges have on indigenous persons. I've seen this from my own experience. I would also add that I have seen how these kinds of charges can also have a disproportionate impact on other vulnerable communities as well, particularly those which are over-surveilled by the police.

As Bill C-75 currently reads, it's left to the police officer's discretion as to whether a criminal charge is laid for an offence against the administration of justice or if the alleged breach will be referred to a judicial referral hearing. Unfortunately, in our experience, and again what we see on a day-to-day basis, is that oftentimes police officers aren't showing a lot of restraint when it comes to laying charges. Obviously this isn't always the case, but this is something that we see.

I want to give one example of what I think highlights our concerns about charges related to the administration of justice offences when there is no harm involved.

Fairly recently, there was an individual in our bail courts who was arrested for breaching a curfew condition a few weeks prior to that. Now, this was despite the fact that the substantive charge that he was out on bail for had already been withdrawn, and when he was arrested he was no longer even on those bail conditions. He was held in custody overnight as a result and brought to court the next day, and ultimately missed a day's work because of this.

I'd like to read to you Justice Iacobucci's comments, a really profound quote in R. v. Hall, which says:

> Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.

In conclusion, we submit that administration of justice offences that don't cause harm shouldn't be prosecuted at all. The police should use their discretion in these circumstances to either take no action or, as is proposed in the legislation, to issue an appearance notice for that individual to appear at a judicial referral hearing.

I'd be happy to answer any questions.

The Chair: Thank you very much.

Ms. Heyens.

Ms. Stephanie Heyens (Senior Criminal Litigator, York Region, Legal Aid Ontario, As an Individual): Thank you for inviting me.

I'm here to present my concerns with clause 278 of Bill C-75. You might recall that clause 278 of the bill seeks to add a new section to the Criminal Code of Canada, which would be section 657.01. It would allow for the admission as evidence at any criminal proceeding, including trials, of what is defined within that proposed section as “routine police evidence”. That would be done via an officer's sworn statement. The section therefore seeks to replace the direct in-court testimony of a police officer with an affidavit or a solemn declaration.

Legal Aid and I do not support the enactment of this amendment. It defines “routine police evidence” far too broadly. As a consequence, it will abrogate on many fundamental rights of due process that are protected under sections 7 and 11 of the Charter of Rights and Freedoms. We believe it will create more delay in criminal cases coming to trial, not less.

Finally, we also believe that the section is unnecessary because the common law and the Criminal Code already have procedures to excuse police officer testimony in appropriate situations.

In our contention, “routine police evidence” is defined far too broadly. The phrase evokes images of uncontroversial activities such as serving subpoenas on witnesses or Canada Evidence Act notices on accused persons, but instead, the proposed section includes a definition that has included things like “observations”, “identifying or arresting” accused persons and the “gathering” of physical evidence. These activities may be everyday routine for police officers, but for an accused these activities of course go to the core of the case against them, and these police observations and the evidence gathered by police are often the only evidence of guilt.

Even more problematic is the fact that the legislation allows for this definition of routine police evidence to remain open, and therefore courts will be able to add additional police officer conduct to an already overly broad list. Because this definition is so broad, clause 278 will breach many fundamental due process rights. Some may argue that the practical effect of filing a sworn statement of a police officer is to provide evidence identical to what they would provide in court in direct testimony, but that's just not true. A sworn statement can be drafted over many days while memories falter and change.

Moreover, direct testimony in open court allows a trier of facts to assess the credibility and reliability of the allegations partially by observing the witness's demeanour and body language while testifying. The Court of Appeal for Ontario has just revisited this issue of observing demeanour evidence. Denying that tool to judges and juries could very well lead to an increasing number of appeals being filed, and maybe even to wrongful convictions.

This result is bad enough, but when I picture how a trial will proceed upon the filing of a police officer's solemn declaration, I see consequences that pierce the very heart of due process and fundamental rights for accused persons. The first practical effect of this proposed section is that the sworn statement of the police officer will be admitted for the truth of its contents. Consequently, the trial judge must begin her analysis of the Crown's case presuming that the contents of the sworn declaration are true. Absent any obvious internal inconsistencies, a judge would have to begin with this basis that there's no reason to question the allegations.

Where the contents of that affidavit, that sworn statement, contain evidence of guilt, the defendant must defend herself against this unchallenged sworn document. This reverses the burden of proof from the Crown to the defendant. No longer is the accused innocent before guilty, but guilty and now having to prove their innocence. Reversing the onus at a criminal trial is not a minor infringement of an accused's rights. It's a core principle of our criminal justice system that if a person is alleged to have committed a criminal act that could put them in jail, it's the Crown's onus to prove it.

Also, because a defence lawyer cannot cross-examine a piece of paper, meeting this burden becomes unfair. Questioning witnesses in cross-examination often erodes their credibility or reliability sufficiently to raise a reasonable doubt, therefore creating an acquittal. Cross-examination is the first and best tool for contesting an allegation, and it exposes something approaching an objective truth. It's the manifestation of our fundamental right to confront one's accuser. It's why we refer to the common law as “adversarial”. Limiting cross-examination for any purpose must be acknowledged as a fundamental shift that favours the Crown while prejudicing the accused. I think that at its core this is what clause 278 in the bill seeks to do. It seeks to abrogate that fundamental right to cross-examine.

● (1900)

Because clause 278 replaces the testimony of police officers with a sworn declaration that's presumed to be true, the only way for the accused to defend herself will be to call her own witnesses, and often the only witness other than the officer is the accused herself. This, therefore, means that she loses her right to silence. She's forced onto the stand. The right to silence, of course, is another fundamental right of our due process, and no person should ever be forced to respond to a bald assertion unless it's withstood challenge by cross examination or unless the accused chooses to.

Finally, where the defence seeks to contest the Crown motion to have a police officer's evidence admitted at trial via sworn declaration, the defence will have to disclose defence evidence. That evidence must be included in the application materials filed with the judge and with the Crown. In this way, the proposed legislation runs contrary to the golden thread of criminal law that says that the defence has no obligation to disclose its evidence unless and until the Crown has posed its case.

Moreover, it's not hard to imagine—and this isn't meant to impute any bad faith—that once the prosecution is alerted to potential weaknesses in their police officer's testimony, they are going to move to shore up those weaknesses. That's going to lead to further investigation, which triggers more disclosure obligations on the Crown and, therefore, further delay in coming to trial.

This begins to explain why the proposed section will require more time for criminal cases to get to trial, not less. The section creates an additional motion for the Crown and defence to litigate, and to admit this foreign statement of a police officer at trial, the party seeking its admission, generally the Crown, must file and argue that motion. This motion will have to be argued before the trial can even be scheduled, because if you don't know how many witnesses are testifying, you don't know how much time to set aside for the trial.

For unrepresented accused, the proposed section will result in even more trial delay. In any case involving an unrepresented accused, the trial judge bears the responsibility of ensuring that the accused understands the effect of admitting documentary evidence. The section will require that judges grant adjournments to unrepresented accused so they can find counsel; consult with counsel; decide how admitting this document, this sworn affidavit; will impact their particular case, and then how to proceed. Wrongful convictions are likely to result, and certainly the number of appeals is likely to rise too.

Finally, proposed section 657.01 is unnecessary. The common law and the Criminal Code both contain trial procedure that allows police officers to be excused from testifying in appropriate circumstances. Before or even during a trial, defence makes admissions of fact that would otherwise have been proven via witness testimony. Defence and Crown also can sometimes agree to admit certain facts as true in an agreed statement of facts, which is drafted and filed at trial, and these types of admissions aren't limited to routine police evidence. It can include any evidence that both parties agree is uncontroversial.

In addition, part XVIII.1 of the Criminal Code consists entirely of case management legislation, which can be invoked by pretrial judges to streamline trials and to manage the scheduling process when there are complicated or very contentious proceedings.

In conclusion, clause 278 of Bill C-75 will harm the criminal process more than it helps. Its application will carve away at fundamental due process rights as guaranteed by the Charter of Rights and Freedoms while causing further delay when law already exists that allows for the waiver of uncontroversial police evidence.

Legal Aid and I therefore recommend that clause 278 be entirely excised from Bill C-75.

Thank you.

● (1905)

The Chair: Thank you very much.

I thank all of our witnesses. We are now going to go to questions, and we're going to start with Mr. MacKenzie.

Mr. Dave MacKenzie: Thank you, Chair, and thank you to the panel for being here tonight.

Ms. Heyens, I take it you're fairly passionate about that whole issue. I also appreciate that you spent more than a little time in the courtroom in pretrial discussions with Crown attorneys.

Would I be right in that assumption?

Ms. Stephanie Heyens: Yes. I have 20 years, unfortunately, of experience litigating criminal matters.

Mr. Dave MacKenzie: I credit you with that and I admire you for it.

The bill was brought forward to try to eliminate delays in the justice system. I think you've made it very obvious that the section is more likely to cause delays than to eliminate them. Would I be right there?

Ms. Stephanie Heyens: That's definitely my contention, yes.

Mr. Dave MacKenzie: Would I also be right in assuming from what you tell us that pretrial discussions between the Crowns and the defence frequently—and I think you have said this—would alleviate not only those issues but many others that become agreed facts heading into a trial, and thus reduce time in trial?

Ms. Stephanie Heyens: Every day we do that. Every day that's part of our process, to go into pretrial discussions with the Crown or with a judge present. Part of the purpose is, of course, to figure out how long the trial will take, and that always involves admissions on both sides.

Mr. Dave MacKenzie: Sure.

From that perspective, I have a bit of history in that field with what happened there, and I appreciate that.

It would seem to me that this might have been some sort of misguided attempt to help the system, but in fact, as you have explained, it's one that will hinder the speeding up of the process.

Have you considered or looked at the issues with respect to eliminating preliminary hearings?

Ms. Stephanie Heyens: No. I would rely on the Legal Aid Ontario submissions. I understand Mr. Field and Mr. Pratt testified yesterday. I was invited to talk about this specific matter.

Mr. Dave MacKenzie: Thank you.

In regard to all the issues on bail, Ashley Smith is a horrific case, one that should never have been in the criminal justice system. She needed help, but not from the criminal justice system. The mental health system probably failed her at a very early age, but she ended up in the justice system, which did not help her and was of no benefit to her.

How do we fix the system that we currently have? You've all addressed that there are problems, but how would you go about changing the bail system to fix it? I don't know what else to ask you, other than, if it's broken, how do we fix it?

● (1910)

Dr. Rebecca Bromwich: If I might, with respect to Ashley Smith, it's my own findings of my Ph.D. research that she had no mental health diagnoses before entering corrections custody and specifically before spending long years in solitary confinement. I really take exception, and my own conclusion is in fact, with respect, that this analysis is incorrect. The mental health system was not the preliminary piece of what went wrong.

In terms of going to your question with respect to how to fix the bail system, I have indicated my support for the submissions made by Professor Sprott and Professor Doob. What would fix this would be an overhaul, and if we look in the large scale, an educational program to ensure that practices and the culture of how law is carried out is shifted as well, as happened when the Youth Criminal Justice Act came into effect in 2003. There was a $20-million budget for educating and training people. I had completed my master's degree at that time and had some level of involvement with that.

A systematic overhaul of the bail system, coupled with education and support for a shift in culture and practice, would fix some of these problems.

The provisions in this piece of proposed legislation go some distance towards those fixes, so I wouldn't want to say, “Don't do this; we should do something big later.” I would say, “Do this small thing now, and let's go big later.”

Mr. Dave MacKenzie: Thank you.

Prof. Nicole Myers: If you had asked me a couple of years ago, I'd have said I didn't think we had to start all over again. I really did believe that the law was fine, that it was just that everyone was messing up how it was being applied, except I've been studying this since 2005 and it keeps getting worse every year. I'm no longer convinced that tinkering is going to result in the widespread change we're looking for, though I have to agree with Rebecca that this is a start. It's something. It's putting the presumption of innocence as the starting place. It's starting with the idea that you're going to be released unconditionally. That is where we begin, and then we work our way forward, having to make sure that we're articulating a clear connection between the kinds of supervision someone might need or the conditions that might be required.

We need to limit the conditions that are imposed overall, and a lot of this is about a cultural change. There's this risk aversion. There's a reluctance. Simply, sometimes codifying some of the case law might be helpful for trying to structure this and trying to guide people a bit. I am apprehensive, though, that without large-scale educational efforts, this is not going to do enough to get everybody on board and to shift the orientation to what has really become an ingrained and accepted practice.

Mr. Dave MacKenzie: Whom do we educate?

Prof. Nicole Myers: Whom do we educate? We educate everybody, Crowns especially.

The Crowns are major drivers of the bail process. If most people are released on a consent release, it really is a great deal of control that the Crown has. The Crown decides what those conditions of release are going to be, because as has been explained, an accused person will agree to almost anything to get out. It doesn't matter how patently absurd the conditions are. They might know they're going to breach the moment they walk out that door, but they will agree to anything. Remand is that bad.

It's about getting the Crowns to shift their orientation, because defence counsels are left scrambling in trying to meet the needs of the Crown because they want a consent release. A contested show cause hearing opens up risk and uncertainty and may ultimately result in detention or an even more restrictive or onerous release.

The Chair: Thank you.

Mr. Ehsassi is next.

Mr. Ali Ehsassi (Willowdale, Lib.): First of all, I'd like to thank all the witnesses. All of your testimonies were incredibly helpful to me.

I have a number of different questions. The first question is for Ms. Myers.

You were noting that some of the conditions that we are seeing are hugely problematic because they have very little to do with the charges. Could you provide us with some examples just to better familiarize us with—

Prof. Nicole Myers: Absolutely.

Mr. Ali Ehsassi: —the problem and the challenge?

Prof. Nicole Myers: For example, it not uncommon to hear a curfew condition being placed on someone when the offence happened at noon, or to being told, "You shoplifted from one Shoppers Drug Mart. You're now not to enter any Shoppers Drug Mart in the entire province", or that you can't enter the greater Toronto area. They can become somewhat expansive compared to what was being articulated in the allegations that are before the court.

● (1915)

Mr. Ali Ehsassi: Okay. Thank you.

Then you said that we could look at all the case law and try to codify that. What are some of the big seminal cases that we know?

Prof. Nicole Myers: I think I'm mostly specifically referring to Antic and the reiteration of the ladder approach, recognizing the starting place is the presumption of innocence, as well as releasing unconditionally, reminding us that conditions are not to be imposed to punish somebody or to modify their behaviour and keeping in mind this is all happening when these are allegations. They have not been proven.

Mr. Ali Ehsassi: Great. Thank you.

Ms. Bromwich, thank you also for your testimony.

You were talking about especially vulnerable groups. This is an issue that came up a few days ago. Could you describe and define for us what those vulnerable groups are?

Dr. Rebecca Bromwich: One reason, as I said, that I like the proposal is that within the legislative proposal, vulnerability is mentioned without necessarily enumerating it specifically. There is, as has been indicated before this committee, a disproportionate overrepresentation of indigenous people at all phases in our criminal justice system as well as in our correctional system. There's a disproportionate overrepresentation of marginalized, racialized individuals. I've also heard some statistics about a disproportionate overrepresentation of LGBT individuals.

That said, there is also a disproportionate overrepresentation of poor people in the system and people with mental health problems. In terms of vulnerability, I think it's so helpful and useful to look at those things intersectionally and to look at it not as a check box and whether you fit this box, but what's the story? If the inquiry into vulnerability can be a bit more nuanced, I think that can be helpful.

Mr. Ali Ehsassi: Absolutely.

I'm not sure whether this should be permitted, but you were saying that although this legislation is a step in the right direction, you would very much be in favour of some broader changes. I know you only have two or three minutes, but if you could tell us what those broader changes would be, what would you say?

Dr. Rebecca Bromwich: The extent to which administration of justice offences have been used and continue to be used in the youth courts, in particular against girls, is problematic. We need an overhaul, a serious look at those provisions, and the reinstitution of the Law Commission—I like to say that whenever I can—so there can be a systematic study of the way the criminal justice system is operating, the way the law is operating, and it should be done not on this incremental basis, but by looking at the Criminal Code as a whole.

That would be my recommendation.

Mr. Ali Ehsassi: That's it for my questions.

The Chair: Okay. Mr. Rankin is next.

Mr. Murray Rankin: Thanks to all of you. This has been fabulous.

I want to start with Professor Myers and Ms. Yamagishi. I think you said things that overlap.

Ms. Yamagishi pointed out properly that release on an undertaking is available right now. Professor Myers said you should start with the premise of release. That's supposed to be already what we do. R. v. Antic only tells us and codifies, as you say, the status quo. The courts have made it clear, and now we put it in the legislation and pretend we've done something. You said we should structure the discretion of the judges and police and so forth, but how do we do that? Do you have suggestions as to how we can do that? It seems to me it's already supposed to be that way. The witnesses who you all agreed with, Professors Doob and Webster and Sprott, all said that we need, in their words, transformative changes, and yet we tinker. Why would we do that? It seems as though all we're doing is futile law reform, based on that testimony.

I'm asking both of you that question. How do we fix it?

Prof. Nicole Myers: Please go ahead first.

Ms. Kendall Yamagishi: Sure, I can take it.

In our written submissions, we outline a proposed amendment to the police releases section on undertakings. I think that one frustration that defence lawyers see is that we can legislate all we want, but without larger cultural shifts, larger systemic changes and attitudinal shifts amongst police officers, we're still seeing that, frankly, what is coming out of the jurisprudence is not necessarily consistent with what's being legislated.

What I do think is that the legislation can set a tone so that if I have a client who is on what I think is an unreasonable undertaking, and I have the law there that says this is an unlawful release, I can make an application to challenge those decisions. The courts will then come out with a decision that can then be published in the media. There can be attention brought to show that the police are not following what the law is asking them to do.

Although I think that there are multiple factors we need to be working on, both legislative and cultural and societal, changes in legislation can set a tone that defence lawyers can use to push things forward.

● (1920)

Prof. Nicole Myers: I completely agree. I'd take up that particular point. It sends a clear message that this is how things are supposed to be done. Yes, in some ways this is involving codification of what's been established in case law, but I do think that having it written in law and having something to hold on to has some power to set intention as well as tone.

I think that what is being proposed—reiterating needs around restraint and reiterating that it should be reasonable to get people to comply and that we should consider vulnerable groups—is not harmful. However, I see it simply as a start.

Mr. Murray Rankin: You said that in your years of studying it, it's gotten worse and worse every year. We have Antic. It's basically been cut and pasted into the law. You think it sets a tone. I get that, but it surely doesn't do very much.

Mr. Zehr, you talked rather provocatively in your summary at the end. I want to give you a chance to elaborate. You said that we should not prosecute administration of justice offences at all. Tell us a bit more about that.

Mr. Garrett Zehr: Well, the qualifier is what is referenced, the specific administration of justice offences that don't cause harm. I of course want to focus on them.

Mr. Murray Rankin: I understand.

Mr. Garrett Zehr: Obviously there will be administration of justice charges going forward, and the legislation, obviously, is not going to change that. What I'm suggesting is that when there is no harm caused by these offences, the proposed regime in the legislation should adequately take into consideration what is needed to determine whether or not that person should be released with the same conditions they were on, perhaps have further conditions added, or be ultimately detained.

Philosophically, it comes down to a question. If there is no harm being caused, why is it that someone should face criminal charges as a result? We need to remember that the people who are on these conditions, specifically bail, are presumed innocent. They're on a condition to have a curfew. Me, I'm not.

Say, ultimately, as in the case that I mentioned, that substantive charge is ultimately withdrawn. It really seems unfair that the person should be punished for a curfew they were on while still being presumed innocent.

Mr. Murray Rankin: I understand. Thank you.

I just want to say to you, Ms. Heyens, that of all the witnesses who have spoken to us about the section involving routine police evidence—and I think a vast number, if not everyone we've had, has said the same thing, that this is misguided, to put it mildly—I thought your presentation was the most effective. It certainly got my attention. I commend you for that.

You made a couple of points. One that I hadn't heard before and that I'd like you to expand on is that somehow this could force a person to take the stand, that somehow this would violate his or her constitutional right to silence.

I also want to mention, because I only have a short amount of time, that it seems to me that the agreed statement of facts does the trick in virtually all cases anyway, so why do we need this? I'd like you to comment on that.

Last, we heard yesterday from a presenter from the Canadian Bar Association.

A voice: Was it yesterday?

Mr. Murray Rankin: Yes, I think it was yesterday. I can't remember.

The Chair: It was Ms. Pentz.

Mr. Murray Rankin: Ms. Pentz asked how we can deal with the sworn statement and the viva voce evidence, how a judge can weigh viva voce evidence versus a sworn statement. She pointed out how difficult that undertaking would be.

Those are my questions.

Ms. Stephanie Heyens: Oh, boy.

First, thank you. I'm gratified.

I think it's quite obvious, and that's the trouble. I think all of this is obvious.

The right to silence is something that's protected in Canada still under section 7. There is no requirement, as we know from certain recent cases, for an accused to take the stand. The reason for that, of course, is that a good cross-examination often undermines the allegation sufficiently that there is no need for the person to do so. It's like if somebody accuses you of something ridiculous. Why should you have to respond to it unless there is some veracity that's being contested?

If a piece of paper—a sworn piece of paper, but still, a piece of paper—is put forward, and the judge is forced.... This is what bothers me. It's admitted "for the truth of its contents". There are certain things put into evidence at a trial that aren't for the truth of their contents. It may just be for the narrative, as often happens, for people to understand the sequence of events or something, but when a piece of paper goes in for the truth of its contents, that means the judge is forced to look at the piece of paper and look at the allegations. Unless there is something obviously contradictory inside, they have to begin their analysis of guilt or innocence from "this is true".

That may be okay for "I served him a notice" or something, but when it's "I saw him do this illegal act", then how else do you defend yourself? You can't cross-examine a paper.

● (1925)

Mr. Murray Rankin: Therefore you have to come forward. You have to give your evidence. Although there is a constitutional right to remain silent—

Ms. Stephanie Heyens: Yes.

Mr. Murray Rankin: —the only way you can defend yourself is to come forward.

Ms. Stephanie Heyens: Yes.

Mr. Murray Rankin: I understand.

Ms. Stephanie Heyens: It literally forces you on the stand. You have no other way to defend yourself.

Mr. Murray Rankin: Thank you.

The Chair: Thank you, Mr. Rankin.

Mr. McKinnon is next.

Mr. Ron McKinnon: Thank you, Chair.

Thank you to all the witnesses.

I'll start with you, Mr. Zehr, following up on Mr. Rankin's questions. You say that there should be no charges on administrative offences except where they cause harm. Wouldn't an action that causes harm be something that qualifies as an offence in its own right?

Mr. Garrett Zehr: I'm not quite sure I understand.

Mr. Ron McKinnon: Let's say someone has breached a condition and they've caused harm.

Mr. Garrett Zehr: Right.

Mr. Ron McKinnon: Wouldn't whatever they did to cause harm be something they could reasonably be charged with as an offence in its own right, rather than as a charge of breach of conditions?

Mr. Garrett Zehr: That's a good point, but at the same time, there perhaps could be, for example, a contact breach. If someone is charged and one of the conditions is that they are not to have any contact with someone, their very contact could be argued to have caused harm even if it's not in itself going to rise to the level that it in itself would be a criminal act. Perhaps they're attending at an address they're not allowed to attend at, and that causes emotional or psychological harm. They're not uttering another threat, they're not committing any assault, but their very presence there I guess could be a breach that we could perhaps say is causing harm without their committing an additional offence.

Mr. Ron McKinnon: But such a breach wouldn't be amenable to a charge in its own right. Is it really appropriate to have a criminal charge for an administrative breach applied to it? Is there some other recourse that could be taken?

Mr. Garrett Zehr: That's a good question. If the behaviour itself wouldn't amount to criminal activity, then perhaps yes. Perhaps all of those charges should then be referred to this judicial referral hearing. Ultimately, the further release will be determined at that point.

I take your point, and I think I agree with it, that if further contact isn't itself criminal behaviour, why is that behaviour being criminalized?

Mr. Ron McKinnon: I'd like to follow up on this a little further. Irrespective of whether it's criminal behaviour or whether or not it causes harm, what should be the appropriate consequence for someone who breaches conditions? If there are conditions and there is no consequence whatsoever, I mean, why follow up, right?

Mr. Garrett Zehr: There will be a consequence for that person. Again, the police obviously have the discretion to do nothing. The police can give a warning, as we know they do now. Sometimes police just give a warning, such as "You're breaching your condition. Don't do it again or you're going to get charged."

The other option, which the proposed legislation provides, is to refer it to this judicial referral hearing. There will be consequences there, because that judicial officer then has the decision on whether to release that person again, whether to impose further conditions, or whether to detain the person. Ultimately, there are consequences that would follow from any of these breaches.

Mr. Ron McKinnon: Those consequences would typically be to end the bail situation and to put them back in custody, perhaps.

Mr. Garrett Zehr: That could ultimately be the case, or it could be that maybe they require being moved up of the ladder, for example, or additional conditions. It's kind of like another bail hearing. It may be required to move up the ladder or the conditions, as appropriate.

Mr. Ron McKinnon: Thank you.

I'm going to move on to Ms. Yamagishi.

You said that the conditions that a judge can set vary, in addition to whatever the judge feels is desirable. That basically makes the whole thing wide open.

What if that were changed from what the judge considered desirable to what the judge considered necessary? Would that address your concerns?

● (1930)

Ms. Kendall Yamagishi: It would, partially.

I'll note that case law such as Antic goes further than just what the judge considers necessary. It also goes into noting, as other speakers have alluded to, that the conditions should not punish the accused and should not be there to modify the person's behaviour. They also need to be not only what they feel is necessary, but also relevant. That would be part of the way there.

Again, in our written submission, we outline a number of proposed amendments to the language specifically.

Mr. Ron McKinnon: Would you say that the conditions that should be applicable would be only those that go to protect public safety or those that will ensure the accused shows up in court?

Ms. Kendall Yamagishi: Yes.

Again, this is a clarification of the law as it already stands. One troublesome thing we're seeing.... We have a case like Morales from 1992—it's been around for a very long time—that says public safety is paramount. However, we see all these other conditions that don't necessarily have to do with public safety, or even primary grounds, as discussed in Pearson, another 1992 Supreme Court of Canada case.

I think this may go to what Mr. Rankin said, which is that when we make these legislative changes, we don't see the results. Clearly stating these things in statute gives, as Ms. Myers said, something for us to grab onto, something I can appeal, something I can make an argument about in court.

Mr. Ron McKinnon: Thank you. I think that's my time.

The Chair: Yes, you were at 5:54. Very good.

I'd like to thank this panel of witnesses. You've been extremely helpful, and it is much appreciated, and I think you're on time for your flight.

I'd like to take a brief recess and ask the next panellists to come forward, please.

● (1930)

(Pause)

● (1935)

The Chair: I am going to reconvene the committee now.

We will be doing our last panel of the day, which is a combination of panels four and five, given the fact that we're running an hour behind.

It's a great pleasure to be joined by Ms. Sarah Leamon, criminal defence lawyer from Leamon Roudette Law Group. Welcome back.

● (1940)

Ms. Sarah Leamon (Criminal Defence Lawyer, Leamon Roudette Law Group, As an Individual): Thank you.

The Chair: We also have Ms. Sayeh Hassan from Walter Fox & Associates. Welcome.

Ms. Sayeh Hassan (Criminal Defence Lawyer, Walter Fox & Associates, As an Individual): Thank you.

The Chair: Next, we have Mr. Geoffrey Cowper, who is from my old firm, Fasken Martineau DuMoulin. Welcome.

From The Advocates' Society in Toronto, we have Mr. Brian Gover, who is the president, and Mr. Dave Mollica, who is the director of policy and practice. Welcome.

We're going to start with the Advocates' Society. Mr. Gover, the floor is yours.

Mr. Brian Gover (President, The Advocates' Society): Thank you very much, Mr. Chair.

My name is Brian Gover, and I'm the president of The Advocates' Society. As you've just heard, Mr. Dave Mollica joins me. He is our director of policy and practice.

Thank you for the opportunity to make oral submissions to your committee on Bill C-75. The Advocates' Society has also provided written submissions to complement today's oral presentation.

The Advocates' Society was established in 1963 as a non-profit association for litigators. We have approximately 6,000 members across Canada who make submissions to governments and other entities on matters that affect access to justice, the administration of justice, and the practice of law by advocates. This is part of our mandate.

The membership of our society includes Crown prosecutors and members of the criminal defence bar, so the submissions I make this evening reflect the diverse and considered views of our membership.

The Advocates' Society applauds the government for its willingness to implement reforms with a view to enhancing efficiency within our criminal justice system. The system is, as the Minister of Justice stated in her remarks to the House of Commons on May 24, "under significant strain". This strain is felt by all those who are part of the justice system, including judges, lawyers, litigants, witnesses, and particularly indigenous people and marginalized Canadians living with mental illnesses and addiction who are overrepresented in the criminal justice system, both as victims and as accused persons.

However, The Advocates' Society has concerns about certain mechanisms that Bill C-75 proposes to use to implement these reforms, as they could result in a compromise of the rights of victims and accused persons. In our written submissions, we have highlighted the areas where The Advocates' Society urges the committee to further scrutinize the provisions in Bill C-75. Today I will focus my presentation on two key areas. One is the elimination of peremptory jury challenges and the other is the acceptance of routine police evidence in writing.

With respect to the elimination of peremptory jury challenges, The Advocates' Society is concerned that Bill C-75's proposal to eliminate the peremptory challenge is not the product of careful study or extensive consultation. The Advocates' Society recommends further study and stakeholder input on other possibilities for reform before any measures are taken.

The peremptory challenge provides a mechanism to both the defence and the prosecution to help ensure an impartial and representative jury. It also gives the accused person a certain measure of control over the selection of the triers of fact who will determine his or her fate in a criminal proceeding. The criminal defence bar overwhelmingly believes that the peremptory challenge is a vital tool in protecting the fair trial rights of an accused person, particularly where that person is indigenous or a person of colour. The defence can exercise peremptory challenges to attempt to secure a jury that is more representative of the Canadian population.

The stated rationale in the minister's charter statement for eliminating peremptory challenges is that either the Crown or the defence can use them in a discriminatory way. The possibility that peremptory challenges may be abused should not be used as a rationale for their elimination. Given that peremptory challenges do serve a useful social function, the focus ought to be on reform rather than abolition.

If the concern is with the discriminatory use of the peremptory challenge, then it is the discriminatory use that ought to be eliminated, not the peremptory challenge itself. The few courts in Canada to have considered these issues have held that the Crown's discriminatory use of peremptory challenges violates subsection 11 (d) and section 15 of the Canadian Charter of Rights and Freedoms and deprives the accused of the right to a representative jury.

In the United States, when counsel believe that their adversary has used a peremptory challenge for a discriminatory purpose, they can mount what is termed a Batson challenge—based on a 1986 decision of the Supreme Court of the United States in Batson v. Kentucky—and ask that the judge demand a racially neutral reason for having exercised the peremptory challenge. If the judge finds that the objecting party has made a first impression or prima facie case, the burden then shifts to the party exercising the peremptory challenge to justify its use.

● (1945)

The mere existence of the Batson process has been shown to have a chilling effect on discriminatory conduct in the United States in jury selection. The Advocates' Society recommends further study and consultation with stakeholders on the use and utility of the peremptory challenge. Alternatively, our society recommends adopting a Batson-type procedure in Canada instead of abolishing the peremptory challenge.

The second area is with respect to proposed amendments to the provisions of the Criminal Code dealing with what is termed “routine police evidence” in writing. The Advocates' Society has concerns that these provisions will not enhance efficiency, will infringe on the rights of the accused, and may be constitutionally vulnerable. The Advocates' Society recommends that these proposed provisions be removed in their entirety from Bill C-75.

The breadth of the definition of “routine police evidence” is such that the vast majority of evidence that is provided by police officers in criminal trials would be admissible in writing. This would effectively rob accused persons of their opportunity to test the credibility and reliability of Crown witnesses through cross-examination, which has been uniformly heralded as a central aspect of our Canadian criminal justice system and a constitutionally protected entitlement for those who stand accused of criminal offences.

Cross-examination allows defence counsel to examine potential frailties or inconsistencies in police evidence and determine whether disclosure has been fully made. Uncovering issues with regard to Crown evidence can assist in reducing wrongful convictions. Large-scale restrictions on the accused's right to cross-examine the Crown's witnesses will not necessarily make for a criminal justice system that is more efficient while still fair. We know of no empirical data to support such a claim. It must remain the responsibility of the trial judge in enforcing the rules of criminal procedure and evidence to manage trials such that cross-examination that is abusive, redundant or irrelevant does not take up court time.

In combination with the proposal to eliminate preliminary inquiries in all but the most serious cases, admitting Crown evidence in this fashion would pose a potentially insurmountable hurdle to making full answer and defence. In addition, putting the onus on the accused person to justify their request for the Crown's evidence to be presented orally would likely require the accused to reveal aspects of their defence to the Crown. This may interfere with the accused's constitutionally enshrined right to remain silent in the face of a criminal allegation. The Advocates' Society recommends that clause 278 and other proposed sections dealing with routine police evidence be removed in their entirety from Bill C-75.

Thank you, Mr. Chair and members of the committee, for giving The Advocates' Society the opportunity to make submissions this evening. We would be pleased to answer any questions your committee members may have.

The Chair: Thank you so much.

Ms. Hassan is next.

Ms. Sayeh Hassan: Thank you for the opportunity to address the committee on proposed Bill C-75, and in particular on the preliminary hearing. This is the first time I have appeared before the committee, and it's a pleasure to be here.

I have practised as a criminal defence lawyer with Walter Fox & Associates for over a decade. I chose the field of criminal defence in part because of my background, being born in Iran and having lived under an oppressive regime.

I'm focusing my submission on the preliminary hearing, and I'm very happy to do so because I believe the preliminary hearing provides an essential procedural protection for all accused, but in particular for those who are marginalized, for the accused who can't afford a lawyer, for the accused who may have mental or addiction issues, and also for those who are overrepresented in our criminal justice system, including indigenous people.

I want to briefly touch on the statistics that we do have. We know that between 2015 and 2016, only 3% of the total number of charges that were before the court had preliminary hearings, and we also know that in the same years, of the charges that had preliminary hearings, only 7% went over the presumptive ceiling.

There are also statistics that indicate cases that have preliminary hearings are much more likely to get results in the Ontario courts rather than being taken to the Superior Court for a trial, and as someone who spends quite a lot of time in both the Ontario Court of Justice and the Superior Court of Justice, I can attest to the fact that the resources in the Superior Court of Justice are extremely limited and that anything that the government does to ensure that cases do not unnecessarily go up to the Superior Court I think would be extremely beneficial.

These are the statistics we do have, but there are also information and statistics that we don't have. To the best of my knowledge, there are no statistical studies that show that eliminating the preliminary hearing for certain offences would lead to speedier trials, thus protecting the accused's right to be tried within a reasonable time. We don't have these statistics, and if the government is seeking to eliminate a very important procedural protection, my recommendation for the government and for this committee would be that the government should at least invest the time and the resources on those empirical studies to ensure that the desired result is going to be achieved if we get rid of those procedural protections.

I would also recommend that the results of those studies be shared with the public.

I want to focus the rest of my submission on the impact of the elimination of the preliminary hearing on the marginalized groups. I think that's very important and I know that's a concern for the Honourable Minister of Justice. The charter statement for Bill C-75 clearly says that the bill seeks to address the overrepresentation of particular groups within the justice system, including indigenous persons and those with mental illness issues and addictions, and I would add another group: the group that doesn't have the economic resources to hire and retain lawyers.

Let's talk about how eliminating the preliminary hearing would negatively affect these individuals.

One of the areas, I believe, would be the use of private investigators. Eliminating the preliminary hearing would lead to a wider use of private investigators by the defence, and I'll give you an example. There are cases where we as the defence need to find out something about the background of a complainant or a witness. That type of information is not the kind of information that would be disclosed by the Crown. We would explore that during the preliminary hearing, but if we don't have a preliminary hearing, defence would hire private investigators to obtain that information.

That puts at a disadvantage individuals who in the first place are not able to hire a lawyer and who can't hire an investigator. If they don't have a preliminary hearing, they're seriously disadvantaged compared to individuals who do have the resources to hire lawyers and private investigators.

Another issue, of course, is the disclosure issue, and yes, the Crown has an obligation to disclose material—very true—but there's a real distinction between disclosure and organized disclosure. When I first start practising, we used to get huge stacks of paper disclosure, and everything was just stapled together. I would have to pull everything apart, review everything, and then see what goes where and what's important, what's peripheral and what's missing.

● (1950)

In recent years, things have changed, and now we've moved away from paper and toward disc disclosure. We obtain discs, and then we have to use a computer to upload the disc, print the disclosure, and then go through that entire process of reviewing the disclosure.

That's all well and good for me. I am a trained lawyer. That's what I do. It's a different story, however, for those accused who can't afford to hire lawyers. These are people with no legal education and often no formal education. Some of them suffer from addiction issues or mental health issues that may impact their ability to function properly, but they're expected to go through this disclosure and figure out what's what, and what case they're facing.

The benefit that the preliminary hearing provides for these individuals is that the Crown will organize the evidence against an accused at the preliminary hearing. The witnesses will testify in a sort of logical and organized manner, and the accused who doesn't have a lawyer is able to see for himself or herself what case he or she is facing.

Another advantage is that the preliminary hearing provides the accused with the opportunity to sit in a real courtroom and see how things function as well as the opportunity to be able to cross-examine witnesses, so that the first time this person goes to court, it is not at the Superior Court, where they're facing trial and their freedom is at risk. Not having this opportunity, I would submit to you, would put unrepresented individuals and marginalized groups at a very great disadvantage.

I know that there is some criticism of preliminary hearings, and one of the criticisms is that preliminary hearings function as sort of discovery hearings and that not much happens during these hearings. I don't agree with that, and I've set out what my ideas are about the preliminary hearing in my brief. My recommendation is that if the government is concerned about that issue, there could be more legislation to sort of bolster the preliminary hearing. You could broaden the jurisdiction of preliminary hearing judges, for example, to allow them to order the Crown to provide disclosure. Currently, they're not able to do that.

We can broaden the jurisdiction of the preliminary hearing judges to allow them to hear charter applications. That becomes very important when the only evidence there is against an accused has been obtained as a result of a charter violation, so if we can eliminate that evidence at the preliminary stage, then it doesn't go to trial, where we would get the same result eventually.

The last thing I would recommend would be the exit pretrials. Right now they are done sort of informally, but I find it extremely useful when a preliminary hearing judge sort of sets out the strengths and the weaknesses of the case so that both the Crown and the defence are able to make an informed decision on whether they want to move on to trial or not.

Finally, I want to leave you with one thought. Efficiency in the justice system is important, but it's not the most important thing. You never hear about delays and inefficiencies under dictatorship regimes. People are arrested, tried in five-minute trials behind closed doors, imprisoned, and executed very efficiently in a very speedy manner.

We live in Canada, however, in a constitutional democracy, and I think that both we as citizens and also our elected government need to ensure that an accused has a fair trial and a fair fighting chance within the criminal justice system when defending themselves against a state with infinite resources.

Thank you.

● (1955)

The Chair: Thank you very much.

Ms. Leamon is next.

Ms. Sarah Leamon: Thank you.

Thank you to all the members of the committee for having me here again. It's always a pleasure and an honour to appear before you.

I'm going to be limiting my submissions this evening to the issue of preliminary inquiries. We know that Bill C-75 endeavours to make a number of wide, sweeping amendments to the Criminal Code, and most of those amendments are being made in an effort to hopefully modernize the justice system and to help curb delay and to conform with the presumptive ceilings as established by Jordan. I certainly applaud those efforts.

As the committee is also well aware, the purpose of preliminary inquiries is to evaluate and test the strength of the Crown's case, not to make any binding determinations with respect to guilt. They are currently available for all indictable offences.

Bill C-75 seeks to restrict the availability of these inquiries to offences committed by adults that are punishable by life imprisonment. It also seeks to strengthen the judge's powers with respect to limiting the range of issues that can be explored and the witnesses that can be called. It's important to note that the Criminal Code, under section 537, already allows a judge to have general powers to regulate the preliminary inquiry process, but of course this bill seeks to make those much stronger.

The guiding rationale behind this appears to be squarely in line with attempts to curb delay. Now, we know that when a person does decide to go ahead with a preliminary inquiry, the matter will take significantly longer to conclude and is likely to use more judicial resources. That is supported by statistics from Statistics Canada, as well as The Canadian Bar Association, and I've provided footnotes for those statistics in my brief, which has been provided to members of the committee in advance. It's also available online.

While it is true that it does take longer, the same studies have also revealed that very few people actually ever elect to undergo this process. The vast majority of people who are charged with criminal offices do not engage in a preliminary inquiry, and depending on the statistics that we're looking at, the frequency of these inquiries is between about 2.8% and 5% of all criminal matters, which is minute. There are also statistics to support that the prevalence of these inquiries is rapidly and steadily declining over the years. There are all kinds of explanations or theories about why that is, but more likely than not it's because of heightened disclosure requirements following the Stinchcombe decision.

That doesn't mean that preliminary inquiries are irrelevant. It doesn't mean that they should be done away with in the interests of curbing delay either. In fact, because they're so rarely used, the delay that we're seeing in our criminal justice system cannot be attributed, in my view, to preliminary inquiries; doing away with them will create perhaps some decrease in delay, but it could be negligible at best.

There's evidence to also suggest that doing away with preliminary inquiries can or may actually contribute to delay, because preliminary inquiries are very helpful at streamlining criminal proceedings, and when they are used, they're helpful to defence counsel, to Crown counsel, and to an accused person.

Preliminary inquiries are useful are the discovery of witnesses, both civilian witnesses and police witnesses, and that's extremely useful for defence counsel and for an accused person who doesn't have the benefit of interacting with these witnesses prior to trial and doing pretrial interviews.

They're also useful in uncovering potential charter issues that can be argued at trial. They're useful in eliminating weak charges and in fostering resolution discussions that are more meaningful. They're also extremely useful at ensuring that trial issues are focused and witnesses that perhaps don't need to be called aren't called at trial. For the Crown, a preliminary inquiry may reveal insurmountable weaknesses or challenges in their case that may ultimately lead them to either withdraw the charge or stay the charge or to engage again in more meaningful resolution discussions. For defence, it can reveal the gravity of the evidence against the accused person and it may elicit an early guilty plea, which can be taken as a mitigating circumstance in sentencing, which of course is to the benefit of your client.

They're also a very useful tool for people who are unrepresented. As my friend Ms. Hassan has mentioned, not all people can afford the benefit of a lawyer. The preliminary inquiry allows a person who's unrepresented to interact with the criminal justice system in a meaningful way without having any jeopardy with respect to their liberty. It allows them to familiarize themselves with evidentiary rules and procedures and it allows them to appreciate the evidence in the case against them and make an informed decision about what they should do—proceed to trial or perhaps enter a plea.

● (2000)

In my view, limiting preliminary inquiries in the way that has been suggested in Bill C-75 will have a disproportionate impact on these people who are more marginalized and who cannot afford the benefit of a lawyer.

We know that the allegation of a criminal offence is one of the most stigmatizing things that anybody can face. It can significantly limit them in terms of creating new barriers and also compounding already existing barriers. For that reason, accused people do have the right to defend themselves, and it's a charter-protected right to do so under the full ambit of the law.

Procedural protections like these are extremely important; in fact, they're essential. The decision in 2016 in R. v. Catellier was just one recent judgment that recognizes the importance of procedural fairness and the preliminary inquiry process. In that case, it was described as a procedural protection for an accused person.

As a criminal defence lawyer, I do, at the end of the day, have significant concerns about limiting such a valuable exploratory tool that has been made available to people who are accused of criminal activity in this country. I have particular concerns about doing so without the evidentiary basis for it.

Delay in the criminal justice system is, of course, in nobody's best interest. It's not in the interest of the community or the complainant. It's not in the interest of witnesses, and it's not in the interest of the accused person either. They do want to have a final resolution to the matter. If they're detained, they want to ensure they're spending the least time possible in pretrial custody. In order to curb delay and to better deal with this issue of delay and efficiency, I would respectfully suggest that instead of limiting inquiries in this manner, we should adopt a more practical, multi-faceted and nuanced approach to dealing with these issues, such as better practice management.

I've made a list of those suggestions on page 7 of my brief. Some of those, off the top of my head, would be ensuring that counsel is giving more appropriate estimates for trial time and ensuring adequate judicial resources, particularly in remote and growing communities, and so on. I think that these kinds of concrete approaches will ensure that we are combatting that issue of delay while also allowing accused people to have this right to a preliminary inquiry and to have the ability to defend themselves in a proper and adequate manner.

I thank you all for listening to my submission on this. I do look forward to your questions.

● (2005)

The Chair: Thank you.

Mr. Cowper is next.

Mr. Geoffrey Cowper (Lawyer, Fasken Martineau DuMoulin LLP, As an Individual): Thank you, Mr. Chair, and members of the committee.

Thank you for the opportunity to address Bill C-75. Let me say at the outset that I'm here as a private citizen. I represent no firm or organization. I might be what passes as an outsider in this debate, as may come clear in a moment.

The main reason that it was suggested I come here was that in 2012, I authored a reported called “A Criminal Justice System for the 21st Century”. In that report, I identified what I thought to be a culture of delay in our criminal justice system. That term and the report were referred to by the majority, and the minority, in the Jordan decision as one of the reasons that action is required to reduce delay in our systems.

I also served for the better part of a decade on the board of our legal services society, administrating the defence side of the criminal legal system, and I encountered in a managerial sense the issues of administration from that perspective. Otherwise, I'm not a criminal law practitioner. I have occasionally practised criminal law, but only at a high risk to my clients.

I have a couple of general comments and then I have some specific requirements.

First, I think the most useful thing I can do is to shine a bit of a light on the general enterprise. Delays have a hugely long history in our justice system and in almost every justice system that you can study. If you study this carefully, you see that delay is a chronic, recurring problem and that solutions, almost always, are short and temporary fixes that don't produce enduring benefits for the public good.

The first point I would make is to recognize that an enduring solution here will have to be organized around changes that are legislative in nature but that will have an impact on the culture of our system and systemic changes.

I think one of the problems in this debate is that we strive to avoid delay, which ought not to be our goal. Our goal should not be to avoid disaster. Our goal should be to deliver justice in a timely way that's responsive to the public interest and to the needs of the victim and the community generally. All too often we don't state or pursue those goals in any aspects of our system, and I think we need to achieve that cultural change.

The success of the changes you're considering really depends upon not only the wisdom of the changes you make but also in resourcing the execution of those changes. In history, the number of changes that have been passed legislatively that weren't supported by resources is legion.

Second is to gather data as to what's working and not working. One of the difficulties is that people make changes, and then no one sees what happens and gathers the information about the consequences and then responds appropriately. The latter two are difficult to do in any system, but they are the most important. I will come back to the implications of that for specific proposals.

With respect to the elimination or reduction of preliminary inquiries, for most of the people in this room, this debate started when you were in grade seven. The first time that I participated in a debate about whether preliminary inquiries had any modern utility was in the 1980s, and that dates me a little. However, there was a consensus amongst most of the first ministers of this country in the early 1990s that preliminary inquiries were no longer necessary and needed to be radically reduced.

In my respectful submission, the fact that they originated in their current form over a hundred years ago is not a reason to hold on to them. I think we have to let go of the preliminary inquiries and find better ways to address the goals that they originally sought to address.

If I can take one of my earlier remarks, the whole Stinchcombe reality has changed the context in which preliminary inquiries are conducted. I think we have to recognize that and tell the system it has to find better ways to achieve those goals.

With respect to routine police evidence—and I may well be the dissenter in all of this—if you wander around the provincial courts and you're not a criminal practitioner, there seems to be an enormous amount of time spent on nothing, on things that people ought not to spend time on. Taxpayers who do that will say, "I went on jury duty and wandered around the courthouse. What was happening there?" We need to take hold of this issue. I support the proposal to identify categories of evidence that don't require cross-examination as of right. Judges can be trusted to identify and respond to applications where cross-examination isn't necessary.

● (2010)

Most importantly, it's an opportunity to learn. If we do that, we may learn how to discriminate between areas of evidence that require a conventional approach and those that don't.

I would say two things about peremptory challenges. First, there is a waterbed effect that I'm concerned about with respect to peremptory challenges. It's not sleep, which is probably what you were hoping I was going to suggest you do. If we eliminate peremptory challenges, the challenges for cause become much more popular elsewhere. That has been done in other systems. We know that challenges for cause can increase astronomically, because it has happened in jurisdictions in the United States. Those can end up being much more conducive to delay and loss of efficiency, and I think that's a very legitimate concern.

Let me make a remark you may not have heard from others. It relates to what we know about the jury system in Canada. We have made it a criminal offence to study the jury system, because jurors are not allowed to disclose jury deliberations. There is an ocean of legitimate research in the United States looking into the effectiveness of jurors—how they conduct their work, and when they're good and when they're bad—because research is allowed. As a result of section 649 of the Criminal Code, that's not permitted in Canada.

There have been calls from time to time for its qualification, and I strongly suggest that anybody who cares about the jury system would support an amendment to qualify the prohibition to permit legitimate academic research into the Canadian jury system. That proposal has wandered around the policy halls and really should be taken up and dusted off as part of this debate, in my respectful submission.

I have a comment on administrative offences. I looked at this in some detail in British Columbia, and I would say the astronomical increase in administrative offences justifies doing something differently with them. What to do with them brings up a fair amount of debate, but I would hope that after due consideration, we would think differently about the terms of release and how we supervise them.

My final point is not a legislative one but an observation about a critical question of the success of any package of proposals. If the resources found for this are unequally parcelled out among judges, the Crown, and police officers, and we don't properly resource defence counsel through the legal aid plans in Canada, they will not succeed. I can guarantee that. Legal aid is still the poor sister in these debates and discussions, and in my respectful submission, it can be the source of collaborative and effective partnership in making our system more effective.

Thank you.

The Chair: Thank you so much.

Those were excellent presentations. Sometimes after hearing a multitude of presentations, it's hard to pay attention, but you were all excellent and we were able to pay attention. That was great.

Now we're going to questions. We're going to start with Mr. Cooper, who will definitely be entertaining.

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

I'll pose my questions to Ms. Hassan or Ms. Leamon.

First of all, there is zero empirical evidence that limiting preliminary inquiries is going to save court time and address the backlog. It's nothing more than anecdotal at best. To the degree, however, that any efficiencies are going to be created, Bill C-75 still provides for preliminary inquiries—and thank goodness it does—for cases involving a maximum of a life sentence. It would seem to me that the preliminary inquiries that take the longest would involve some of those most serious offences, like murder.

Doesn't that reality just further illustrate that this is really going to do absolutely nothing to save court time? We know the statistics, which show that 86% of cases are resolved following preliminary inquiry.

● (2015)

Ms. Sarah Leamon: It's very interesting that you point out that the preliminary inquiry process will remain available for those who are charged with the peril of a maximum penalty, which is life imprisonment. In that way, we're tacitly endorsing the value of preliminary inquiries. We're saying that a person is only entitled to them if they have committed the most horrendous possible offence. For me, as a criminal defence lawyer, that doesn't make very much sense.

I can tell you that preliminary inquiries are extremely useful when somebody is charged with many different offences and a lot of indictable offences appear on the same information, or when we have multiple parties. I think a lot about my clients who are charged, for instance, with drug trafficking and conspiracy. In those kinds of situations it's very useful, because we actually end up paring down the number of accused people after maybe only one or two days in a preliminary inquiry, and some people are severed. That saves a lot of judicial resources and a lot of court time.

I don't know if Ms. Hassan has anything to add to my comments.

Ms. Sayeh Hassan: The only thing I would add is that I would go back to my point that we can't sacrifice people's rights and procedural protections for the sake of speeding things up. This is not a fast-food restaurant; it's the justice system. Let's make sure that we keep that in mind when making those decisions.

Mr. Michael Cooper: Yes, I agree. In restricting it to maximum life sentences, it seems somewhat illogical in a lot of ways.

Ms. Leamon, you talked about drug trafficking, which I don't think carries a life sentence under the Criminal Code, but something like robbery I think does. Certain types of robberies would be life sentences, yet although the types of sentences that would likely be applied for robbery or for drug trafficking would be in the same range, one would be entitled to a preliminary inquiry and the other wouldn't.

Ms. Sarah Leamon: Absolutely. It does create really illogical situations. For example, somebody who does an attempted break-and-enter is not entitled to a preliminary inquiry, but somebody who completes the break-and-enter is. Somebody charged with impaired driving causing bodily harm, which can carry extremely high and punitive sentences of incarceration, would not be entitled to a preliminary inquiry, but somebody who engages in impaired driving causing death would be. It's just very bizarre to me to see this kind of discrepancy. I don't think there's any evidentiary basis for doing so. There's no logical basis either, in my view.

Mr. Michael Cooper: That's right. Mr. Cowper had referenced Stinchcombe, but as both of you had pointed out, the purpose of preliminary inquiries is much more than just Stinchcombe.

Ms. Hassan, you talked about the difference between disclosure and orderly disclosure, but there is some degree of discovery function in preliminary inquiries. Perhaps you could elaborate on that.

Ms. Sayeh Hassan: There is, and I think that's a very important aspect of it for the unrepresented accused. For example, I have been part of a very long fraud trial for which there was a preliminary hearing. A number of co-accused were not represented. These individuals were able to see what the case against them was. I don't know who else is a criminal defence lawyer here, but when you have a fraud case, you have boxes and boxes of disclosures, and it's impossible to make sense of that, sometimes even for defence lawyers, let alone these unrepresented individuals. It does serve the discovery purpose, and I think that's a very important part of it, absolutely. Maybe we could bolster that function even more if we increased the power of judges who do preliminary hearings.

Mr. Michael Cooper: Thank you.

The Chair: Thank you very much.

Mr. McKinnon is next.

Mr. Ron McKinnon: Thanks, Chair. I'd also like to save a minute for my colleague Mr. Virani.

The Chair: All right. I will stop you before you get to that point.

Mr. Ron McKinnon: Thank you.

Ms. Hassan, I'm very interested in exit pretrials. First, I'm going to play the I'm-not-a-lawyer card. I don't really know what goes on there.

Are the judges who preside over pretrials the same ones who might preside over the trials themselves?

Ms. Sayeh Hassan: No. The preliminary hearing takes place in the Ontario Court of Justice, and once the accused is committed for a trial, the case moves up to the Ontario Superior Court of Justice, where the trials happen.

● (2020)

Mr. Ron McKinnon: I was concerned that maybe having a judge opine on a pretrial might be prejudicial to them if they sat on the case later on.

Ms. Sayeh Hassan: No.

Mr. Ron McKinnon: Okay. You also indicated that these exit pretrials should be mandatory, with a written response by the judge. How much time would that involve for the judges?

Ms. Sayeh Hassan: I've had exit pretrials. I've explained that in my brief. What happens is that after the preliminary hearing, the judge orally—it doesn't necessarily have to be in writing—tells both the defence and the Crown the weaknesses and strengths of the case. Not every judge will do that, and not every Crown or every defence counsel will request that. The Crown and the defence would have to come together to request it in exit pretrial. It's done informally, but it's extremely helpful. I've certainly found it extremely helpful in more than one case, and thus I would think that if it were done in a routine way, then it would give both the defence and the Crown something to seriously consider in deciding whether they're going to move up or not. You've had a judge who's not the trial judge tell you where the weaknesses and the strengths of the case are.

Mr. Ron McKinnon: Thank you.

You have suggested also that judges presiding over preliminary hearings who do not now have the jurisdiction to weigh out the evidence should have that jurisdiction.

I was wondering what the consequences of that would be to the pretrial itself—whether that would lengthen it, whether it would streamline it, whether it would be more amenable to justice in general, and whether such a ruling by a pretrial judge would be applicable to the actual trial. If the pretrial judge says certain evidence is not admissible, would that be binding on the trial judge?

Ms. Sayeh Hassan: That's my suggestion, that if there's a concern by the government that the only purpose the preliminary hearing serves is the discovery purpose, then let's give the judges more jurisdiction to do more. I'll give you a practical example; I think I did already.

Let's talk about an evidence such as a statement that was taken while violating the accused's rights. If they had the ability to deal with that at the preliminary hearing, theoretically then the judge would say “Yes, the charter has been breached, and I'm throwing out the statement.” Then that would be it: there would be no more statement. Then the Crown would either have to proceed without the statement, or in cases where the only evidence had been obtained by the breaching of somebody's charter rights, the case would be over because the evidence is gone, and then it's not going to go up to the superior court and take more time when essentially the exact same thing will happen if you take the charter application up to the superior court.

Mr. Ron McKinnon: If it did go on to the superior court, could the prosecution not come back and say, “Listen, this was excluded by the preliminary trial, but we think it should be part of this trial. Can we reintroduce it?” Is this something that you would foresee happening?

Ms. Sayeh Hassan: It would depend on how the legislation would be worded, but what I am suggesting is that the preliminary judge would have this jurisdiction, and that would be final, and the Crown would not be able to now take this charter application and take it up to the superior court, because that would defeat the purpose of doing it during the preliminary in the first place.

The Chair: I'm going to let you know that it's probably time to move to Mr. Virani.

Mr. Ron McKinnon: Thank you.

Mr. Arif Virani (Parkdale—High Park, Lib.): Thank you, Mr. Chair.

Just quickly, first of all, welcome, Mr. Cowper. I'm a former Fasken's lawyer myself.

Ms. Hassan and Ms. Leamon, I'm going to ask you guys a couple of questions.

I take your points. We've heard a lot of sometimes competing views in the three days that we've had on this study so far, which feels like three months. However, your point about this being a constitutional democracy and that we want to ensure there's due process is, of course, understood.

You made the point that it's not a fast-food restaurant. It's also not an eight-course banquet, right? I think the right to be tried within reasonable time, as we all know in this room, is protected under the charter. That's what Jordan is trying to drive us towards. We're trying to find that balance.

Ms. Sayeh Hassan: Yes.

Mr. Arif Virani: I take your points about the preliminary inquiries.

I have two questions. You mentioned that preliminary inquiries serve an educative discovery-like aspect, particularly for unrepresented accused, etc., but what about the traumatic impacts that preliminary inquiries can have, particularly in sexual offence cases?

Second, do you have anything to offer with respect to some of the evidence we've heard about reverse onuses on bail, and how those might impact on women, particularly indigenous women?

Ms. Sayeh Hassan: With respect to your first question about.... First, I just want to comment on what you said about it not being a fast-food restaurant and also not a banquet. We have to take into consideration that Jordan actually takes into account the preliminary hearing; when the Supreme Court gave us the 30 months, that's the limit. It takes into account the preliminary hearing, so if you take out the preliminary hearing, I have a feeling that then the ceiling is going to come down, so it's not going to start immediately at the 30 months.

With respect to the effect on the complainants, again, it's a balancing act, but I think we need to keep in mind the fact that when a person is accused, those are just allegations, and they're innocent until proven guilty. The complainant is not a victim, in my opinion, until that person has been proved guilty in court.

It's a balancing act, and I suppose that's the job of the government to decide what is more important, but in my respectful submission, I think it's extremely important that when an individual is being charged with an offence those are just allegations. We don't know if this person is guilty; otherwise, obviously, we wouldn't need the court system.

We have to balance those rights.

● (2025)

Ms. Sarah Leamon: I would like to elaborate on that.

I actually do have significant concerns about how this is going to impact people accused of sexual offences in this country. My concerns about that are exacerbated by Bill C-51, which I came and spoke to the committee about—it seems like a very long time ago, but it may have been just a few months. In any event, that bill does significantly limit an accused person's abilities to fully make answer and defence, in my view at least, when they are accused of crimes of a sexual nature.

Crimes of a sexual nature are the most stigmatizing things, arguably, that one can be accused of. If Bill C-51 passes in its current form, alongside this amendment under Bill C-75 to preliminary inquiries, it means that the only people who will have the preliminary inquiry process available to them, those who are charged with a sexual offence, are ones who have done so in an aggravated fashion or have caused bodily harm. That's a big concern for me.

I can tell you that in my practice as a defence lawyer, the vast majority of times that I use a preliminary inquiry process is for crimes of a sexual nature, because it is so useful in terms of an investigative or discovery tool. As Mr. Cooper pointed out, 87% of them actually resolve after the preliminary inquiry process. It saves the complainant, in the vast majority of circumstances, from having to testify again and from being re-traumatized.

Mr. Arif Virani: Do you have any thoughts, quickly, on the reverse onus that we heard about on bail?

Ms. Sarah Leamon: I'm actually in favour of the provisions in Bill C-75 for bail. When it comes to reverse onus provisions for domestic allegations, which is what you're referring to, as a criminal defence lawyer, of course, I'm not in favour of reverse onus. It should be up to the Crown to show grounds for detention.

Yes, I think that it could.... I've never really put my mind to it to any great extent with respect to how it could affect women who are charged or marginalized people who are charged, but I do think it could have some significant impacts, adversarial impacts on the LGBTQ2 community, people who are not in heterosexual relationships. If we see that they have a reverse onus all of a sudden to show why they should get out, they may more frequently be detained. That could be very problematic.

Thank you.

Mr. Arif Virani: Thank you.

The Chair: Thank you so much.

Mr. Rankin is next.

Mr. Murray Rankin: Thank you, everyone.

I don't want to be accused of discriminating against Toronto, so I want to speak to Mr. Gover. It's nice to see you, Mr. Gover.

I understand very clearly that you and The Advocates' Society favour peremptory challenges. You've suggested that if we're going to change it, we need to do further studies and consultation. In the alternative argument, you said we should take a look at the Batson v. Kentucky procedure that the United States has implemented, which allows for addressing discrimination and so on. What would that look like? Would that look like more challenges for cause?

Mr. Cowper has said that if we were to do that, there would be this waterbed effect, that we might end up with more delay as we do more challenges for cause. Could you elaborate on how that would look? We've had some witnesses say we should give the courts the discretion to look at the representivity—if that is such a word—on the jury and decide whether that's fair. That's what we've heard others suggest. How exactly would you line up?

Mr. Brian Gover: It would be done on a juror-by-juror basis, with the exercise of the peremptory challenge, and it would be where the objecting party, either the Crown or the defence, feels that the jury is no longer being representative, that discriminatory use underlies the exercise of the peremptory challenge. That's where the exercise would be engaged.

I don't see it taking very much time in jury selection, Mr. Rankin. This is the kind of thing, in my experience, that would take a trial judge something like five to 10 minutes at the outside to decide in making a determination about whether there has been prima facie or first impression of discriminatory use.

Overall, I think this is going to be time-efficient because of the alternative raised by Mr. Cowper.

● (2030)

Mr. Murray Rankin: I'd just like to say—

Please go ahead, Mr. Cowper.

Mr. Geoffrey Cowper: It might be helpful to know—I did speak to American colleagues on this—that the Batson procedure actually rarely produces lengthy additions to process. The challenges for cause process in the United States can produce weeks and weeks of delay. I spoke to one fellow who said they had to have questionnaires distributed to 1,200 people—one jury—last year in Seattle. Therefore, in terms of risks, challenges for cause are a greater risk for adding time and delay than is the Batson procedure.

Mr. Murray Rankin: I just want to say for the record, Mr. Cowper, that I really appreciate the work you did on the criminal justice system for the 21st century, and all your service to the profession and your leadership on legal aid. Thank you for that.

I also want to give you some hope that this committee has in fact made studies and recommended that section 649 of the Criminal Code be amended. You'll be interested in why. It is to allow for jurors to seek counselling in that rare circumstance where they're traumatized by their duty. If we did that, I think your point would be that it would open the door to allow for more academic studies of jurors under some conditions. Thank you for helping us connect a couple of dots.

I want to say to you, if I may, Ms. Hassan, how powerful I thought your point was about the brutal efficiency of certain regimes versus our constitutional charter rights—our common-law rights. You gave us, as we sit here hour after hour doing this, a sense of the importance of what we're doing. Thanks for that reminder.

Thank you also for doing something I haven't heard other witnesses do, which is to talk about the importance of preliminary inquiries for what you characterized as marginalized groups, such as those with mental health problems and addictions, and also the poor. You made a very powerful point about unrepresented individuals getting boxes of documents or an electronic version thereof and being asked to deal with that.

You also made a point about people who need often to get private investigators, and asked how a poor person could do that with legal aid in the state it is in. Those were very important points, and I want to thank you for making them.

Also, though, in paragraphs 31 and 32 of your recommendations, you had some specific points about how we could broaden the jurisdiction of judges on preliminary inquiries. You spoke to our colleague about that. You talked about disclosure being fixed up a bit more, giving a judge broader discretion on preliminary inquiries, and this intriguing notion of letting the courts grapple with charter issues so as to avoid a subsequent trial where everything gets to be done again, and this time the evidence we saw that couldn't be admissible suddenly causes the case to disappear. Clearly it's going to save a lot of time if we do that.

Would it simply be a question of amending the preliminary inquiry sections to do those two things? Do you have any thoughts about how we might act on your ideas?

Ms. Sayeh Hassan: Well, I thought I would leave it to the government, but my suggestion is just to amend the bill to give the judge more jurisdiction to do the things I've recommended: to be able to order the Crown, to give disclosure, and to do the charter motions and exit pretrials. I will leave the wording of it to you guys, though.

Mr. Murray Rankin: Thank you. That's fine.

Just for a moment, I would like to thank Ms. Leamon. It's nice to see you again. Thank you for coming.

I wanted to ask you another question that you didn't address: would you agree that addressing mandatory minimum sentences would significantly reduce court delay? Would it make a difference, perhaps more than the preliminaries? Do you have a thought on that?

Ms. Sarah Leamon: Absolutely, yes, it would, in my view. I know that the vast majority of my clients who are facing mandatory minimums are more likely to want to proceed to trial than to enter an early plea, because it deters them from doing so. Yes, getting rid of mandatory minimums or significantly reducing the number of mandatory minimums would have quite a tangible effect on delay.

● (2035)

Mr. Murray Rankin: That's what one of our witnesses referred to as the elephant in the room in this particular reform effort: they want to save time, but they didn't even talk about mandatory minimums in the bill.

Finally, on page 7, there are 10 little points that you suggested as alternative approaches to trial management. I know you won't have time to go through them, but I just want to commend them to this committee for its consideration. They're very practical things that could make a gigantic difference if you're serious about delay. I'll just leave it at that. Thank you for organizing them so succinctly.

Ms. Sarah Leamon: Thank you.

I will say just very quickly that I made those recommendations based on my experience in the courtroom as a criminal defence lawyer. These things would have a great impact on reducing delay.

The Chair: Thank you very much.

Mr. Fraser is next.

Mr. Colin Fraser: Thank you very much to you all for being here today. I thought your presentations were very interesting. I'm glad that briefs were submitted as well.

Ms. Leamon, I'd like to start with you.

You mentioned that preliminary inquiries in a case would actually make it take longer. Obviously, a preliminary inquiry date would have to be selected, and then you would go to trial after that. That does stretch out, so I get your point on that.

You also say they're not used all that often, so they don't really contribute significantly overall to the delay problem we have. Do the statistics you're analyzing for that include instances where a preliminary inquiry was set down and actually waived, or is that preliminary inquiries that are actually proceeded with?

Ms. Sarah Leamon: My understanding is they're preliminary inquiries that are proceeded with. However, I would have to refer to the primary resource material in order to give any certainty on that point.

Mr. Colin Fraser: Okay.

Oftentimes, a preliminary inquiry will be set. The defence obviously is putting together its case in the meantime, and when the preliminary inquiry date comes, which can oftentimes be a year down the road, or many months at least, at that point in time, a decision is made to maybe re-elect, or perhaps discussions have taken place with the Crown. Sometimes preliminary inquiries are chosen as the avenue, and then during that period of time different decisions are made. If a preliminary inquiry in that case wasn't proceeded with, it wouldn't be one of those cases where it's not often used, but would actually have lengthened the period of time for that matter to be resolved.

Do you see what I'm saying?

Ms. Sarah Leamon: Yes.

Of course, it's something we can't control. The instruction of our client sometimes changes over time because of different life circumstances and so on. Somebody who may have wanted to proceed with the preliminary inquiry or trial at the outset may change their mind six months or a year down the road and may say actually that they do just want to enter a plea or something like that.

I will tell you that when preliminary inquiries are set, they are set after we've already had an opportunity to speak with the Crown and to negotiate with the Crown, and those negotiations have failed. Out of the preliminary inquiries that I currently have coming up in the future, I think that at least two out of the three of them, the majority of them, were requested by the Crown. It's not always the defence that's asking for these things. Often it is the Crown as well, and it's something that is beneficial to both parties.

Mr. Colin Fraser: Obviously, Mr. Cowper, after Stinchcombe the main reason for preliminary inquiries perhaps was not as obvious as it had been as far as the discovery process goes.

I know, Ms. Hassan, you commented that it's useful for discovery purposes.

Mr. Cowper, you said there are other ways outside of an official courtroom setting where things could actually be done. Do you see discovery as a possible thing that could be done outside of a preliminary inquiry setting? Are there other avenues that would happen if preliminary inquiries weren't used as often as they are now?

Mr. Geoffrey Cowper: I think the opposite of some of my colleagues here. I actually think it would be dangerous to add authority and decision-making roles to judges sitting on preliminary inquiries. Right now they pass and say it goes to trial in the other court. The test is simply whether or not there's sufficient evidence under the proper test to have a trial.

If you then carve off some of the trial issues for the first thing, you really are creating two trials, one of which is going to happen in the first time and one will happen in the second time. I think that's a dangerous reform that should be very cautiously considered.

The second point is—and this a culture point—it used to all be about preliminary inquiries. It's now hardly about preliminary inquiries at all. They are dying, frankly, a natural death. What we really need to do is focus on how to achieve the goals that preliminary inquiries used to be the only tool for, through the other tools that are available. In my view those have to surround themselves around the relationship between the Crown and the defence primarily, not the judges and decisions made by trial judges ahead of the trial instead of at the trial. We have to dispose of this rigid, theory-bound approach to criminal process. That includes disclosure and preliminary decisions, which in my view have to be made by the trial judge and not by other judicial officers.

● (2040)

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

If I could turn to The Advocates' Society for a moment, I want to touch on one point that you raised in your presentation regarding routine police evidence. Generally speaking, I know you have great reservations about that part of the bill.

Do you think that this part of the bill in admitting routine police evidence by affidavit without an automatic right to cross-examination overall would help with delay or hinder delay in our court system?

Mr. Brian Gover: If we were strictly speaking of efficiency and not concerned with making full answer and defence, the answer clearly is it would reduce delay, but our point is that there's a broader concern here, and that is making full answer and defence.

In cases such as this, for the reasons that I articulated earlier, there's just too much risk that constitutional rights will be violated. Section 7 of the charter guarantees fundamental justice. In my experience, it's the rare case where defence counsel goes through by rote and challenges continuity of exhibits and so on as a matter of course. It's the rare case because there are so many other means by which we can create the culture that Mr. Cowper's been talking about.

I don't see admitting routine police evidence ultimately as being the answer here. Admitting it in that fashion I think is going to be problematic. It's inevitably going to lead to constitutional challenges and greater uncertainty, and we need to guard against that as we administer the criminal justice system.

Mr. Colin Fraser: Great. Thank you.

Those are my questions.

The Chair: Thank you very much.

It's been a long day and a long three days. That was the end of the round of questions.

I had a request from Mr. Doherty to ask a short question. This will be the last question.

You may have one short question, Mr. Doherty.

Mr. Todd Doherty (Cariboo—Prince George, CPC): Great.

I just want to say thank you to the committee members and thank you to the guests. I have not sat through hours and hours of testimony. This is only—

Mr. Arif Virani: You just showed up for the food.

Mr. Todd Doherty: Frankly, I just had vegetables and water.

I just want to say thank you to our witnesses because it is very eye-opening, and I do appreciate the testimony.

I do want to ask one question of Ms. Leamon. We have heard time and time again about the judicial vacancies and the challenges that we have. I've sat here for an hour now, and I have not heard that brought up once. However, we continually hear in the media, of course, about cases being thrown out.

You mentioned in your brief that a better way to reduce court delays would be the prompt filling of judicial vacancies. As you know, it's been a serious problem with the current administration. Despite public pressure, despite serious criminals walking free, there are still over 30 judicial vacancies out there.

Can you tell us some of your personal experiences with regard to a lack of available judges?

Ms. Sarah Leamon: Yes, I can tell you—

The Chair: I have to say that I have to rule that question out of order. It has nothing to do with Bill C-75. I'm sorry; it doesn't.

This is a discussion about issues associated with Bill C-75. Mr. Rankin's question talked about an issue and brought it into Bill C-75. You may want to rephrase your question, but it has nothing to do with Bill C-75.

Mr. Michael Cooper: This will become part of Bill C-75 once Bill C-75 is—

The Chair: This bill would not be a bill that would add something to do with judicial vacancies.

Mr. Colin Fraser: It was a courtesy question.

The Chair: Really, I have to say—

Mr. Todd Doherty: Mr. Chairman, with all due respect—

The Chair: Mr. Doherty, this was the end of a round of questions. There were no more questions. I allowed you a courtesy question and I appreciate, because I usually do, that we will always try to accommodate guests. This was not a question that deals with the bill. It was a question to attempt to make a political point.

Mr. Todd Doherty: It's not.

The Chair: I don't want to overreach this. If you want to rephrase your question to bring it into Bill C-75, I'm allowing you to do so.

Mr. Todd Doherty: Ms. Leamon, you were asked to submit testimony on ways that perhaps could reduce court delays. Not being a lawyer, as are many others around the table, I read your brief, and one of the suggestions that you brought up was the prompt filling of judicial vacancies.

Can you perhaps provide some of your own experiences with regard to a lack of available judges?

● (2045)

Ms. Sarah Leamon: I can. I can tell you that this problem is most frequently occurring in more remote communities, so practising in Vancouver in the Lower Mainland—

Mr. Todd Doherty: Or in areas like Cariboo—Prince George, where I am.

Ms. Sarah Leamon: Yes, exactly. Prince George is a place that does regularly experience judicial vacancies—

Mr. Todd Doherty: Absolutely.

Ms. Sarah Leamon: —and there are places like that throughout northern British Columbia.

There are places like Fort McMurray, for instance—

Mr. Todd Doherty: Right.

Ms. Sarah Leamon: —my hometown. I practise there as well. There are two judges there, so if one judge is sick and the other one catches a cold—

Mr. Todd Doherty: Delays, delays.

Ms. Sarah Leamon: Yes, there are all kinds of problems, so it's important for us to have all of these resources available. I do think it's important to make the point that funding legal aid is just as important as filling judicial vacancies as well, but we do have to approach it from a multi-faceted perspective, and that's just one element of it.

Mr. Todd Doherty: I appreciate that.

Thank you.

The Chair: Thank you.

Again, colleagues, it's been a long day. I thank you all for your patience.

Thank you to our witnesses.

To the The Advocates' Society, thank you for coming in from Toronto. We really appreciate it.

To all three of you, thank you so much.

The meeting is adjourned.