HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 107 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Monday, September 24, 2018

Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

Monday, September 24, 2018

● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I call the meeting to order.

Good afternoon, everyone. Welcome to this regular meeting of the Standing Committee on Justice and Human Rights.

I would like to welcome Mr. Clement to our committee, as it is his first meeting.

It's a pleasure to have you.

Hon. Tony Clement (Parry Sound—Muskoka, CPC): It's a pleasure to be here, Chair.

The Chair: Thank you.

Murray, do you mind if we first move that Tony be a vice-chair? It should take about one minute.

Mr. Murray Rankin (Victoria, NDP): I think that's a great idea, Chair.

The Chair: Perfect.

Mr. MacKenzie, can I have a motion for the vice-chair?

Mr. Dave MacKenzie (Oxford, CPC): I move that the Honourable Tony Clement be named a vice-chair of this committee.

The Chair: The motion is to make Tony Clement the first vice-chair.

Do I have any other motions?

Not hearing any, is it the pleasure of the committee to accept Mr. Clement as the first vice-chair?

(Motion agreed to)

Mr. Colin Fraser (West Nova, Lib.): Congratulations.

Hon. Tony Clement: Thank you.

The Chair: Mr. Clement, it is a pleasure to have you as our first vice-chair.

Hon. Tony Clement: Thank you, Mr. Chair.

The Chair: It is also a pleasure to now turn the meeting over to Mr. Rankin's motion. Mr. Rankin properly gave a notice of motion on a study on the notwithstanding clause.

Mr. Rankin, the floor is yours to move the motion and to speak to it.

Mr. Murray Rankin: Thanks very much, Chair. Thanks for your support in getting this before members in a timely way.

Welcome, Tony Clement, to our committee.

This motion is before everyone. You will have received it. I sent a letter out on September 13, and then formally entered the motion on September 14.

It calls on the committee to undertake a study—nothing more, nothing less—into the potential for the routine use of section 33, or the so-called notwithstanding clause of the Constitution Act, 1982.

I've asked that constitutional experts and Attorneys General come to this committee to participate in a true dialogue about the nature of this clause under our Constitution and how Canadians should agree to deploy it in the future.

At the outset, Chair, I have four points to make about the motion.

First, I emphasize that this is not about a particular premier or event. The reason for the motion is that it now appears that some political leaders in our country may believe that the so-called notwithstanding clause can be used in a repeated and routine way, rather than as a tool of last resort to be reserved for very serious public policy matters. I believe that the founders of the charter intended it to be used sparingly, as Alberta Premier Peter Lougheed told his legislature in 1981.

Second, I recognize and acknowledge from the outset that the notwithstanding clause is an integral part of the charter. History will show that in 1981, it was inserted at the instigation of Premier Lougheed, and affirmed by B.C. Premier Bennett, as a compromise, in order that the rest of the charter could be enacted. It was truly the price of admission. I get that. I accept that it is every bit as much a part of the charter as other provisions that are better known and more frequently used.

Third, I'm not now arguing that this important debate needs to take place immediately. I understand that we are conducting a very important study of Bill C-75 right now. I also know that we're intending to study discrimination on the basis of HIV/AIDS. There are many other reasons of timing that may argue against proceeding right away with this study. I get that. I'm perfectly content to delay this conversation until later. All that I'm seeking is a clear commitment from this committee that we will undertake the study. Today all I want is a vote on this matter so that we have it on the record as to whether we are prepared to move forward or not.

Lastly, I believe there is no better forum for a critical conversation like this to take place than the justice and human rights committee.

Colleagues, I can't imagine a more important justice and human rights issue than the potential erosion, indeed trivialization, of our Charter of Rights and Freedoms.

Members, what is my motion about, and what is it not about? This is not a partisan issue. It goes to the very basis of the constitutional arrangements that Canadians entered into in 1982, some 36 years ago. My motion concerns the possibility of any senior government—federal, provincial, territorial—routinely invoking section 33 of the Constitution Act.

As all members of this committee know, when a government invokes section 33, it passes a bill that suspends, for five years, a court decision relating to key charter rights. The notwithstanding clause overrules freedom of expression, freedom of religion, freedom of conscience, and freedom of association. It also deals with legal rights, like the right to life, liberty and security of the person, which was the foundation of a woman's right to choose. That was upheld in the Supreme Court of Canada, of course, in the Morgentaler case, and it was upheld more recently in the right to medical assistance in dying. It can override search and seizure rights and equality rights.

There are many decisions of Canadian courts that have made a difference to the LGBTQ2 community, from equality rights to same-sex couples in social benefits, from Nesbit and Egan all the way to same-sex marriage. These gains could be eroded at any time by a provincial or federal government. Indeed, the record will show, for example, that Alberta Premier Ralph Klein contemplated the use of this clause to override aspects of the same-sex marriage debate in his province.

I reiterate that my motion may have been prompted by, but is not about, a particular decision made in a particular province.

The context of my motion, of course, is well known: the decision by a premier in Ontario, for the first time in that province's history, to use the notwithstanding clause to deal with a dispute between the City of Toronto and the Province.

People may perhaps differ as to whether this kind of situation was what the framers of the charter intended with the notwithstanding clause.

As members know, the Ontario Court of Appeal made it unnecessary in this instance for the Ontario government to invoke the notwithstanding clause.

Again, that particular case is not in issue. However, it was a statement by the Premier that he would routinely and repeatedly use the notwithstanding clause that has caused constitutional lawyers across Canada such grave concern. The Ontario Premier's statement to use it repeatedly has been condemned by most constitutional lawyers and equality-seeking groups across Canada.

I don't know about you, Mr. Chairman, but I have been inundated by calls from prominent constitutional lawyers. I'd refer members to YouTube to see, for example, two colloquiums—one at the University of Ottawa, another at the University of Toronto—that were prompted by recent events and the fear that the Charter of Rights will be eroded.

● (1535)

[*Translation*]

The possibility of systematic recourse to the notwithstanding clause, and the erosion of the Canadian Constitution are extremely troubling for the generation of lawyers like myself who grew up and practised at the time when Canada adopted the Charter. I believe that over the last 36 years since it came into effect, the Charter was used only 15 times, and by only three Canadian legislatures. This bears witness to the fact that its exceptional use was the express intent of the provincial premiers and the Prime Minister of Canada at the inception of the Charter in 1982. It was meant to be a measure of last resort. The fact that it was only used 15 times in 36 years in only three legislative assemblies attests to that reality.

Both Prime Minister Chrétien and premiers Romanow and Davis, as well as the Honourable R. Roy McMurtry, energetically contended that that was not the intention at the outset. They knew, since they were there.

It is not sufficient to simply express one's disappointment to see the Premier of Ontario use clause 33 to systematically request that judicial decisions in connection with our constitutional rights be annulled, or simply to declare that we have to defend our Constitution. Former Prime Minister Martin swore to never use the notwithstanding clause in connection with federal laws. Former Prime Minister Mulroney is also firmly opposed to the use of this provision.

Could the committee recommend to the federal government that it respect the clear commitment made by two prime ministers, one from the Liberal party and the other from the Conservative party?

[*English*]

Let me be clear. Some have stated that the only two ways to address this issue are to either open up the Constitution and make an amendment to limit the inappropriate use of section 33, or to invoke something that most of us think is a constitutional dead letter, the so-called disallowance power. I want nothing to do with either of those options. I hope I've made that clear.

The reason for my motion is to see if experts and Attorneys General can generate other options. For example, is it now a “convention”—that is, part of our unwritten Constitution—that since the resort to section 33 has been so infrequent, and since the politicians who brought the charter to us have all confirmed the original intent, perhaps there is already a convention to that effect? Alternatively, perhaps Canadian leaders of goodwill could commit to limit its use, as I believe the framers of the charter intended.

Mr. Chair, I don't have all the answers. I don't pretend to. That is why I believe this committee is the appropriate place to show leadership and to try to come up with answers using the best expertise available to us.

In conclusion, thank you for your indulgence. I would ask that each of you consider this motion for what it is: an opportunity to begin an open-minded discussion with constitutional experts and others who may wish to join us, so that we might learn from them and evaluate options that could be employed to protect all Canadians' charter rights from the routine and systematic use of the notwithstanding clause.

I look forward to a vote today on this critically important issue.

The Chair: Thank you very much.

Go ahead, Mr. Clement.

Hon. Tony Clement: Thank you, Chair. Thank you for your remarks, Mr. Rankin.

I don't have any prepared remarks, but I do have some thoughts about this motion. I take as the basis for the request your very well-expressed belief that this issue is important to study. I may or may not agree with a little context that you've woven into the discussion, but I think the basis of the motion is to have a study about the use of section 33.

There are many disadvantages to being older. One of the advantages, however, is that I remember 1982. I was a sentient human being at the time, just starting law school in 1983. The debate, of course, was captivating the country. It was a genuine debate. I remember many voices that wanted to ensure that Parliament and/or legislatures had an option to voice public opinion or to defend rights that they felt needed defending.

One of the most articulate members of this was an NDP premier, Premier Blakeney, who wanted the notwithstanding clause, as I recall, to ensure that workers' rights would have the benefit of protection of a legislature. I remember, from the other side of the coin, Sterling Lyon, who is no longer with us, who did express, on behalf of the people of Manitoba, the belief that there were times when the legislature still had to be supreme in those cases.

Those voices were there, as well as some of the other voices that we've heard in recent weeks, about their interpretation of why the notwithstanding clause was present in the final draft of the Canadian Constitution and the charter.

There's also, of course, the evidence of legislatures using the notwithstanding clause. Of course the Government of Quebec, as part of their protest on the charter, regularly invoked the notwithstanding clause for many bills over a period of years, I recall—I stand to be corrected on that—to express their disagreement with how the Constitution was repatriated. I am advised by a Saskatchewan parliamentarian that the notwithstanding clause was deployed by the legislature of Saskatchewan just three weeks ago. There wasn't much of a hullabaloo about that. There's been a little more hullabaloo about another provincial legislature.

All of which is to say, Mr. Chair, that I think it is appropriate for us to have such a study and to hear from experts from the academic world, as well as some who perhaps were witnesses at the time of the patriation of the Constitution. It might be of good use to have this committee record those views in an environment that I hope would be devoid of political grandstanding, so that we could get to the root of the issues and have that discussion in a respectful way and generate some light rather than just heat.

I'm inclined to support the motion. As I say, I don't want to be on the record agreeing with everything that Mr. Rankin has said in his introduction, but when I look at the essence of the motion, I can sign on to it.

● (1540)

The Chair: Does anyone else want to intervene?

Go ahead, Ms. Khalid.

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

In the past three years sitting on this committee, I've really looked up to Mr. Rankin and the wealth of knowledge he has bestowed upon us. I genuinely believe in all the issues you've raised. I think it is a very legitimate concern for us to have, but I'm not sure if this committee is the right place for that debate to occur.

We have been very much looking at concrete ways to impact our laws, concrete recommendations that we can provide to the government. We've had some really great reports and studies over the past three years. I'm not sure if we can fit this into our agenda in the next year.

We have 10 months in which we have really heavy, substantial legislation to get through. We have that human trafficking study report to finalize. We have a number of things on our agenda already. I really want to work on this issue. We know in the future we'd be happy to work with Mr. Rankin and our government to see how we can look at this issue in a substantial way, but I don't think this committee is the right place for it.

● (1545)

The Chair: Go ahead, Mr. Rankin.

Mr. Murray Rankin: First of all, I really appreciate your support for this idea, and I hope my reference to the specifics that led Canadians to be so concerned doesn't detract from my commitment to make this a non-partisan issue. You have my word on that. I think it's too important for that.

Your reference to workers' rights is important. As you know, the Supreme Court has confirmed that collective bargaining is a constitutional right. That happened since Saskatchewan talked about it, and the fact that Saskatchewan has used it recently is no surprise. It's one of those legislatures that has used it in the past. Since this was the first time in Ontario it was being used, given that Ontario is the largest province and the biggest media market, it's no wonder we all took notice.

Ms. Khalid, I appreciate your generous words. I really mean it. I can only reiterate that there is nothing more important than this, in my humble opinion. If not here, where? I thought of the Council of the Federation, but the federal government isn't part of that. I thought of universities. We've already had colloquiums galore: just look at YouTube. It's a big deal out there in Canada, and I can't think of a better place.

I just suggested, as you know, five meetings. For goodness' sake, we're going until nine o'clock tonight. We're going until nine o'clock other nights. We've gone until nine o'clock frequently. I think Canadians have a right to expect us to take up our responsibilities and do this, for the simple reason that all we're asking for is a study, and I'm prepared to defer it until much later in the timetable. I seriously cannot think of anywhere else this can be done, where we can have witnesses come, perhaps as Mr. Clement suggested, those who were there and the current Attorneys General, to have one of the dialogues Canadians are so famous for, just to have a turnout, roll up our sleeves and see if we can find ways to agree that its appropriate use is "thus and so" and not "this and that".

That's all I want. It would really be a shame if—given that we have 10 months or so left—we can't find a few nights or days to talk about this. I think Canadians would be very disappointed if we did not.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thanks, Mr. Chair, and thank you, Mr. Rankin, for putting this motion forward.

I think it's fair to say that in our human trafficking study, we got to know each other better, and I think we were both talking about how we can do more for the federation and make sure that it stays strong.

I had the opportunity when I was in Victoria for ParlAmericas to meet with a dear friend, a professor, almost a second father, J. Peter Meekison, who was a deputy minister to Premier Lougheed during the time of the repatriation of the Constitution. He is the man responsible for creating the Victoria amending formula in the Constitution. We talked about the notwithstanding clause, how it was intended to be used, and why it was part of the negotiation around the repatriation of the Constitution.

I appreciate the sentiment of your motion and what you'd like us to see. At the same time, as a government member, I see our work pushing legislation, listening to witnesses, and making sure that we get done what needs to get done on behalf of the government for the next 10 months. I think Mr. Clement is right. There wasn't much ballyhoo about Saskatchewan using the notwithstanding clause. It hasn't been applied here in Ontario, because of the stay of the decision. I appreciate your mentioning the study on HIV over-criminalization, because that's a study I've put on the Order Paper, and I'm going to be agreeing with Ms. Khalid that we need to keep moving. We're going to have more legislation come to this committee, and that is how I'll be voting.

The Chair: Mr. Cooper is next.

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

I strongly associate my sentiments with the words expressed by Mr. Clement, and I have to say, Mr. Rankin, that we did have an opportunity to discuss the motion. At the outset, I was a little bit skeptical, but I think you've made it clear in your comments to me and to the committee that the intent of the motion is to have a dispassionate study whereby we can bring in constitutional experts, people who were around in 1982, and have a good study of an issue of significant importance to all Canadians.

I have to say that I am quite disappointed with the sentiments expressed by Ms. Khalid and Mr. Boissonnault as the basis for opposing this, I think, timely motion.

In fact, over the last three years that I've had an opportunity to serve on this committee, I can't think of a single instance when we were not able to reach a consensus on any of the many issues we studied. Indeed, the only time that we were unable to reach consensus was on a motion I brought forward a number of months ago related to the crisis that we face caused by the Minister of Justice's failure to fill judicial vacancies. That was the one time when the government voted against studying an issue, and it was obviously because they don't want to talk about this minister's failure when it comes to filling judicial vacancies in a timely manner.

Mr. Rankin has not imposed a hard and fast date. The motion is simply to give the green light, and hopefully, as a committee that has generally worked collaboratively on this matter, we can find time to see whether we can schedule it in. Hopefully, there will be time between now and June to do it.

● (1550)

Mr. Arif Virani (Parkdale—High Park, Lib.): Perhaps I could just respond to that briefly, Mr. Chair, since this issue has been raised by Mr. Cooper.

I think the record should reflect that this minister has appointed 212 people to the bench, 100 people in each of the last two years. That's more than any minister of justice in Canadian history, including every minister of justice who served in the previous government.

It takes time to implement a balanced, merit-based process that includes things like lived experience, gender, race, persons with disabilities, and indigenous representation on the bench. Those clearly weren't priorities for the previous government. We know why those are priorities for our government. We will not apologize or listen to that response. It is criticism that is completely unmerited and unfounded.

The Chair: Thank you.

Coming back to the notwithstanding clause, I just wanted to intervene for a second, if I may, colleagues.

Being a member of a community that was impacted by the notwithstanding clause in 1989 as a teenager, seeing how it impacted the members of my community, and seeing how it made many people feel very uncomfortable that their language was banished from public view after a Supreme Court decision and after a promise in an election that bilingual signs would be permitted, I certainly understand the consternation of people when this clause is used. I certainly speak for myself and, I think, for most Liberal members of this committee when we say that we don't support the use of the notwithstanding clause. We certainly share your concerns, Mr. Rankin, about the indiscriminate use of the notwithstanding clause. That is a given.

I do believe that the urgency of the issue is somewhat abated by the decision of the Ontario Court of Appeal to stay the Toronto decision. I think that there probably needs to be some cooling-off period to make sure that when we talk about this issue dispassionately, we understand that it won't be related to one government in one part of the country on one specific decision.

Based on all that I've heard, we currently have a study on Bill C-75 that we're doing, and we're shortly going to get the divorce legislation, Bill C-78. We also have to conclude our study on human trafficking, and we have the study from Mr. Boissonneault on the decriminalization of HIV.

Because I think government members are willing to discuss this with you and see how we can work with you on this, my thought is that perhaps we don't need to vote today; we can bring this back at a later date. Should you wish to vote today, there's no problem. We can still try to find solutions in the future and bring this issue back if there isn't agreement. We always try to find agreement. I don't think today there is one, but maybe at some point in the future there will be.

Go ahead, Mr. Rankin.

Mr. Murray Rankin: Thank you.

I think it's precisely thanks to you, Chair, that we've had—as Mr. Cooper pointed out—very harmonious relations on this committee. We very rarely have had the kind of dissension that occurs on so many of the other committees. I salute you for that.

I made clear in my remarks, I hope, that I wasn't suggesting that there was a sense of urgency now. I was simply saying that we should do it at some point on our timetable. To not agree to do this, I think, is quite surprising. I committed to recognition through Mr. Boissonneault's important motion that it would be something that I would treat with the respect it deserves and put on the timetable as quickly as we can. I point out, though, that we're not just dealing with legislation on this committee. I can remember a study on legal aid as just one of many examples that, frankly, had nothing to do with legislation.

I do want to vote today, Mr. Chairman. I think we need to let Canadians know where we stand on this issue. If there's a better place, I'm open to it. I do not accept that we don't have time. I simply find that a specious argument, with respect. I just want to get on the record whether we're prepared to do this work. Many people have come to me and asked, “If not you, who?” I believe they need an answer, so I would respectfully ask for that vote to occur.

● (1555)

The Chair: You have every right to have a vote on your motion. I was simply suggesting that, again, there may be other ways to tackle it than the type of study proposed. Even if there's a vote today, it doesn't mean that we won't find some other means to handle it.

Is there any other discussion on the motion? Not hearing any, may I call a vote? Is that okay with you, Mr. Rankin?

Mr. Rankin has made a motion. All those in favour of the motion?

(Motion negatived [See Minutes of Proceedings])

The Chair: I thank you again, colleagues, for the way that you handled this. I very much appreciate the cordiality that occurs even when there is disagreement in this committee.

Because we have multiple votes tonight that will prolong our meeting, I also was wondering, colleagues, since we're a little bit early, if we might call the panel up that was here at four o'clock so that we can start a little bit early.

If so, may I call the witnesses for the four o'clock panel up, please, all four of you. I very much appreciate your forbearance in sitting through this with us. If you have speaking notes, please, if you wouldn't mind, provide them to the clerk. Thank you.

I promise there can be multiple handshaking at the end of the panel. I just want to make sure we try to get two panels through before we leave for the vote. The best we can do, we will do.

It is a great pleasure to resume our study of Bill C-75 and be joined by this illustrious panel that we have today. It is a pleasure to welcome as an individual Ms. Laurelly Dale, who is a criminal defence counsel for Dale Law Professional Corporation. Welcome, Ms. Dale.

Ms. Laurelly Dale (Criminal Defense Counsel, Dale Law Professional Corporation, As an Individual): Thank you.

The Chair: We have Mr. Michael Spratt, who is a criminal lawyer at Abergel Goldstein and Partners.

Welcome, Mr. Spratt.

Mr. Michael Spratt (Criminal Lawyer, Abergel Goldstein and Partners, As an Individual): Thank you.

The Chair: As well, we have the Canadian Council of Criminal Defence Lawyers, represented by Mr. Richard Fowler and Ms. Rosellen Sullivan. Welcome.

Ms. Rosellen Sullivan (Canadian Council of Criminal Defence Lawyers): Thank you.

The Chair: We're going to go in the order of the agenda, if that's okay with you, which means your eight minutes will go in that order. I won't cut you off until 10 minutes, but if you could stick to eight, that would be amazing.

We're going to start with Ms. Dale.

Ms. Laurelly Dale: Good afternoon. I'm grateful for the opportunity to be before the committee today.

My name is Laurelly Dale. I am a criminal defence counsel of over 11 years. I share an office in downtown Toronto with the reputable John Rosen, and I also have an office in northwestern Ontario, in Kenora.

I am first and foremost an officer of the court. My views today are in response to your invitation to offer my opinion on a fragment of Bill C-75 that would eliminate preliminary hearings.

Extensive consultation with lawyers is necessary to shape our pending laws. As defence counsel, I am but one player in the larger administration of justice. I submit to you that there is a disconnect between reducing delay by eliminating preliminary inquiries. The administration of justice would be obstructed by this removal. It is not a debate between Crown versus defence strategies.

I am also a member of the Criminal Lawyers' Association, and I adopt and support their position on this. It's not my intent to reiterate their position. I'm here today to provide you four reasons justifying my position.

First, disposing of preliminary hearings will not save time. This will have the reverse effect, by causing further delay in court. We're well aware of the Supreme Court of Canada decision in Jordan declaring a specific presumptive ceiling of 30 months with or without a preliminary inquiry. The objective of Jordan is to preserve the section 11(b) charter right to be tried within a reasonable time. It was not to use this case as a weapon that will harm the administration of justice.

The claims that this will reduce court delays are false. Only 3% of cases utilize preliminary hearings. The majority of the cases that did proceed to preliminary hearing were resolved in provincial court. Two major studies have concluded that preliminary inquiries do not contribute substantially to the problem of court delay. Preliminary hearings facilitate the resolution of potentially lengthy and expensive trials in superior court. They are often used instead of rather than in addition to trials. They expedite the administration of justice. It is far easier and quicker to get a two- to four-day prelim, as opposed to a one- to two-week trial in superior court.

Recently I've had two matters proceed to prelim that ultimately saved the court from having two very expensive jury trials in the superior court. The first was a consent issue in a sex assault case. We proceeded to prelim. My client was able to truly appreciate the evidence against him in a way that watching video statements cannot. Midway through the day, my client reviewed his position and decided to plead guilty. The complainant left knowing that she would no longer be needed to testify in that matter. In the second, after day one of the prelim, the Crown was made aware of weaknesses in their case. The preliminary inquiry revealed a complete lack of evidence for the charges, resulting in a withdrawal.

None of those results could have been attained in the same time frame had we proceeded directly to the superior court. Preliminary inquiries help formulate accurate trial estimates and deal with front-end applications, discovery issues, and motions.

I ask you to look at the youth criminal justice system. This is an example of an existing system that doesn't have preliminary inquiries except in rare circumstances. There are still delays in the youth system.

I had a youth client who was charged with aggravated assault. The complainant was a child of eight months. The charges were very serious. The child suffered a cerebral hemorrhage that caused permanent damage.

Young offenders are not permitted a preliminary hearing except if charged with murder or as an adult or if proceeded with as an adult. This case is an example of one for which we needed a preliminary hearing. There were major causation issues. The Crown did not produce an expert report, but still wanted to proceed. There was limited medical evidence. In order to fully answer and defend the charge against him, my client required numerous third party records. The section 11(b) time was running out through no fault of the defence. We scheduled the trial not knowing how many experts there would be or if there would be charter issues. We received medical records through third party records application.

● (1600)

From those, we needed further child and family services records to begin the process of organizing our own expert. Evidence substantiating this could be obtained through the testimony of the mother's child, through the trial that would be adjourned mid-testimony to proceed with a third party records application. This is getting very much into the weeds, but it's establishing a real point that from there, transcripts would be ordered and another third party records application scheduled. We'd hear the schedule, wait 60 days to produce the records and another 90 to organize our expert. The trial would resume many months later. This would be our world if we eliminated preliminary hearings in the adult system. This is not how justice was intended to be administered.

The second justification is that both players, defence and Crown, already have tools that can be used to bypass the preliminary hearing. Deciding to have a preliminary hearing requires a case-by-case analysis. We must not assume that they are to be utilized by defence as a delay tactic or to earn higher fees per file. As defence counsel, I am often waiving preliminary hearings for a number of reasons. Sometimes it's because of the offence and jurisdiction, other times my client's in custody, or sometimes it's because of the strength of the Crown's case.

I was counsel involved in a large drug project in Toronto. Multiple accused were involved. We had a five-day prelim scheduled for November, and in a rare move the Crown preferred the indictment. This is a tool that they have. The authorization of the Attorney General is required; however, the Crown has used this tool to now force this matter to skip over prelim right into the superior courts.

The third justification is that Bill C-75 prioritizes false hope of efficiency over trial fairness. Section 7 of the charter guarantees both substantive and procedural safeguards to those accused of a crime. It is important to remember that preliminary inquiries are only available to those facing indictable offences, lengthy prison sentences and significant consequences if convicted. This extra step adds a layer of protection against wrongful convictions of the most serious crimes.

I was raised in northwestern Ontario. My paternal grandmother was Métis. My office in Kenora covers a substantial territory in the north. We participate in circuit court. Each week, roughly, we attend remote aboriginal reservations by squishing into cigar planes and crossing our fingers in the hopes that we land through the fog and ice sometimes. It is well known, sadly, that aboriginal peoples are overrepresented in our justice system. In my office located in Kenora, they represent over 90% of my criminal clients.

It is they who will suffer the consequences of this amendment. Adding further delays means they will spend longer in pretrial custody. Removing a safeguard means they will be the most likely to be wrongfully convicted. Bill C-75 did not consider how this would impact the most vulnerable group.

My fourth and last point is that eliminating preliminary hearings ignores the root causes of delay. I'm not here to provide you with an exhaustive list. However, substantive research has established that delay is caused by mandatory minimum jail sentences, disclosure practices, and self-represented litigants.

In conclusion, eliminating preliminary hearings will impede the administration of justice. Discretion is stripped away at the provincial level. Lengthy and expensive superior court trials will become the norm, causing a demand for resources that our system cannot fulfill. There is no data to support Bill C-75. My experience and the available data suggests that eliminating them will, in fact, cause significant delay.

Bill C-75 represents an illogical response to court delay. The public could lose confidence in our administration of justice if our accused are stripped of their ability to make full answer in defence, and court delays inevitably will still exist despite the elimination of preliminary hearings.

Subject to any questions, those are my submissions.

● (1605)

The Chair: Thank you very much, Ms. Dale.

Mr. Spratt is next.

Mr. Michael Spratt: Thank you. It's always an honour and pleasure to appear before this committee. I have submitted a brief. It's nine pages, so I don't intend to go over that in detail. You have that information. I think you will find that my friends and I are perhaps in violent agreement on some of these issues.

The preliminary inquiry is really a long-standing feature of the Canadian criminal justice system and it's a procedural safeguard. It's available only for those individuals who are charged with some of the most serious offences to ensure that there is sufficient evidence so that they will proceed and face the jeopardy of a trial. In addition to that primary screening function, the preliminary inquiry also confers a number of other incidental benefits that promote efficient operation of the justice system, enhance the fairness of the justice system and also increase the quality of justice that we have in our courts.

As my friend said, preliminary inquiries occupy only a very small time in provincial court dockets, but they do deliver huge savings to the system. Preliminary inquiries deliver these efficiencies in a number of different ways. They focus the issues to be litigated at trial. They identify evidentiary landmines that can arise in the middle of a trial, and they also ensure that parties have a sufficient and detailed knowledge of the evidence and that can assist in resolving matters that don't need to go to trial in the first place. Importantly, preliminary inquiries increase the fairness of our trial system by allowing both the Crown and the defence to probe the strengths and weaknesses of a case to evaluate the reliability and credibility of witnesses and, importantly, they also act in many cases to preserve and memorialize evidence at an early stage. Many times a preliminary inquiry has allowed the Crown to introduce evidence at trial of witnesses who have absconded, who find themselves in custody, who have recanted their statements, or who have become deceased while awaiting trial.

The government offers two justifications for the preliminary inquiry limitations in this bill. One is efficiency and one is to reduce the burden on witnesses and complainants. My friend is right: There is a delay problem in our courts, but preliminary inquiries are not the cause of that delay. In fact, the focus on efficiency doesn't just ignore the questions of fairness that I raised but it also ignores the available evidence and experience that we have in dealing with how preliminary inquiries can actually expedite the procedures. I'm not going to go over the evidence with you. I have cited some of that in my brief. It does show that preliminary inquiries are decreasing in frequency, that preliminary inquiries specifically looking at Jordan issues don't disproportionately cause those issues that we see in Jordan about cases being stayed. But there isn't a wealth of evidence here. The proponents of this bill have not put forward exactly when preliminary inquiries occur, how many cases resolve after a preliminary inquiry, or how many court hours are saved. That's the type of evidence that I think we would like to see before changes are made. That's the evidence-based policy-making that I think we deserve in the criminal justice system.

I think it's safe to say that preliminary inquiries aren't a common occurrence, but they are something that has been studied to some extent. Of course you will be familiar with the 2017 report of the Senate Standing Committee on Legal and Constitutional Affairs that found that there wasn't consensus amongst the witnesses they heard about whether preliminary inquiries should be eliminated. There wasn't a consensus among those witnesses about whether they should be restricted. Indeed, that committee said that there wasn't a consensus even amongst the provinces about what should be done with preliminary inquiries.

When you look at the preliminary inquiry, what we do know and what I as a practitioner am here to tell you is that they are an ideal way to actually bring efficiencies to the justice system. As I said, they can identify issues. These are invaluable tools to ensure that a charter issue or an issue about search and seizure isn't just discovered in the middle of evidence at a trial. In a sexual assault case, if there is an issue about third party records or about prior sexual history, that those issues don't raise their head in the middle of a trial, causing adjournment in the superior court or, more likely in the case of a jury trial, endangering the whole trial itself. You can't adjourn a jury trial to litigate those issues, but we can identify them early through a preliminary inquiry.

I take it, and I'm going to assume, that this committee is aware of Dr. Webster's study. I know it has been cited in a number of different briefs. That's a very valuable resource that supports some of the anecdotal evidence that you will hear from us today.

● (1610)

There are two issues that I think haven't been discussed. The first is in relation to the preliminary inquiry as an important judicial screening function. What this bill will do in a large number of cases is download that discretion, that function, into the hands of Crown attorneys, which of course isn't reviewable and can cause some issues. That shift in judicial discretion was the topic of some negative critique by the Supreme Court in the Nur case.

Second, with respect to delay issues, when we look at Jordan, the Supreme Court specifically considered the 30-month Jordan time period for a two-stage proceeding. That's a proceeding that has a preliminary inquiry.

I don't think there's much justification for that 30 months if we turn these cases into a one-stage proceeding. That's an issue that's currently before the Court of Appeal for Ontario. By eliminating the preliminary inquiry, we could be in a much bigger Jordan issue, above and beyond the efficiencies that preliminary inquiries can bring.

I do want to speak about the discovery function in my last few minutes.

I know proponents of limiting the preliminary inquiries say that since the advent of the charter, since Stinchcombe, the defence has a wealth of disclosure. That's true; we do. That disclosure often tells us the who, the what, the where, and the when, but quite often that disclosure doesn't tell us the why. Police officers don't always record that in their notes. That disclosure doesn't tell us issues about reliability or credibility that can only be apparent through testimony.

I can tell you that just today in the Ottawa Superior Court of Justice, I was in pretrial for a matter that had a one-day preliminary inquiry. It would have been a two-week trial, but that case was resolved because those questions of “why?” were answered, and it caused the parties to come together.

Lastly, I want to say that in my brief I've set out some possible amendments that can be made to formalize a discovery procedure or perhaps require a more robust justification on the defence of the party seeking a preliminary inquiry.

I want to dispel some misinformation that's out there. The Minister of Justice, in the House of Commons, said that some procedures already exist to cure some of the problems about this discovery function. She said that there would remain the flexibility in existing processes such as out-of-court discoveries that have been implemented in some provinces already, such as in Ontario and Quebec.

I can tell you that's not really true. In Ontario there is no formal out-of-court discovery process for criminal procedures. It can be done with consent of the Crown informally, but there's no formal mechanism for that. That means, if this committee is going to rely on that procedure as a safeguard to alleviate some of the concerns, it's not uniform across Canada, and it certainly isn't available in all cases in a regulated way in Ontario.

Preliminary inquiries and unnecessary preliminary inquiries have already been curtailed through the use of section 540 of the Criminal Code that allows the Crown to adduce written evidence and statements as evidence. That has reduced some burdens on people testifying. Of course we have the requirement that the requesting party, which is usually the defence, comply with section 536.4 and 536.5 of the Criminal Code about notice of issues and notice of witnesses it would like to hear from.

Perhaps amendments can made to make those slightly more robust, but those current controls have addressed some of the issues that have already been raised. I'm very concerned that we're sacrificing fairness for the sake of efficiency, and we're not really going to gain the efficiency that's sought at the end of the day.

● (1615)

The Chair: Thank you very much.

We'll move to the Canadian Council of Criminal Defence Lawyers.

Mr. Richard Fowler (Canadian Council of Criminal Defence Lawyers): Thank you very much, Mr. Chair and honourable members of the committee. This is my third appearance before this committee, and it's an honour to be back again today. My colleague and I are here from the left coast and the right coast—I'll leave it to you to decide which is the left and which is the right. We know a lot less about what happens in the middle.

I want to start by saying that we echo and support the comments you have already heard. The strength of our agreement as defence counsel shows what we've learned from many years of experience. Combined, my colleague and I have over 44 years of experience. I myself have conducted over 500 trials, of which more than 50 have been murder cases. I've conducted preliminary inquiries when necessary.

I want to start by also saying we're here today to talk about the preliminary inquiry, but there are other parts of this bill that we have significant concerns with. I will just say, as an aside, that the abolition of peremptory challenges is a huge mistake. I've selected over 100 juries, and I've never seen it misused. It's necessary.

Let's go back to preliminary inquiries. I'm convinced they're an essential tool for an efficient, fair and reliable justice system. I also have seen no data that in any way suggests a justification for their abolition. In fact, the bill itself is inconsistent because it preserves preliminary inquiries for offences where there's a potential for life imprisonment, but that's also arbitrary—in the case of robbery, for example. Abolishing preliminary inquiries is short-sighted and will lead to far greater problems than many will anticipate.

I'll give you an example. I was counsel for an accused charged with historical sex offences. There were five complainants. The offences dated back to 1959, covering a time period to 1992. We elected trial by Supreme Court judge alone, and requested a preliminary inquiry. One was scheduled. Shortly before the preliminary inquiry was due to start, Crown counsel preferred an indictment and we went straight to the Supreme Court.

The trial took over two years to complete. Why? Unbeknownst to either the Crown or the defence, there were a number of section 276 issues—that is, prior sexual history—as well as at least two, maybe three, third party records applications. You can imagine that in historical sexual offence cases, you're very likely to have applications related to third party records. There was also a severance application. We were successful on all of those applications. In other words, they all had merit. They led to the trial having to be adjourned three or four times.

Of course, rescheduling a trial that's been adjourned is very difficult. It's also, ironically, very inconvenient for complainants. They start their testimony; they've started a cross-examination; evidence comes to light that requires a section 276 ruling; we have to adjourn, and then they have to come back.

In my respectful submission to you, they should not and must not be abolished. They need to be improved. For example, provincial court judges at a preliminary inquiry have almost no powers. The test for committal is very low. We need to give judges at preliminary inquiries more powers, such as the jurisdiction to order disclosure. It's often self-evident to everybody in the courtroom that the defence is entitled to this disclosure, but we have to wait till we get to the Supreme Court for an order to receive it. Judges need the power to hear third party record applications and to rule on prior sexual history.

In other words, we should give them the powers to adjudicate on matters prior to getting to the Supreme Court for trial. Let's utilize the preliminary inquiry to make sure that when we get to trial in the Supreme Court, the trial occurs efficiently, without interruption and without unnecessary motions.

It's the lack of power in the “preliminary inquiry justice”, as it's defined in the code, that gives rise to concerns that in some cases they seem to be a waste of time.

● (1620)

We need to make them better, not abolish them.

Thank you.

Ms. Rosellen Sullivan: Good afternoon. I'm Rosellen Sullivan, and I'm here from Newfoundland. I'm going to say that's the right coast.

Some hon. members: Oh, oh!

Ms. Rosellen Sullivan: I think that goes without saying, actually.

I don't want to repeat what my colleagues have said. Again, we all agree that we all agree, which I think is important.

I do want to speak about my experience in Newfoundland, which I believe probably had less than a 3% Jordan issue, even when Jordan was an issue.

My concern, of course, is whether the decision itself has rectified many of the issues that led to Jordan in the first place, and I don't think there's any empirical data to suggest that. Particularly, I would suggest, from my neck of the woods, that a lot of the delay issues have mostly to do with disclosure, as opposed to the preliminary inquiry. That's particularly true in large CDSA cases and in a lot of cases that have a lot of forensic analysis and forensic disclosure, which are pretty commonplace these days. Oftentimes that's the reason that cases are being delayed.

In fact, I would submit that some of the other proposed amendments are going to have consequences in terms of delay. Again, I know we're here to talk about the preliminary inquiry, but if you look at peremptory challenges, I would submit that those are going to be causing delay, because they're going to lead to more challenge for cause applications. The other example that comes to my mind is police officers reading in evidence, which is going to lead to an extra step along the way of defence counsel bringing applications to cross-examine on that.

In terms of whether or not the system has already addressed Jordan issues, I can tell you that it is commonplace now in Newfoundland for all the issues to addressed on the record. Waivers are explicitly asked for. Reasons for postponements are explicitly put on the record, so that they're clear and articulated.

I would go beyond what my friend has said in terms of giving the preliminary inquiry judge more power. I would also suggest that one of the things that could be contemplated is raising the threshold for committal. A scintilla of evidence is actually pretty low. So many times the judge will say, “I can't weigh credibility issues. I can't decide those things.” If the threshold were higher and those issues could be dealt with, I think it would be a lot more effective and even go beyond being able to pare off the cases that don't go to trial. I know anecdotally we've all told you, but I can tell you that in the last two preliminary inquiries that I've had, in one of them the Crown pulled the charge after the prelim because the witnesses were clearly very inconsistent with their statements. With the other one, the strength of the case against my client was so obvious that we ended up making a deal.

I would think that the prelims are more effective in terms of streamlining cases.

Subject to any questions you might have, those would be my comments.

● (1625)

The Chair: Thank you very much to all the witnesses.

The Conservatives have the first question.

Hon. Tony Clement: Thank you to the panellists for taking time to be here with us as we study the bill.

I want to get a couple of elaborations from a couple of the individuals.

Ms. Dale, you talked about the false hope of efficiency when it comes to eliminating preliminary inquiries. In your view, and maybe this is to Mr. Spratt as well, are there jurisdictions you're aware of that could buttress the case you're making? Has there been any evidence—maybe even to Mr. Fowler or Ms. Sullivan—from other jurisdictions that should be a warning to our jurisdiction on this issue?

Mr. Michael Spratt: I certainly don't have that sort of evidence on the tip of my fingers. My experiences are more anecdotal.

I know that this committee in the past has heard from Dr. Doob and Dr. Webster, and they might be in a better position to provide some supplementary information about the statistics.

Hon. Tony Clement: But in terms of the experience of your practice—that's where you do have some expertise obviously, because you're there on the ground where these cases are being considered—you're not concerned that it's contributing to the challenge that is being faced in the wake of the Jordan decision.

Mr. Michael Spratt: No, quite the opposite. I can say that preliminary inquiries are rarely set. I rarely set them. When they are set, even for very complicated matters such as second degree and first degree murders, they have been very constrained and very focused, especially lately, and I can say without a doubt that every hour I spend in a preliminary inquiry saves tenfold hours at the door of the superior court.

Hon. Tony Clement: Have you seen many cases of abuse of the preliminary inquiry in your practice?

Mr. Michael Spratt: I haven't, and part of the reason I haven't seen that sort of abuse is that for the very serious charges that are set for preliminary inquiry, many of my clients are in custody, and one of their big issues is that they don't want to delay their trials, and getting court time can be a delay. That's why I don't see any defence counsel setting preliminary inquiries to delay matters, setting preliminary inquiries to obstruct matters, or setting preliminary inquiries that deal with repetitive, needless, or useless questioning.

Mr. Richard Fowler: I'll just echo what my friend has said. Abusing the preliminary inquiry, has it ever happened? Of course it has—let's be honest—but is it used routinely to cause delay? No, because judges have the powers now, with the focus hearing, to require counsel to come before them and to ask them, “Well, what are you going to do with this court time I'm giving you? What witnesses are being called? How much time is each witness going to take? What are the issues at the preliminary inquiry?” They're very streamlined.

Most of the preliminary inquiries I've done have been on murder cases, and often they take no more than three or four days, even if the trial is going to take a month or two. We focus on issues for which the preliminary inquiry is going to provide sort of value for money in a very real sense.

You also have to be aware that preliminary inquiries are very helpful to the Crown. In fact—not to let too many secrets out here—I often waive a preliminary inquiry because I know it's going to be more helpful to the Crown than it is to me.

They are tremendously valuable, then, and until you get down there and look at a case and prepare it for court and know what trials are like, it's hard to appreciate how helpful they are, but they really are.

● (1630)

Mr. Michael Spratt: If I could just add this very briefly, in terms of just the practicality of scheduling a preliminary inquiry, I can't walk into court and say that I want to set a date for a preliminary inquiry and they'll just hand out that court time. In virtually every jurisdiction, you need to have a judicial pretrial with a judge to actually obtain the court time, so there's a front-end limit on wasting court time or scheduling time that may not be used appropriately.

Hon. Tony Clement: Well, you don't want to gain a reputation in the system of abusing that privilege either, as a defence counsel.

Mr. Michael Spratt: Quite right, and I don't want to waste my time or my client's time either.

The Chair: You have another minute, Mr. Clement.

Hon. Tony Clement: Okay.

Mr. Fowler, in terms of how things happen in practice, there's a constant evolution of criminal justice and the proceedings. Are you finding that your conclusion is that defence counsel, through that evolution, have come to a position now where the preliminary inquiry is used in an expert way, not for dilatory tactics, and that's where the evolution of that practice has come?

Mr. Richard Fowler: I would very much agree with that. I think they are used by defence counsel only when necessary. I think you made a very important point: Nobody wants to develop a reputation for wasting court time. It's so much of an issue now. Court time is so precious. Everybody talks about it from the moment a file comes in and you first appear in court.

Short of being dishonest to the court, the next worst reputation you could develop is for wasting court time. There's just absolutely no advantage to it. That culture has changed completely. Even if it really ever existed, it doesn't exist in people's minds anymore.

Hon. Tony Clement: Thank you.

The Chair: Thank you very much.

Mr. Fraser is next.

Mr. Colin Fraser: Thank you very much.

Thank you all very much for being here. I appreciate your presentations and your thoughtful comments on this.

Mr. Spratt, you spoke anecdotally, and that's what you folks can provide us with today. I recognize there doesn't seem to be a lot of data on this, but in your experience how often are preliminary inquiries waived after they've been set? Could you also comment on how long it takes when you do set one? If they're being waived close to the time that they're supposed to be scheduled, then that court time is being wasted.

Mr. Michael Spratt: I haven't set a preliminary inquiry and then waived it at a later date in recent recollection. I'm sure I have at some point, but that's not a common occurrence. That's because court time is so precious. When we're talking about the root causes of delay—why does it take so long, in some cases, for matters to be heard?—part of the answer, I think, is disclosure, and part of the answer is the legal aid process, but most of it is getting court time. That's the longest delay.

I have clients in custody who I think should have a preliminary inquiry. It could focus the issue and it may be beneficial to them, but they still don't want to set up a preliminary inquiry because it will delay them. It's very rare that a preliminary inquiry will be set and then waived. Even when it is, at least in Ottawa we're double- and triple-booking our courtrooms, so if a preliminary inquiry is set and then waived, at least in this jurisdiction, there is a trial to fill in that time.

Mr. Colin Fraser: You talked a little about a discovery process for criminal proceedings not being available, or not having a mechanism to request one, although I suppose it happens informally. Do you see a way for our system to develop better case management practices and have discovery-type proceedings that happen outside court to save time?

Mr. Michael Spratt: I think so, and especially with such a low standard for committal, I prefer the discovery process. It can be arranged much more quickly and be done much more flexibly. I don't have to stand up when I ask questions. I don't even have to wear a suit. There are lots of advantages to that discovery process, but I think if we're going to rely on it, it has to be a uniform, legislatively based process, because different jurisdictions have different rules, and I don't want to be dependent on the discretion of a Crown about whether they're going to agree or disagree to that process.

● (1635)

Mr. Colin Fraser: Do you see that answering most of the concerns here today? It narrows the issues. You obviously have an ability to test some of the evidence. You get to determine whether there are disclosure issues that still need to be fulfilled and these sorts of things.

Mr. Michael Spratt: It would satisfy a lot of my concerns. I don't think it would necessarily apply in all cases, because there still is that screening function. As a practitioner, even though that committal threshold is so low, I've done lots of cases where committal hasn't been ordered on all counts or at all. I wouldn't want to lose that, but in 90% to 95% of the cases that I think should go to a preliminary inquiry, I would be satisfied with a discovery procedure.

Mr. Colin Fraser: If you were to set a preliminary inquiry in Ottawa today, how long are we talking to get there?

Mr. Michael Spratt: If we're looking at a day or two in custody, we might be looking at four to eight months, and out of custody we could be looking at over a year to get that court time.

The other thing about the discovery process is that we don't need judges. That can be done in the absence of judicial intervention for the most part.

Mr. Colin Fraser: Mr. Fowler, you talked a little about case management issues. Do you see a way to have case management and discovery to get around the necessity of having a preliminary inquiry?

Mr. Richard Fowler: I'm cautious about the discovery process because, from having sat in many different courtrooms on many different days, there's something about the formality of the process, the taking of the oath and the judge being present, that really instills in people's minds that they have to be truthful. We cannot underestimate it. The informality of a discovery process doesn't answer that fundamental issue, which is the pressure to tell the truth. It doesn't deliver the message that we're serious about this now.

In case management, there's such a variety of jurisdictions with their own different needs and resource availabilities. I think centralizing case management in the Criminal Code, other than the Criminal Code conferring that power on provinces and judges, is the answer. The chief judges in the particular provinces or territories are the best ones to be able to determine how best to use case management, given the resources they have and given the fluctuation in cases, the fluctuation in the number of judges, and all those things.

Mr. Colin Fraser: Ms. Dale, I'm just curious: You talked about how preliminary inquiry leads to new information or each side seeing what evidence may be proffered at trial actually leads to resolutions more often. Can you give us some anecdotal information on how often matters resolve once a preliminary inquiry has taken place?

Ms. Laurelly Dale: I can indicate that the last two out of three preliminary inquiries I've conducted in the past year have been resolved at the provincial court level. This is consistent with—and I know it's been referenced—the Webster and Bebbington study of 2013. It found, particularly in Ontario, that there were twice as many cases with preliminary inquiries that did resolve at that provincial level.

When I am scheduling preliminary inquiry.... We all have to go through the judicial pretrial process. We sort of have to fight for our time estimates and show why we need the preliminary inquiry, because they're not just granted upon request. A lot of various kinds of information and coordination need to happen before they are scheduled. At the back of everyone's mind, Crown and defence, is whether or not this will result in a resolution at the provincial level, rather than having to escalate to the higher level of court.

Mr. Colin Fraser: If I can just ask very quickly, when a matter is set for preliminary inquiry, how often does it happen that it gets waived or done away with by the person re-electing and pleading out, once it's been set?

● (1640)

Ms. Laurelly Dale: Do you mean in terms of waiving the preliminary inquiry?

Mr. Colin Fraser: Well, you would have no need for the preliminary inquiry, because six months down the road you don't need it anymore, because you have re-elected and the person has been pled out.

Ms. Laurelly Dale: I would share my friend's comments. I can't recall recently doing that. It would be a very odd occurrence.

Generally, when a preliminary inquiry is scheduled, it's for a very focused purpose. Although it's referred to as a dress rehearsal of the trial, that's a bit of a generous description, because the Crown isn't required to provide all of their witnesses and evidence. Generally, the parties agree on which witnesses they want to hear from, and it's very focused.

The Chair: Thank you.

Mr. Colin Fraser: Thank you. I'm sure I'm over my time.

The Chair: Go ahead, Mr. Rankin.

Mr. Murray Rankin: Thank you.

I'm going to start with you, Mr. Fowler, because I think you've come the farthest. I want to say something to you, sir. I disagree with you on some things, but in terms of which is the right coast, I think we would agree that of course it's the left coast. I just wanted to put that on the record.

I think the thrust of your remarks was the need to improve and not abolish preliminary inquiries. I think everyone said that. I thought you said that very forcefully.

You did raise parenthetically the whole issue of peremptory challenges. You said that in your experience they were never misused. I think many people who have come here would say that in the Stanley case in Saskatchewan with Colten Boushie, in which there was an indigenous deceased, the lawyer for Mr. Stanley managed to get no indigenous people on the jury. It certainly caused a lot of Canadians who wrote to me great concern.

I appreciate that some people have indicated that they use peremptory challenges precisely to get racialized people onto juries. I'd just like to give you an opportunity to expand on your forceful remarks on peremptory challenges. I ask you whether you don't think that there was a misuse in at least that case.

Mr. Richard Fowler: Well, you know, I wasn't there, but I've read a lot about it. As far as I know, I've seen no data on who was stood aside, who was indigenous. I've heard no evidence about how many indigenous people were on the array, which is the panel of people from which the jury is selected. Also, I strongly believe that we should not do fundamental criminal law reform based on anecdotes. We should do it based on research and reliably gathered data.

Let me just ask you this rhetorical question, because we know about the Boushie case. Let me ask you this question.

A client is charged with sexual assault. We have gotten rid of peremptory challenges, so the Crown has no ability to decide who is on the jury; I have no ability to decide on the jury. By chance—because that's what it will be—12 men are selected. It's a high-profile sexual assault case, there are 12 men on the jury, and my client is acquitted. What do you think the outcry is going to be?

I can tell you that with peremptory challenges in place, there would be women on that jury. We utilize peremptory challenges because those of us who do jury trials—and many lawyers don't—believe that a representative jury in terms of age, occupation, and gender is the best way to have a cohesive group of 12 people sitting in that room deliberating about our client's fate.

Mr. Murray Rankin: I understand, and we would have a longer debate that time doesn't permit here, but the Criminal Lawyers' Association, for example, has suggested that there be a stand-alone section that allows a judge at the end of the day to eyeball that jury to see if it is representative of the community. If that section were in place, I think we would probably avoid an all-male jury.

Mr. Richard Fowler: I agree with you, and as best as I know, New Zealand is the one jurisdiction that has that.

Mr. Murray Rankin: All right. Thank you.

Mr. Richard Fowler: They have that ability to say to everybody, “This jury is just not representative. You have been misusing your peremptory challenges. We're going to get rid of the jury, and we're going to start again."

● (1645)

Mr. Murray Rankin: Thank you, Mr. Fowler.

Ms. Dale, I just want to re-emphasize one of your initial anecdotes, because we've heard so frequently that the problem with preliminary inquiries for women in the case of sexual assault cases is that they are retraumatized by having to do it twice. I thought your suggestion was really powerful in the case that you were involved in where the accused was led to plead guilty and therefore the trial never happened. I want to thank you for giving us that illustration.

You also talked about delays and about a number of reasons that were given for delays. You suggested that mandatory minimum sentences was an important one, as well as self-represented litigants. Could you expand on that?

Ms. Laurelly Dale: As I noted, the research isn't exhaustive on that point. Particularly with regard to the self-represented litigants, I do know that there have been a number of studies to support the position that there should be more legal aid funding in the criminal justice system because it has been determined that self-represented litigants do add to court delays.

There's a reason we went to law school. We have this experience. It is a very complicated process, and having self-represented litigants who are trying to navigate it on their own causes significant delays in the system.

The mandatory minimum sentences reflect a lack of discretion with respect to the sentences that are imposed. Therefore, more of a need is created to determine the strengths and weaknesses at every available opportunity and for the clients to make full answer in defence, because if they are facing a mandatory minimum sentence, those consequences are extremely significant. Then, of course—

Mr. Murray Rankin: Then there would be more trial time because people have nothing but a mandatory large sentence to face —

Ms. Laurelly Dale: Yes.

Mr. Murray Rankin: —and, therefore, there's no incentive to take the time-saving measures.

Ms. Laurelly Dale: Exactly, and the consequences are severe, reflecting penitentiary-length sentences, and of course that's a significant consideration.

Mr. Murray Rankin: I was also impressed with your reference to the disproportionate impact on indigenous people.

Mr. Spratt, if I could—

The Chair: I just want to warn you that your time has elapsed. If you have a short question for Mr. Spratt, then try to be....

Mr. Murray Rankin: I don't know how long it will take.

The Chair: If it's going to be that long....

Mr. Murray Rankin: I'll just ask it anyway.

The Chair: Sure.

Mr. Murray Rankin: You did talk about the who, what, where, and when that the Stinchcombe information gives you. You also said “why”. You said the preliminary inquiry often allows the important question of “why” to be addressed and provides context that cannot be teased out of paper disclosure.

My question is, how come? Elaborate on why the "why" would be more relevant, then.

Mr. Michael Spratt: Perhaps I'll use the example of a police officer who engages in a search. The officer will always say what he did and where he found it, but the subjective motivations of the police officer—what he was thinking, why he thought certain aspects of his observations were important, and how those related to what he did—are often not recorded in notes, especially dealing with those important charter issues.

Mr. Murray Rankin: Thank you.

The Chair: That was an excellent succinct answer. Thank you.

Mr. Boissonnault is next.

Mr. Randy Boissonnault: Thank you, Mr. Chair, and thank you to all of the guests for being here today.

To give you some context, I come at this not from a legal point of view but from that of a business consultant, an NGO director. It's not from the deep steeping in the law that all of you have, with over 100 years of representation at the bar and what have you.

I want to share some stats with you. I come from a province that is part of the country and has 55% of the indigenous population of Canada. Twenty-five per cent of the youth in my city are indigenous, and we will have the absolute largest concentration of indigenous peoples anywhere in the country by 2025. Indigenous peoples are overrepresented in the criminal justice system, yet under-represented on juries. We're 27 years from the Sherratt decision, which made it clear that peremptory challenges can help make it more representative but can also harm representation.

I take you at your word, Mr. Fowler, that you're one of the good ones and that you don't use peremptory challenges to exclude people, but we have lots of anecdotal evidence that it occurs.

I want to start with Ms. Sullivan. How do we get to this goal of more representative juries if we keep peremptory challenges and practitioners are able to abuse them? I'd like comments from all of you on what Nova Scotia does. Instead of using property ownership as a means to select juries, it uses the health care system. If you take a look at how we're selecting our juries, it's like where we were before women's suffrage for voting.

● (1650)

Mr. Richard Fowler: Yes.

Mr. Randy Boissonnault: The justice system evolves, according to Mr. Clement, but maybe we could help move the evolution along a little bit.

I'd like comments on those two points.

Ms. Rosellen Sullivan: I agree. I think that in Newfoundland as well they use the health care system, and Labrador in particular would involve these issues. I've just recently done a jury trial in Labrador. It was the panel itself that was problematic in that case. Even though they did use the health care system, many of the reserves were so far away from the judicial centre that even getting there was a problem, so a lot of people were exempt on the basis of undue hardship and were never participants in the system at all.

I think you need to improve those sorts of things—for example, by making sure everyone is accessible. People do want to serve on juries.

Mr. Randy Boissonnault: You mean widen the pool.

Ms. Rosellen Sullivan: Widen the pool and make it easier for people to come. In Newfoundland, geographically, this is a big issue.

Mr. Randy Boissonnault: Of course.

Ms. Rosellen Sullivan: If you make it so that people can come, so that it's not a hardship for them to get there, then people are willing to serve on juries and the pool is more representative.

Mr. Randy Boissonnault: What else can we do to make juries more representative and keep peremptory challenges?

Ms. Rosellen Sullivan: In my experience, people haven't tried to manipulate the process in that way.

Mr. Randy Boissonnault: I appreciate that.

Mr. Fowler, would you comment first on that? Then I have a question for you on another matter.

Mr. Richard Fowler: I agree. It's the provincial jury acts that dictate, to a large extent, how big the array is. You can pay jurors more because it's inconvenient.

When it comes to indigenous people, we have to recognize a fundamental.... They have a mistrust of the criminal justice system for obvious reasons, all the reasons you've stated. How do we encourage them to trust the system enough to want to participate on a jury?

I've selected juries in B.C. and the Yukon. The Yukon uses health records, so many more first nations people come. They all say they don't want to sit. Many people try to find reasons not to be on the jury. It would be partly through education and encouraging indigenous people to understand that they have much to gain by being on a jury.

Mr. Randy Boissonnault: We have the same issue in the LGBTQ2 community and in racialized communities, particularly the black community, which rightly feels it is overrepresented in the criminal justice system, yet under-represented on the juries.

I wanted to go to your point, Mr. Fowler. You started to go down the path of some reforms that could happen on preliminary inquiries. How would those or other recommended modifications to the system speed up the criminal justice system?

Mr. Richard Fowler: As it stands, because of a decision from the Supreme Court of Canada called Mills, provincial court judges sitting as preliminary inquiry judges do not have the same jurisdiction they would have if they were trial judges. You have the same individual, with the same level of experience and education, but because it's a preliminary inquiry rather than a trial, they can't do many of the things, or almost all of the things, they could do if they were trial judges. They can't make orders for disclosure and they can't rule on third party record applications or make rulings in respect of prior sexual history applications.

If we could broaden the jurisdiction of the provincial court judge at a preliminary inquiry, we could take many of these applications in the preliminary inquiry. They are simply being delayed and can only be heard at the Supreme Court trial. It would make the preliminary inquiries much better at gathering the information and resolving many of the questions so that the trial doesn't have to duplicate some of that.

Mr. Randy Boissonnault: I haven't seen your brief, but if you could share with us some of those recommendations, I would certainly deliberate on that with my colleagues.

Mr. Richard Fowler: Thank you.

Mr. Randy Boissonnault: Mr. Spratt, I have a question for you and Ms. Dale in terms of other ways to speed up the criminal justice system, as well as on keeping peremptory challenges and preliminary inquiries.

● (1655)

Mr. Michael Spratt: Before I answer that, could I just add one more thing to the jury issue?

The issue is, indeed, the representative sample. Beyond that, it's about who can actually have the privilege if you actually have the representative sample. Take national child care. Every single mother who I've had on a jury wants out, and it's not enough to throw a few bucks; it's national child care that supports people to serve on juries and participate fully, as one prong.

To speed up a trial, there are a few things. I think the preliminary inquiry speeds up trials now, so I think we have to foster that, but if you want to speed up trials, get me more judges, get me more courtrooms. I'm ready to go to trial tomorrow on a number of charges, especially if my client is in custody. The reason we have to wait eight months or 12 months isn't because of disclosure issues—I can solve those in the meantime—it's because the first date that the court offers me is six months or 12 months, and in Ottawa you wait six months or 12 months, and when you get to trial, there are three other cases set in that court.

Just today I had a matter set, and luckily one of my associates was able to take the matter. It was a short trial, but she wasn't able to actually start that trial until about 3 p.m., because she was waiting for a court.

Mr. Randy Boissonnault: With the time remaining before the chair intervenes, do you share Mr. Spratt's concern, Ms. Dale, that if we remove preliminary inquiries, the 30 months will go down to 24 under Jordan?

Mr. Michael Spratt: It's 18.

Ms. Laurelly Dale: I'm sorry; can you repeat the question?

Mr. Randy Boissonnault: If we get rid of preliminary investigations do you think the court will, over time, shorten the amount of time we have in Jordan?

Ms. Laurelly Dale: I share his concerns that the Jordan clock and the evaluation in that respect will change the landscape.

Mr. Randy Boissonnault: Thank you.

The Chair: Thank you very much.

This is a fascinating panel and we could do multiple rounds, but unfortunately, given the number of panels today, I've got to cut it short here.

I want to thank each and every one of you very much; you've been very helpful to the committee.

I'm going to call a short recess for one minute to change panels. I'd ask the next panel to please come up, because we have a vote and I want to get at least the speaking parts done before we have to leave for the vote.

● (1655)

(Pause)

● (1700)

The Chair: We will resume. I invite everyone to please take their seats.

I know that there's lot's to do, but I want to make sure that the meeting gets on track and we get the benefit of the time with all of our witnesses that we can.

We're joined today, for our second panel...and I have to correct myself. As Mr. Clement pointed out to me, I had the wrong hour for the vote. The panel that will be interrupted is actually our next panel, not this one, so fortunately, for you guys, there's going to be continuity and you won't have to wait in between your statements and our questions.

We're joined today by Ms. Lisa Silver, who is assistant professor in the faculty of law at the University of Calgary. Welcome.

Ms. Lisa Silver (Assistant Professor, Faculty of Law, University of Calgary, As an Individual): Thank you.

The Chair: We have Mr. Daniel Brown, who is from Daniel Brown Law. Welcome.

Mr. Daniel Brown (Lawyer, Daniel Brown Law, As an Individual): Thank you.

The Chair: From the Canadian Association of Chiefs of Police, we're joined by Mr. Howard Chow, deputy chief constable of the Vancouver Police Department.

Mr. Howard Chow (Deputy Chief Constable, Vancouver Police Department, Canadian Association of Chiefs of Police): Thank you.

The Chair: We have Ms. Rachel Huntsman, legal counsel of the Royal Newfoundland Constabulary. Welcome.

Ms. Rachel Huntsman (Legal Counsel, Royal Newfoundland Constabulary, Canadian Association of Chiefs of Police): Thank you.

The Chair: We're going to go in the order of the agenda. We're going to start with Ms. Silver.

Ms. Lisa Silver: Thank you very much.

Mr. Chair and honourable members of the standing committee, thank you for giving me this opportunity to comment on the proposed amendments to the preliminary inquiry sections of the Criminal Code. It is a privilege to be here to speak about an issue that carries the weight of historical discourse and has engaged far greater minds than mine. The question of abolishing the preliminary inquiry has echoed through these halls and the courts of our nations and has indeed engaged the public's interest as well.

How do I come to speak to this matter? I am by trade a criminal defence lawyer, and I've been so from my early days of law school in the mid-1980s. I've conducted preliminary inquiries, I've argued about them as appellate counsel, and I've written about them now as a law professor. Indeed, I've been rather vocal about the preliminary inquiry and these proposed changes. I hope my brief and this opening statement will shed some light on why I believe the preliminary inquiry, albeit in perhaps a different structural format, is worth saving.

I will open with a personal story. It's a story I often repeat to my students when asked which case most significantly impacted me in my early career. The day after being called to the bar in 1989, I received a case from one of the lawyers sharing space with the law firm with which I was employed.

The preliminary inquiry was only two days away. The client, who was detained in custody, was charged with an attempted break and enter with the intent to commit an indictable offence. The maximum punishment for the full offence—because it involved a dwelling house—would have been life imprisonment, but as an attempt, it was punishable by 14 years, still a serious term of imprisonment.

As an aside, under the new proposed amendments, such a preliminary inquiry would not be possible.

It was a rather pathetic and all too familiar story. The client was found loitering in front of a house on the sidewalks of Rosedale—this was in Toronto—holding a pointy and frayed stick. He appeared to be intoxicated. The police were called, and upon investigation of the nearby home, it appeared that the front door lock was freshly scratched with bits of paint that appeared to be derived from his pointed stick.

Appearances, however, may be deceiving. Upon review of the file, I recommended to the client that we argue against committal at the preliminary inquiry. Needless to say, the judge agreed, and the client was discharged and immediately released.

The preliminary inquiry changed my client's life. It gave him hope. In fact, he ended up straightening out. He went back to school and became a youth worker in a young offender facility. I received a postcard from him when he ultimately went to Bosnia as part of the UN peacekeeping tour.

I wanted to share this story with you. I know I was asked here based on my academic credentials and writing in this area, but to me there is no clearer evidence of the importance of the preliminary inquiry as a tool for good than this particular story.

On the less emotional side of the equation, I'm certain you've already heard last week and today—I was listening—many good reasons demonstrating why the preliminary inquiry in its present format must be retained. My brief also outlines the historical significance of the preliminary inquiry as an essential protective shield against the power of the state.

It's more than procedural. We keep calling it a procedural matter, but it's more than that. It lies at the heart of the criminal justice system because, in my view, it is linked with the presumption of innocence and fair trial concepts. The preliminary inquiry calibrates the scales of justice in accordance with those fundamental principles and provides meaningful judicial oversight.

The power of the preliminary inquiry, as I've already alluded to, cannot be taken for granted or underestimated. I know there are questions regarding where the evidence comes from as to whether preliminary inquiries do cause delay, but certainly they do take court resources that are finite. We are, as has already discussed, having a crisis, so to speak, in our court system, as evidenced by those Jordan and Cody decisions.

● (1705)

In fact, as you've already heard, one of the suggestions from the Senate committee on that crisis recommended the termination or limitation of the preliminary inquiry. Bill C-75 has a more tempered vision of the Senate recommendation, but it still goes too far. The amendments do not provide the protection promised by the full operation of preliminary inquiries, and as outlined in my brief on page 5—and I think I have about eight different points there—they don't account for the many other ways the preliminary inquiry assists the proper functioning of the criminal justice system.

Keeping in mind all of these competing concerns and considering that we still have to create a solution to the problem that remains with our desire to provide a fair trial, we need a solution that may perhaps recalibrate, yet one that will maintain the scales of justice as writ large in our common law and charter. In my submission, the solution recommended in the amendments does not do this.

Instead, this honourable committee should consider a more practical and useful solution. It's a solution that lies within easy reach. It can be found in our civil system of justice—you've already heard about it today—in its procedures for civil questioning or discovery.

The discovery system for the most part lies outside of the court. It provides useful evidence for trial. It encourages resolution on the civil side as well. It's available to all superior court civil litigants, and it's predicated on full disclosure. By using that civil system, judicial resources and therefore court resources can be focused in a manner that stays true to the primary committal function of the preliminary inquiry, yet would permit the advancement of those vital ancillary purposes, be it preservation of evidence, building an evidential threshold case for a defence or engaging in resolution discussions.

Where there is a realistic committal issue, a preliminary can be heard by a judge. Where the matter involves one of the other viable purposes for a pretrial questioning, the matter can be heard in a less costly form outside of court in a conference room, where the matter can be recorded for future use at trial.

This recommendation provides a viable alternative to the amendments, it balances competing rights, it's mindful of court resources, and it's already in use.

I thank the chair and the other members of this committee for inviting me to make submissions on what is an integral part of our criminal justice system.

Thank you.

● (1710)

The Chair: Thank you very much.

We will now hear Mr. Brown.

Mr. Daniel Brown: Thank you.

Good afternoon, Mr. Chair and honourable members. Thank you for the opportunity to address you all on Bill C-75.

By way of background, I'm a criminal defence lawyer. I practise in Toronto, which is one of the busiest criminal court jurisdictions in all of Canada.

Delay is something that is always on the front of mind of all the justice participants in Toronto—the judges, the Crown attorneys, and the defence. Over the last decade and a half, I've had an opportunity to act as counsel on hundreds of cases, and I hope to speak to you today on my experiences with preliminary inquiries and how they act as ways to preserve efficiency and fairness in the justice system.

As I sat here listening to the last panel, and now to Professor Silver speaking at this one, I was worried. I felt like everyone was starting to steal my thunder. However, I actually take comfort in the fact that it seems as though there's a lot of consensus among all of our views. I take hope from the fact that I share my views with so many different qualified experts.

First and foremost, it's important to state again that a preliminary inquiry isn't a one-size-fits-all. It's something that acts and adapts to different types of cases and different types of situations. It's a tool that can be used in a number of different ways. In some cases, as you've heard, a preliminary inquiry acts as an essential screening tool to weed out weak cases before significant time and energy have been allocated to prosecuting them. When the Crown attorney can't prove that there's some evidence capable of supporting the allegations, some charges or even, as we've heard, the entire case may be dismissed by the preliminary inquiry judge.

In addition to reducing the consumption of scarce court time and resources, this screening function can also reduce the amount of time people spend in custody for something they didn't do or something the Crown attorney simply can't prove they did. As others here have said, it would be a mistake to think that we can simply take the time allocated for a preliminary inquiry and just drop a trial into that time slot.

Preliminary inquiries are much more abbreviated hearings for a number of reasons.

First of all, judges don't make credibility findings at a preliminary inquiry. They must accept the witnesses' evidence at face value. Because of this, lawyers often focus the inquiry on questioning the most important witnesses or exploring legal issues they believe will assist them at trial instead of trying to prove to the judge the witness is not credible or reliable.

Our Criminal Code also equips prosecutors with tools to dispense with calling non-essential witnesses at a preliminary inquiry as long as that evidence meets the basic threshold of being credible or trustworthy. This explains why statistics show that most preliminary inquiries are completed in a day or two, because they are focused on discrete issues intended, in some cases, to demonstrate the strength or reveal the weakness of the Crown attorney's case.

In contrast, presenting a criminal case at trial is far more complex and may require the scheduling of weeks, if not months, of court time. Because of this, criminal trials often happen many months, if not a year or more, after a preliminary inquiry could have taken place.

It's simply good policy to have a mechanism such as the preliminary inquiry in place to screen out weak cases before significant time and resources are expended for their prosecution. This is especially true if accused individuals are remanded into custody pending the outcome of their criminal matter.

Even in cases when some charges aren't dismissed or when the entire case still goes forward to trial, the preliminary inquiry provides an opportunity to have fruitful discussions. As we've heard today, prosecutors may appreciate the significant weaknesses in their case, or as Ms. Dale spoke about in the last panel, defendants may see that there are no holes in the evidence against them and may opt to plead guilty, bringing an end to a prosecution before trial time is spent on it. Preliminary inquiries foster the resolution of trial matters.

It should also be considered whether or not both parties should be required, at the end of a preliminary inquiry, to have a mandatory meeting with the preliminary inquiry judge. We call them exit judicial pretrials. While they're somewhat rare and certainly not mandatory in Ontario, they can help foster additional resolution discussions because the judge, who's heard the witnesses testifying, can give some additional input that may help broker an agreement between the parties before the matter leaves that courthouse and goes to another venue.

● (1715)

In addition to screening and a resolution function, preliminary inquiries also play an important discovery function.

Now, there are some who will question the value of a preliminary inquiry in light of expanded disclosure obligations placed on the police and Crown. However, it must be said that disclosure can't act as a substitute for the discovery function of a focused preliminary inquiry, because while there is a constitutional right to disclosure, there's not a constitutional guarantee to an exhaustively thorough police investigation.

A police officer may simply interview a witness briefly, scribe their interview into a memo book and lay a criminal charge based solely on that information. There's no legal requirement that requires the officer to seek out other witnesses who may have witnessed the events, to collect social media evidence or text messages or to inquire whether or not there's been collusion between the witnesses. Requiring disclosure as an answer to discovery doesn't do it justice.

More importantly, of course, there's no ability to compel Crown witnesses to speak with the defence prior to a preliminary inquiry or outside of the court system. Defence lawyers who are trying to gain information or access to witnesses have no way of ensuring that they can hear that evidence before a case comes to trial.

Preliminary inquiries aren't just a tool for the defence. They can also assist the Crown attorneys, because any witness testimony elicited at a preliminary inquiry can be tendered at trial in the event that a witness later becomes unavailable to testify. We heard about that a little bit in the last panel.

This is especially true of vulnerable witnesses who may be very reluctant to come to court and testify in court, but who have already given their evidence in the preliminary inquiry. That prosecution can be saved by the Crown attorney by tendering the preliminary inquiry evidence, rather than having the case dismissed for a lack of evidence. A preliminary inquiry can also help prepare a Crown witness to testify, and to testify better at a trial by having testified once before at the preliminary inquiry.

There are a number of ways in which preliminary inquiries don't just assist the defence. They assist the Crown attorneys as well.

Preliminary inquiries also keep cases on track. They ensure accurately scheduled trials. They prevent late disclosure or late discovery of relevant medical or psychiatric evidence that can derail a trial and lead to lengthy trial adjournments. Studies have shown that lost trial time due to late disclosure is a significant contributor to the delay problem in Canada.

Because of the role preliminary inquiries play in the screening of weak cases—because they foster resolutions and because they prevent trials from going off the rails—it's my experience that preliminary inquiries don't contribute to delay or create inefficiencies in the justice system. The real question to ask is whether eliminating preliminary inquiries for most serious offences enhances fairness by protecting witnesses who may be required to testify twice in a criminal court proceeding.

While there may be some occasions where Crowns wish to protect vulnerable witnesses, our Criminal Code already offers a complete tool box to address those concerns. For example, as we've heard, where it's warranted, the Crown attorney can prefer a direct indictment and send a case immediately to trial without a preliminary inquiry. That can be done on a case-by-case basis. The Crown attorneys also have the ability to tender prior police statements under section 540 of the Criminal Code to avoid a vulnerable witness having to testify at a preliminary inquiry.

Our Criminal Code also contains a host of other provisions to protect vulnerable witnesses when they testify, including the ability to testify by closed-circuit television or from behind a screen, to order a court-appointed lawyer to cross-examine a vulnerable witness where the accused is self-represented, and to offer publication bans to protect the identities of some vulnerable witnesses. Again, all of this can be done on a case-by-case basis.

A flexible approach to preliminary inquiries, one that allows the inquiry to be tailored to the case at hand, will much better meet the objectives of fairness and efficiency and allow both the Crown and defence to benefit from some of the many advantages a preliminary inquiry has to offer. This approach is far superior to a wholesale elimination of the preliminary inquiry for most offences simply to protect vulnerable witnesses where other options already exist within the Criminal Code to achieve that goal.

● (1720)

I make the following three recommendations to the committee:

Number one is to maintain preliminary inquiries for all indictable offences.

Number two, as Professor Silver said, is to adopt reforms that allow the preliminary inquiry to be streamlined in appropriate cases without eliminating its appropriate discovery function. That's being mindful of some of the recommendations to amend section 537 of the Criminal Code to give preliminary inquiry judges more control and more power over the proceedings.

Number three is to study more substantial reforms that maintain the discovery function of the preliminary inquiry but offer flexibility, such as requiring permission for the court to hold a preliminary inquiry when it would be in the interests of justice to do so, or legislating for out-of-court discovery in cases where committal to stand trial is not an issue.

Thank you for having me. I look forward to your questions.

The Chair: Thank you very much.

Now we'll go to the Canadian Association of Chiefs of Police.

Mr. Howard Chow: Good afternoon.

I'm Deputy Chief Constable Howard Chow of the Vancouver Police Department. I'm joined by Rachel Huntsman, Q.C., legal counsel with the Royal Newfoundland Constabulary.

Distinguished members of this committee, on behalf of Chief Constable Adam Palmer, president of the Canadian Association of Chiefs of Police, I'm pleased to be given the opportunity to speak before you today. I should clarify that because of scheduling conflicts last week, we're here to discuss issues with Bill C-75 that are broader than just the preliminary inquiries.

Overall, the CACP supports Bill C-75 and the clear intention by Parliament to modernize the criminal justice system and reduce court delays and judicial proceedings. In the interest of time, my comments will focus on amendments that the CACP views as having a direct impact on police powers and operations.

First, I'd like to discuss routine police evidence. This bill would amend the Criminal Code to allow police officers to provide evidence by way of affidavit, eliminating the necessity for them to attend court. While the CACP supports this amendment, our position is that the current definition is too broad and that a clarification of “routine police evidence” is required. The proposed amendment fails to delineate what type of police evidence would be acceptable, thereby potentially contributing to further inefficiencies through pretrial motions.

The next area of concern relates to the judicial referral hearings. While the CACP supports an option for police to divert an accused away from bail court for administrative justice offences, it is anticipated that the judicial referral hearing process will result in a lack of documentation of these same offences into CPIC. This lack of documentation means that police officers from other jurisdictions will be incapable of accessing the full criminal history of an offender. This is vital information for law enforcement when deciding whether to release a person and under what conditions.

As well, in 2008, the offence of failure to appear was added to the list of secondary designated offences. This information was provided to us by the National DNA Data Bank: They indicated they received upwards of 36,220 submissions under this section of the Criminal Code and that these submissions have yielded 1,157 matches to a DNA profile in a criminal index, including 55 homicides and 107 sexual assaults. The concern is that if an offender undergoes a judicial referral for a failure to appear instead of having a charge laid, there'll be no submission of the offender's DNA.

Next, the CACP supports the principle of restraint as it relates to indigenous and vulnerable populations. However, proposed section 493.2 places considerable onus on a police officer at the time of arrest to try to identify who falls within this classification of offender. A reality of policing is that arrests are often made in the middle of the night, with little known about the person's history and background. The CACP recommends amending the section to require that a police officer give particular attention to the circumstances of accused persons who appear to be indigenous and/or belong to a vulnerable population.

Further, the CACP recommends that a definition of “vulnerable population” be included in Bill C-75. Factors such as a person's ethnicity, economic status, drug dependency, age, mental health issues, or overall health are difficult to measure and assess out in the field. A clarification of what is defined as a “vulnerable person” would assist the police in meeting the requirements of this section.

I'd like now to address a significant concern for CACP, and that is the hybridization of indictable offences. This amendment will affect 85 Criminal Code offences, including a number of terrorism-related ones. Currently, these are classified as secondary offences under the Criminal Code. If the Crown proceeds by indictment and the offender is convicted of one of these offences, the Crown can request that the offender provide a DNA sample for submission to the National DNA Data Bank; however, if these 85 offences are hybridized and the Crown elects to proceed by summary conviction, the offence will no longer be deemed a secondary offence and a DNA order cannot be obtained.

The submission of DNA samples to the data bank is used by law enforcement to link crime scenes and match offenders to these crime scenes. Removing these indictable offences from potential inclusion into the data bank will have a direct and negative impact on police investigations.

● (1725)

Again, the numbers that follow were obtained by the data bank, and they demonstrate how submissions of these 85 indictable offences have assisted in matches to profiles for primary and secondary offences.

During the period between June 30, 2000, and February 21, 2018, during that 18-year period, the data bank received submissions for 52 of these 85 secondary offences, which resulted in 9,677 submissions to the NDDB. Of these 52 indictable offences, 22 led to 588 matches being made to a DNA profile in a criminal index, together with 221 matches to primary offences, which included 19 homicides and 24 sexual assaults.

We're proposing a solution to this, and that would be to list these 85 indictable offences as secondary or primary offences under section 487.04 of the Criminal Code, which will permit a DNA order to be made regardless of the Crown's election.

The final point I'd like to discuss is the Identification of Criminals Act, subsection 2(1). It provides that a person in lawful custody and charged with or convicted of an indictable offence may be fingerprinted or photographed. Under Bill C-75, the accused can still be compelled to appear under the terms of an appearance notice or undertaking for identification purposes. However, the case law has established that the appearance notice has to be confirmed by a judge or a justice before the person is considered to be formally charged with the offence.

A person who is under arrest and in lawful custody of the police cannot be fingerprinted or photographed until a charge is laid. The problem lies in the fact that once the Crown has elected to proceed by way of summary conviction, the offence is no longer deemed an indictable offence and the accused cannot be identified under the Identification of Criminals Act. This means that a significant number of charges will not be entered on CPIC, resulting in out-of-province police officers, Crowns, justices, and judges not knowing if the arrestee or accused has a pending case or a previous conviction.

The CACP is recommending that the Identification of Criminals Act be amended to allow for fingerprinting on arrest, with proper safeguards in place to protect the integrity of the process. CACP is also recommending that the ICA should be amended to allow fingerprinting for all Criminal Code offences, or at the very least to allow fingerprinting notwithstanding the Crown's election.

Finally, the CACP supports amendments that pertain to the leveraging of technology for the police community, while encouraging strong leadership and guidance in establishing appropriate standards related to the introduction and implementation of technology.

We are encouraged by the recommended amendments proposed by Bill C-75; however, we acknowledge that this will involve considerable training for front-line police officers.

Thank you for your time and work on this bill. We'd be happy to take any of your questions.

Thank you.

The Chair: Thank you very much.

We'll now move to questions.

Mr. Cooper is first.

Mr. Michael Cooper: Thank you very much, Mr. Chair, and my thanks to the witnesses.

I want to discuss a little bit and probe around the issue of the reclassification of offences. However, before I do that, Mr. Chow, you made reference to the summary hearings related to the administration of justice offences and some of the issues regarding CPIC and the problems with that database and the fact that those problems will be exacerbated by those referral hearings.

John Muise, who appeared before our committee last week, proposed that this committee create a mechanism to ensure that judicial referral entries appear on the right side of the criminal record, allowing for use when future decisions to release, refer, or detain are being made by police, courts and parole boards. Is that a recommendation that you would endorse?

● (1730)

Mr. Howard Chow: From our perspective, in terms of restraint conditions, opting for the least onerous is a position that we've taken and adopted at CACP. With the hybridization, there are going to be certain offences that will not allow us to capture those individuals in our CPIC data bank. That handcuffs us when offenders go across the country and end up in different jurisdictions where we don't have access to that information, which is crucial information when we're making decisions on whether and under what conditions we're releasing these offenders or holding them.

Mr. Michael Cooper: Some of the offences that the government is proposing to hybridize are very serious in nature. You pointed, for example, to terrorism-related offences. There's impaired driving causing bodily harm. There's kidnapping a minor. Maybe you could speak to that issue.

Another one is with respect to individuals who are subject to long-term supervision orders—very dangerous individuals. Right now, breaches of LTSO constitute an indictable offence. Under Bill C-75, that would be hybridized. Perhaps you could speak to that.

Mr. Howard Chow: Clearly there are some very serious offences. There are a number of terrorism-related offences that have fallen within those 85 indictable offences and will now, if the bill goes ahead, be considered hybridized.

The downgrading of these offences to a hybridized category also has an impact for our international partners and the message that it sends to them as well.

The more detailed submission that we provided will have the stats very well laid out. A big concern that we do have is in relation to the national DNA data bank and our inability to capture or make a submission for a DNA request following conviction. I think the proof is in the numbers. For those years for which they were able to provide us with statistics, we would not be able to match individuals to a crime scene because we would not have the data or the DNA matches in front of us.

Mr. Michael Cooper: What would your response be to the Minister's assertion that the hybridization of offences has nothing to do with sentencing? When you take a maximum of 10 years and you make it prosecutable by way of summary conviction, wherein the maximum would be two years less a day, that clearly has an impact upon sentencing. Wouldn't you agree?

Mr. Howard Chow: I think...I understand—

Mr. Michael Cooper: I realize it's not in every case that the maximum is going to be provided, but clearly it has an impact on sentencing when you're going from 10 years to two years less a day.

Mr. Howard Chow: In respect to that, I understand there are different perspectives and I understand the intent in terms of where they're going. I think that where the challenge is for us. The position of the CACP is that the difficulty will be in capturing that DNA request and putting in that submission. That's where it falls.

I know there were other panels that discussed what it's suggesting. The new proposal with Bill C-75 is that there may be fines that are eligible, but those are, again, eligible right now as well.

I don't know if I've quite answered your question.

Mr. Michael Cooper: No. That's fair enough. How much time do I have?

The Chair: You have another minute.

Mr. Michael Cooper: I'll go to Professor Silver.

You talked about establishing procedures for civil questioning. I understand that this is taking place in the province of Quebec, at least in a limited capacity. The Barreau du Québec spoke to that when they appeared before us last week. Perhaps you could elaborate on what the experience has been in the province of Quebec.

Ms. Lisa Silver: I don't know what's been going on in Quebec, but I can tell you that it has been used in a limited way in Alberta in restoration hearings when there are proceeds of crime or there's a forfeiture hearing. The cross-examinations on any affidavits that are filed for that have been going through that civil questioning. It has been working.

It's also available in the criminal appeal rules, so when you appear before a court, if you have fresh evidence, if you do any of those applications that are by way of an affidavit, that's what's done. You go through the civil questioning rules.

I don't know what the experience is in Quebec, but it's certainly something that is not foreign to the criminal procedure and the criminal process.

● (1735)

Mr. Michael Cooper: Thank you.

The Chair: Thank you.

Go ahead, Mr. Boissonnault.

Mr. Randy Boissonnault: Thank you, Chair, very much. Thank you to all the witnesses appearing today.

Dr. Silver, you have presented a great brief. Thank you for getting it to us early. I appreciate it.

You live in Alberta.

Ms. Lisa Silver: I do.

Mr. Randy Boissonnault: You understand that a large concentration of indigenous people live in the province—

Ms. Lisa Silver: Yes.

Mr. Randy Boissonnault: —and they are overrepresented in the criminal justice system.

Ms. Lisa Silver: Yes.

Mr. Randy Boissonnault: Also, there is the case for LGBTQ2S people and the case for racialized people, particularly the black community.

Ms. Lisa Silver: Yes.

Mr. Randy Boissonnault: I was struck on page 6 of your submission—your recommendations, which I'm going to get to in a minute—but you said in the last paragraph:

> Efficiency is not what we want from our justice system. That is not what the Jordan and Cody decisions are all about. Cultural change involves a bundle of values, not a bundle of paper being efficiently pushed about. The goal should be to enhance the criminal justice system while preserving the protections of those whose liberty is at risk.

As one of the non-lawyers at the table, I'm struck by that philosophical but practical recommendation to remind us what the system is for.

How does your second recommendation play out? It reads:

> For those cases where committal is not in issue, to utilize a modified civil form of discovery procedures, which would permit questioning to occur outside of the court process in a less costly and more efficient atmosphere.

Would that be a less effective way to conduct a preliminary inquiry, without the weight of the justice system to compel people to really be truthful, as we heard from Richard Fowler earlier?

Ms. Lisa Silver: I do appreciate what he had to say about that, but this is done under oath. It's not as if an oath is not there. In fact, it could be an atmosphere that would be more open for people who are unrepresented or for people from the indigenous communities, who feel oppressed by a courtroom.

As I said, it's a matter of balancing, but I believe that it's being used. It's been used successfully in the civil courts and it can still be used successfully in the criminal justice system as well. It requires a culture change. That's all. It requires us to think a little differently.

Mr. Randy Boissonnault: Thank you.

What steps would you take to make sure that we have a more representative jury pool?

Ms. Lisa Silver: At least when I think about the situation that has been going on in two cases that we have had in Canada, I believe that the Crown can make a motion before the judge and that the judge could be responding to the fact that the jury that's been chosen is not representative or that it's biased.

Mr. Randy Boissonnault: Thank you.

Mr. Brown, do you have any recommendations for us for a more representative jury pool?

Mr. Daniel Brown: One of the things that you touch upon is that many racialized and aboriginal people are overrepresented in the justice system, which means that they leave the justice system with criminal records in record numbers. One of the things that bars a person from sitting on a jury is a conviction for an indictable offence. It may be that the government needs to take a look at whether or not we want to exclude the types of people who are overrepresented in the justice system and keep them excluded from participating on juries and from participating in the justice system because of this perhaps out-of-date rule that exists that keeps them off the juries in the first place.

Mr. Randy Boissonnault: Do you like the idea of health cards being the way that we select jury pools?

Mr. Daniel Brown: What I don't like is the idea that we would use property rolls as a way to select juries, because again, there is inherent bias in the way that people end up on the rolls or off the rolls. I think there has to be a better way. It seems, though, that one of the better ways to do it is to assess people by their health cards. It's certainly one of the many solutions, as well as identifying the problem that simply choosing people who are not property holders excludes a group of people from entering the pool in the first place.

● (1740)

Mr. Randy Boissonnault: Thank you.

Deputy Chief Constable Chow, thank you to you and your colleagues for the work that you have done and continue to do with the LGBTQ community. The pride shield that lets us know when we're safe and know which businesses we can go into when we're in the city is great. Not only does your city produce great crime dramas, but you're doing great work on the ground. I appreciate that.

I want to talk about clause 236 and proposed new section 523.1 that's going to give police officers the ability to decline to charge for administrative offences. We have a lot of people who are being brought back into the court system because of failure to comply with a bail provision. They have an addiction, so they go back to the bottle, but not doing that is one of their bail conditions.

Do you think officers will decline to charge, and do we need to make sure that training is available to help police officers exercise that discretion in the field?

Mr. Howard Chow: I think that discretion is used day in and day out right now. I don't think we need the.... The mere fact of it being structured and formalized in a bill will only add to it. Our officers understand the cycle of breaches and returns because of failure to comply with the conditions. That exists. As I said, I can tell you that on a daily basis our officers are making that discretionary call.

There were a number of examples cited about somebody being late because the bus is late, and it means they have exceeded their curfew. I'd say by and large most officers would exercise discretion in cases like that.

There has to be latitude given to our members, however, simply because there are offenders out there who will work the system. We see that on a regular basis.

Mr. Randy Boissonnault: I think the intent of having it in the code is to provide that protection but also to be explicit that we expect police officers to exercise that discretion on the ground. It's why your members are trained. We give police officers that power over us. We want them to also be able to execute it and use judgment when doing so.

Mr. Howard Chow: Correct.

Mr. Randy Boissonnault: Thank you very much.

The Chair: Mr. Rankin will now speak.

Mr. Murray Rankin: Thanks to everyone. These were really good presentations.

I'd like to start with Professor Silver and say how much I applaud your blog. I love it. Thank you, and congratulations on winning that big award. It's excellent.

Ms. Lisa Silver: Thanks.

Mr. Murray Rankin: With that advertising out of the way, I would also like to say that in your brief—which was, as my colleague said, really appreciated—you reminded me of the example of Susan Nelles in the early 1980s. We protect people from having to go to a trial when none is necessary, when there is that complete lack of evidence and the trial doesn't proceed. That's a very important reason, in and of itself, for preserving preliminary inquiries.

Thank you for that reminder.

Ms. Lisa Silver: You're welcome.

Mr. Murray Rankin: I had forgotten that example.

Both you and Mr. Brown—Mr. Brown on page 3 of his brief and you on page 3, I guess, as well—talk about the paper and video disclosure, but you say that with no opportunity for cross-examination, it's not a suitable substitute for the preliminary inquiry. You refer to Chief Justice McLachlin and all of that.

I want to ask you to elaborate on that, because there certainly must be some places we're going to use more video, and video disclosure and the like would be useful. Could you elaborate a bit on that aspect of your submission?

Ms. Lisa Silver: I think in terms of using paper disclosure, you have to be concerned about what exactly you're getting out of it. You already heard during the last panel—and it could be applied here—Michael Spratt say it's about the "why". Often in a very contained video or a very contained paper statement, you're not going to have the ability to pull out what is needed for trial, particularly because there is an ability to offer hearsay evidence at a preliminary inquiry. When you get into that, you are losing focus on the endgame, which is the trial. That's what I think you have to do when you're doing that ancillary purpose of the prelim.

Mr. Murray Rankin: Do you have anything to add to that, Mr. Brown?

Mr. Daniel Brown: I think it's important to remember that, again, what appears on paper or what we see on a video can't tell us whether or not there is collusion between the parties. It can't tell, as Professor Silver says, whether or not it was first-hand information or something they heard from someone else that they haven't clearly articulated in that witness statement. There are a lot of benefits that can be explored by the preliminary inquiry in asking these questions that can't necessarily be answered on paper.

● (1745)

Mr. Murray Rankin: I want to turn to Deputy Chief Constable Chow.

Thank you for your presentation. Obviously I look forward to reading it in more detail, because you went quickly through a number of points. To note for the record, you talked about routine police evidence and said that needs clarification, that it's overly broad. We've heard that constantly. It's reassuring to hear it from the police as well.

Second, regarding the definition of "vulnerable population" being required, I thought you were very good in putting that on the record as well.

Frankly, I don't know if I grasped the point about the databases. I would like to go through that with you. You talked about the hybridization and that if you proceed by summary conviction, DNA can't be obtained and sent to the centre. Have I got that right? I think your recommendation was that you permit DNA orders to be made under Criminal Code section 487.04, regardless of the Crown's election. Have I got that right? Is that what you are recommending to address that situation? I may have misunderstood your remarks.

Mr. Howard Chow: I'll turn this over to Ms. Huntsman.

Ms. Rachel Huntsman: I'll address that. To get a DNA order at sentencing, the offence has to be either a primary offence or a secondary offence. If it is a primary offence, then the judge shall make a DNA order. If it is a secondary offence, the Crown can request that a DNA order be made, and it's up to the judge to decide whether to make that order.

Within the secondary offences, there are a number that are called listed offences. I'm not quite sure offhand how many there are, but let's say there could be 10 or 15. They are identified by section number.

There are also some offences that we may call generic. They are defined as being indictable offences for which the period of imprisonment is 10 years or less. However, the Crown must have proceeded by indictment.

Mr. Murray Rankin: Then if we have hybridization and the Crown chooses to proceed by summary, they're out of luck.

Ms. Rachel Huntsman: Exactly. It's out the window. That is the problem.

Because Parliament is looking to increase the period of incarceration for summary conviction offences from six months to two years, that would obviously invite the Crown, I would suggest, to proceed by summary conviction more often than not, so we're going to see that a large number of offences that would have received a secondary DNA order will no longer receive that order.

Mr. Murray Rankin: And there would be the consequences for policing that Deputy Chief Constable Chow alluded to.

Ms. Rachel Huntsman: Right.

Mr. Murray Rankin: That's interesting. It's the first time we've heard that, I believe.

Ms. Rachel Huntsman: We did, in fact, offer what we believe to be a solution, which is to just make those 85 offences primary offences, or list them as secondary offences.

Mr. Murray Rankin: That kind of amendment would address your concern entirely, wouldn't it?

Ms. Rachel Huntsman: Yes, we think so.

Mr. Murray Rankin: Do I have more time?

The Chair: You have two seconds. You just ran out of time.

Mr. Murray Rankin: Thank you, Chair.

The Chair: Ms. Khalid is next.

Ms. Iqra Khalid: Thank you, Chair.

Thank you to the witnesses for your very interesting testimony today.

This is to Professor Silver or Mr. Brown. You spoke at length about preliminary inquiries, as have a lot of other witnesses. The Canadian Bar Association gave us some stats. They said that only 54% of Superior Court cases are subject to preliminary inquiries, out of which 25% of eligible cases actually opt for a preliminary inquiry. The proportion of cases with a preliminary inquiry does not exceed 5% of the overall caseload in any part of Canada, and at most, 2% of all court appearances are used for preliminary inquiries, and the vast majority take two days or less.

My understanding from all of the testimony we've heard is that only a very small number of cases use preliminary inquiries. We've heard a substantial amount about the negative impact that would be imposed on the justice system if preliminary inquiries were taken away. Can you explain how many people would be impacted if preliminary inquiries were indeed taken away, as is suggested in Bill C-75?

Ms. Lisa Silver: It's my position that it's not the quantity but the quality. That was the purpose of my little narrative at the beginning. It's not about “How much time are you going to save?” or “Oh, there's only 5%. What does it matter?” Every person matters, particularly when we're looking at our presumption of innocence, those principles. If a person is going to be discharged, it matters to that person.

Yes, it's only 5%, and in terms of time, maybe not as much as everyone thinks, but I don't think that matters. What matters is the “why”. Why do we have these inquiries? It's the primary committal function that we should be concerned about.

● (1750)

Mr. Daniel Brown: The only thing I'd add is that there exists a report on the wrongful conviction of James Driskell. One of the things the Crown did in that case was to prefer a direct indictment; they skipped over the preliminary inquiry. Thirteen years later, after James served all of those years in jail for something he didn't do, Justice Patrick LeSage looked into the wrongful conviction and concluded that the absence of a preliminary inquiry in that particular case, and the failure to discover the non-disclosure that led in part to the wrongful conviction, were contributing factors.

Again, whether we're talking about 5%, 10%, or 3%, for any one person who is wrongfully convicted, we want to do what we can to ensure a fair and just system. A preliminary inquiry helps achieve that.

Ms. Iqra Khalid: Are there other tools available that serve the purpose of preliminary inquiries?

Ms. Lisa Silver: Perhaps I can answer that. Some of the arguments have been well about prosecutorial discretion. The Crown does a review. It does a triage. It looks and withdraws those cases that are on the border. It's fairly clear.

I believe the last panel referred to it. In R. v. Nur, which was a Supreme Court of Canada case, then Chief Justice McLachlin made it very clear that you cannot substitute prosecutorial discretion for judicial oversight. That's what this is.

Ms. Iqra Khalid: Thank you.

I think my colleague Mr. Fragiskatos has a question.

Mr. Peter Fragiskatos (London North Centre, Lib.): I do.

I'm not a regular member of this committee, but I do have the good fortune of sitting in today to study a very important bill.

My question relates to preliminary inquiries. It's been said by some observers that in cases of, say, violent assault, having a victim testify at a prelim, then having that same victim relive that experience at the regular trial actually serves to re-victimize the experience.

Could you speak to that? I ask this as someone who is genuinely interested in the issue. I don't have a law degree like my friend to my right here, but I worry about victims and the trauma of their experience being relived in both settings.

Mr. Daniel Brown: One of the things I spoke about before is that there are already tools on a case-by-case basis to avail yourselves of at a preliminary inquiry. A direct indictment, with the consent of the Attorney General, sends a case directly to trial.

In cases where there's a particularly vulnerable complainant, there already exist tools to skip over a preliminary inquiry. Again, we want to shelter complainants, but we also want to protect and shelter the presumption of innocence. There needs to be an appropriate balance struck between the two. Perhaps the answer isn't to eliminate preliminary inquiries in all cases.

If we're particularly talking about vulnerable victims, because we've maintained this threshold of a life sentence, it means that, okay, now we've protected the sexual assault complainant, who won't have to testify twice, but the victims of an aggregated sexual assault, because it carries a life sentence, or the victims of an aggregated assault or an attempted murder will still have to testify.

Bill C-75 is just an imperfect solution to that problem of protecting vulnerable victims in any event.

Mr. Peter Fragiskatos: Thank you very much.

The Chair: Before we end, I just want to come back to one issue.

Mr. Fragiskatos reminded us of something we heard in the first panel for the very first time, that if the trial keeps getting broken up because motions are filed, for example, for the subpoena of third party documents or information, the complainant may then be subjected to cross-examination, which then stops, and then more cross-examination, and have to come back on multiple days. This could be sometimes alleviated by the preliminary inquiry, which was an interesting point that Mr. Fragiskatos raised, pursuant to what you had said.

It was a great, fascinating panel again. I want to thank you so much for coming from all across the country. It is much appreciated.

We're going to again ask the next panel to come as quickly as possible as we take a brief recess.

● (1755)

(Pause)

● (1800)

The Chair: Folks, ladies and gentlemen, we're reconvening. My goal is to make sure all three witnesses can get their testimony in before we have a vote. Then we'll do our questions after the vote, if the panellists can remain. It's up to the panellists, of course.

We're joined by Ms. Elizabeth Sheehy, professor, faculty of law, University of Ottawa. It's a pleasure to have you again.

We have Ms. Kathryn Smithen, who is a barrister and solicitor, Smithen Law, Child and Family Advocacy Services. Welcome.

By video conference from Vancouver, we are joined by Ms. Daisy Kler from the Vancouver Rape Relief and Women's Shelter, and she's a transition house worker. Welcome.

Ms. Daisy Kler (Transition House Worker, Vancouver Rape Relief and Women's Shelter): Thank you.

The Chair: We'll follow this order. Ms. Smithen has a flight, so I'm going to put her first. I'm going to do Ms. Kler second; and then I'm going to do Dr. Sheehy, because she's a local here in Ottawa.

The goal is if you can each stick to eight minutes we can get all three of you done before we leave for the vote.

Ms. Smithen, the floor is yours.

Ms. Kathryn Smithen (Barrister and Solicitor, Child and Family Advocacy Services, Smithen Law, As an Individual): Thank you.

I thank the committee for the kind invitation I got a mere four days ago. I'm happy to be here and happy to speak about the provisions of Bill C-75 that deal with the justice system's response to intimate partner violence.

I'd like to say straight up front that I appear with two fundamental biases, both as an individual and a legal professional. I think I should bring those biases to the committee's attention in advance of my submission.

The first one is that I was a victim of severe domestic violence over 25 years ago. My ex-spouse was charged and tried with 17 criminal offences, including strangulation and sexual assault. This led to my appearing as a complainant witness in a Superior Court criminal case against my former spouse several years after the offences took place, and it sadly led me also to become the mother of a Crown witness. My now 30-year-old daughter testified when she was nine years old about violence she saw when she was four years old.

My second bias is that in my professional life I was an articling student for a criminal defence counsel, but chose very deliberately to focus on family law after my call to the bar of Ontario seven years ago, when I was 49 years old. In that current work I represent many women who have suffered through domestic and/or sexual violence and whose children have been affected by it too.

As I said earlier, the focus of my professional work is a deliberate choice that I made. Criminal defence work, although I recognize it as important and vital to any society that values the rule of law, was not a very good fit for me, probably because of my own experiences.

I made it a professional priority, consciously, when I became a lawyer to try to represent women and their children in ways that hopefully addressed the violence in their domestic lives in the justice system, and I always make it a goal to try to effect change where possible to make their lives safer.

There are many intersections between family and criminal law that one could argue might help me to do that, but I can truthfully express frustration before the committee on trying to achieve those goals daily.

I'm choosing today to focus on the issue of judicial interim release, which I believe needs to be amended in a way that makes victims more safe.

My view is that if Bill C-75 were amended in a way that provides for a reverse onus on persons charged with two or more acts of intimate partner violence, it would serve victims better than focusing on what I call the back end, which is waiting for a conviction.

Making this a condition only in cases where there's an actual previous conviction, which I understand is the current proposed amendment, is problematic for the following reasons. One is that intimate partner violence is often under-reported. Whether they're before the courts for the first time or not, it is not unusual, as we all know, for there to be a long history of violence before an alleged offender is actually identified by the police. Intimate partner violence, as we know, is highly secretive. It's not unusual for that historical record to be hidden not only from authorities but also from family members, friends, and co-workers, until an incident brings the family to the attention of authorities. The secrecy inherent in domestic violence often imposed on the complainant through the cycle of violence or through her own shame makes it very difficult for the victim to seek help.

Also, women are in more danger once the secret is out. The public shame and the effort to pressure her into backing off or testifying differently is a new source of pressure, as well as a new source of real danger. The high rate of complainants being pressured to recant or not appear at trial makes this a unique offence, in that obtaining a conviction for it, as opposed to other offences, is far more difficult.

In the time that I worked for a criminal defence counsel as an articling student between 2008 and 2009, my principal, who will remain nameless and did not appear today, was consistently telling his clients charged with domestic violence offences to refuse any offer by Crowns to resolve cases. The advice given was constantly that you can count on the complainant not to appear, which would result in the complete withdrawal of charges.

● (1805)

Sadly, he was mostly successful.

In intimate partner violence cases, conditions to bail are commonly breached or outright ignored. I believe this makes a mockery of the judicial system. This is a known and undisputed fact in criminal courts. Making the bar for a reverse onus only if there's an actual conviction raises the bar far too high and far too late.

As legislators and lawyers, we don't need convictions to know that this offence presents a higher likelihood of danger to the victim than others. I believe that releasing an alleged offender back into society is short-sighted, and if he or she is charged with two or more offences, it's a recipe for danger.

In my work as a family lawyer, I see clients after they've gone through the criminal justice system. I've heard Crowns offering peace bonds in intimate partner violence cases many times. This means there will never be convictions.

A variety of reasons are offered for this position. These are a smattering of the ones I've heard in my very short career.

“Domestic violence is a social problem; it's better addressed outside the justice system.”

I've heard some Crowns rationalize that victims are better served with partner-abuse counselling—which I would agree with, and would be great, if there was an admission of responsibility and a change in behaviour outside the counselling room. This sadly doesn't happen very often.

I have also heard the argument that putting the offender out of work—which is argued will happen if there is a criminal conviction—will have a negative impact on the offender's ability to pay support, as if a victim's safety should take priority over support.

I've heard even more jaded remarks, such as “She's going back to him anyway”, as if that's an acceptable justification for not pursuing a conviction.

While obviously there's merit in some of these arguments, they don't treat the complainants with the respect that any person in the justice system is entitled to. They defeat the very purposes of this well-thought-out legislation. They're not keeping complainants or their children safe. Often what I see in the family court system is that when the criminal course disappears through the peace bond process, the offenders carry on in the family cases as though the offence has never officially happened in the justice system, and they return to the cycle of terror against their victims.

In the family law system, where many family lawyers like me are trying to bridge the gap to create safety plans for our clients, we are then undermined by the Crown's position taken in the criminal case.

In short, the bill is sending a message that the justice system treats domestic violence as a less serious crime than stranger-on-stranger crime, which I'm confident to say is not the goal we're trying to achieve.

I realize that much of what I have submitted today is contrary to much of the case law and the submissions of my esteemed colleagues in the criminal defence bar. I have long been criticized in legal circles for the views I have told you today and for my ideas about reform. In law school I was teased relentlessly by a fellow student, who acted as though I were a three-headed lizard for suggesting these things. I stand by them.

Sadly, I've heard people in the criminal defence bar ridicule victims' rights bills and efforts. I was very bewildered last year to hear an esteemed member of that bar criticize her Crown colleagues at a continuing professional development program for calling complainants “survivors”, as if that term was somehow offensive.

Nothing I have proposed today would diminish the right to make fair answer in defence or reduce an accused person's charter rights, but it would offer the victims of violence in intimate relationships the recognition that their charter rights—specifically the right to safety, liberty, and security of the person—are valued and protected by Canadian institutions such as this House.

I thank you very kindly for the opportunity to make these submissions.

● (1810)

The Chair: Thank you very much.

Go ahead, Ms. Kler.

Ms. Daisy Kler: I would like to thank the committee for inviting me to speak. I thought I had 10 minutes, so I will have to be faster than I'd like.

First of all, the Vancouver Rape Relief and Women's Shelter is Canada's first rape crisis line. We opened in 1973, and we operate a transition house for battered women and their children. We receive about 1,300 new calls per year and house about 100 women and their children who are escaping violent men. We offer advocacy and accompaniment to police, court, and hospital, as well as oftentimes to immigration and welfare.

In the course of their stay, we assist women with finding housing, obtaining a lawyer for family law matters such as custody and access, making a police statement, finding day care, and almost everything they need on a daily basis. Also, if needed we find translation and assist with immigration and refugee issues.

Vancouver Rape Relief is a collective of paid and volunteer members. Our membership includes former battered women, women who have exited prostitution, and sexual assault survivors. Our members vary in age, race, and class.

Our 40 years of front-line work informs our understanding of all forms of male violence against women, including wife assault, incest, rape, sexual harassment, and prostitution.

We have been widely consulted for our expertise and our understanding of male violence against women, locally, nationally and internationally. For example, we've also been contributing our expertise on violence against women in provincial and federal consultations, most recently to this committee on trafficking and prostitution, and for Bill C-51.

We also participate widely in the women's movement. Since 1997, we have held an annual all-day event in the form of a public conference in memory of the Montreal massacre. Rape Relief has led in-depth facilitated discussions on key issues regarding male violence against women. The participants include local, national, and international equality-seeking women's groups and feminist front-line women's service workers, and the event is highly attended by members of the public and other feminists in the city.

In 2011 we were part of the global Women's Worlds conference in Ottawa, and with CLES—Concertation des luttes contre l'exploitation sexuelle—we organized an international trilingual discussion among women experts who discussed prostitution as male violence against women. We hosted discussants from first nations and from 15 countries around the world.

We also work in coalition with other anti-violence workers and organizations, such as the Canadian Association of Sexual Assault Centres, the Canadian Network of Women's Shelters and the BC Society of Transition Houses.

Vancouver Rape Relief has advanced and pursued public cases where there is a women's equality interest. For example, Rape Relief was a party with standing in the institutional and expert hearings for the National Inquiry into Missing and Murdered Indigenous Women and Girls. We're part of a national coalition of front-line workers that has been granted intervenor status in the appeal of Bradley Barton, who was found not guilty for the murder of Cindy Gladue. Our oral submission will be heard in the Supreme Court of Canada on October 11.

What does our front-line experience tell us? Most women who have experienced male violence do not engage with the criminal justice system. Roughly 30% of the women who call us have done so. That is high, because most rape crisis centres are only dealing with sexual assault, for which the numbers are lower. However, because we're dealing with battered women as well, sometimes the police are called for them by neighbours and other people. They're not the only ones calling, so that makes our numbers a bit high.

Oftentimes the women we work with in the transition house have the police called on them, but if they themselves call, they don't see their cases get to court, and even fewer of those cases result in criminal convictions. Our work shows that most of the women who've stayed in our house and who have tried to use the police don't get more than a police file number. It's uncommon for there to be any arrest or charges. It's extremely unlikely that there will be a conviction.

● (1815)

Women don't have faith in the criminal justice system. They don't have faith that it'll work in their favour because history has shown that it doesn't. Although we welcome some of the changes in the bill, it must be acknowledged that these changes will affect a small portion of women who have experienced male violence.

I'm hopeful that some of the measures will have a positive impact. We believe that protecting women's equality rights does not have to come at the expense or violation of men's charter rights. We do take the position that it's battered and sexually assaulted women who rarely find justice or have their charter rights upheld. We argue that the existing laws must be applied as they relate to battered and raped women.

We recognize that it's poor, racialized, and indigenous men who fill the prisons, not because they commit more crimes against women but because the criminal justice system unfairly criminalizes these populations and lets rich white men off the hook. It's a poor, racialized, and indigenous woman who is most likely to be arrested if the violent man calls the police on her.

We don't believe that prisons successfully reform men, and we don't call for longer jail sentences. However, communities do not hold men accountable for the violence men commit. Therefore, women will continue to need the criminal justice system for protection, and we feminists must fight for women's access to the rule of law.

We welcome some of the changes in the language, such as the change from “spousal” to “intimate partner” and the expansion of the definition to include former partners and dating partners because it better reflects the range of relations women are in outside of marriage. This change also allows for a broader and deeper interpretation of the continuing power that abusive men exert over women after the relationship has ended since a woman is most at risk in the first 18 months after leaving an abusive man. We see that men use violence towards women at all different stages of a relationship, including after it ends, so the change to “intimate partner” violence is good because it could mean a higher chance of him being held responsible for his behaviour.

However, this language change does nothing to correct the fundamental flaw in this bill. Nowhere in this bill is male violence against women acknowledged. It is understood worldwide that male violence against women is a social reality that cannot be denied. This bill does nothing to reflect or acknowledge the fact that the perpetrators of violence are overwhelmingly men and that the victims of that violence are women.

The change to the reverse-onus bail in cases of male violence is an encouraging step to help reduce the number of men who immediately reoffend and attack their female intimate partners. It's a positive step because the onus is on him to prove why he should be let out if he has a history of domestic violence. It sends a message that violence against women is a serious crime.

It is, however, unfortunate that this reverse onus will not apply to those men without a criminal record for domestic violence. This includes convicted persons who have received an absolute or conditional discharge. In a case in which I was working with a battered woman, her abuser was a lawyer. He argued to the judge that he needed to go to the States to visit family. Even though he admitted that he was guilty, she granted him a conditional discharge. If he batters again, which he likely will, he won't be held on this reverse onus.

We think that eliminating the mandatory use of preliminary inquiries is a positive step. We know from our own experience of accompanying women to court that preliminary inquiries are used by the defence as an attempt to discredit the women's testimonies by pointing out minute discrepancies between their police statements, their preliminary inquiry evidence and their trial testimonies. As a recent example, in a trial I attended last month, the woman was testifying, and she said in her pretrial, “I think I wore a cardigan,” in one statement, and in another statement she said, “I was wearing a cardigan.” The defence cross-examined her gratuitously on the difference, implying that because she didn't use the exact same wording, she was lying. This misuse of preliminary hearings in sexual assault trials is common, and we're glad to see its use limited.

Bill C-75 makes strangulation a more serious level of assault, equal to assault causing bodily harm. Since strangulation is an indicator of the likelihood of increased and more severe violence, including wife murder, this change better reflects the seriousness of the crime—

● (1820)

The Chair: Ms. Kler, I'm sorry to interrupt. We're at 10 minutes now, and I have to give Ms. Sheehy the chance to intervene.

Ms. Daisy Kler: Okay. I have one more point.

With regard to strangulation, we think the change is good, but it doesn't reflect the potential lethality of strangulation.

In terms of sentencing, the shift to include former partners and dating partners is significant, because women who have left abusive men are at increased risk of violence. Although Bill C-75 would allow the court to raise the maximum sentence for a repeat offender who has a record of domestic violence offences, most judges don't apply maximum sentences to domestic violence, so this is unlikely to have an impact.

I note, however, that summary conviction offences that include most forms of male violence have their sentencing maximum increased from six months to two years, except for sexual assault. This is an odd omission. It suggests that sexual assault doesn't happen to battered women. I think this reflects a common myth that somehow women who experience intimate partner violence are different from the women who experience sex assault. In fact, abusive men's physical assault often includes sexual assault.

I'll stop there. I have a few more points, but hopefully I'll get to them in the questions.

Thank you.

The Chair: Thank you.

Go ahead, Professor Sheehy.

Professor Elizabeth Sheehy (Professor, Faculty of Law, University of Ottawa, As an Individual): How many minutes do I have?

The Chair: You have until we have to leave.

Prof. Elizabeth Sheehy: Pardon?

The Chair: Hopefully, we have eight minutes until we have to leave.

Prof. Elizabeth Sheehy: Okay.

Thank you for inviting me to address Bill C-75. As you know, I'm professor emerita at the University of Ottawa faculty of law, where I've taught criminal law and procedure for 34 years. My life's work is focused on law's response to violence against women.

I don't speak on behalf of any group, but whenever I have the opportunity to work with the feminist advocates of the independent women's movement, I take that opportunity. That's because the leadership and analysis of front-line women like Daisy is based on decades of front-line experience and strategy in confronting violence against women, as well as on their unwavering political commitment to the liberation and equality rights of all women—so I say what she said, but I'll say a few more things.

I agree with Daisy that without attention to the specific experience and conditions of women's lives and men's violence, it's really hard to develop sound criminal law policy and legislation. When we use these vague and generic terms like “spousal assault” and “domestic violence” and we don't name it as men's violence against women, I think we lend the misleading appearance of parity between men and women when it comes to violence, and we are incapacitated from developing effective legal strategies that target the massive threat that men's violence presents to women's lives, freedoms, and equality rights.

I agree with Daisy. There's a problem here. It makes it hard for us to get the right language and the right strategy. The good intentions behind the provisions in this bill are to some extent undermined by the fact that the bill is not anchored in a national violence against women strategy or informed by front-line feminist expertise.

I had four points to make, but Daisy has made several of them.

I was going to talk about the issue around the disparity in sentencing. We have all the summary conviction violence offences being raised to a maximum of two years, except for sexual assault. That's odd. It's anomalous. It I think reflects bifurcated thinking, putting domestic violence over here and then sexual assault over there.

Like Daisy, I am not a proponent of longer jail sentences. I'm not sure that's where we should be focusing our energy, but there is a message in this bill that probably needs to be corrected. We should be using the two-year maximum for all the summary conviction offences here that involve violence against women.

The other point I wanted to make is that the bill is now going to aggravate sentences for crimes of threat or violence based on commission by a former or current intimate partner, including a dating partner. This amendment does not include those men who obsess about and stalk women who've refused them access to even a dating relationship. These men are motivated by the same ideas that infect other men who assault intimate partners: ideas that women belong to them, owe them something or must be punished for failing to love them or obey them. They can be as dangerous as men who batter their wives or ex-partners. The threat they pose to the women they harass should be recorded in the criminal justice system's records to help assess the risks they pose to those women and to other women in the future.

The new definition also fails to respond to the targeting of others by the perpetrator, whether that's new boyfriends, family members, mothers, fathers, sisters or friends. Perpetrators may harm or threaten others as a strategy to intimidate and control the woman, and they might also strike out against those who intervene to try to protect her. These forms of violence are part of the dynamic of wife-battering and should be similarly treated for the purposes of these amendments.

Let me just say that for each of my suggestions I do have legislative language that I would propose. I'm not going to read that now. It's in my submission, which the clerk has in hand.

I've already mentioned the sentencing issue, and the third thing I want to address is the strangulation point that Daisy has mentioned. I agree that this is a good amendment. We ought to be exaggerating or raising the offence of either assault or sexual assault to tier two, to that second level, if strangulation, choking or suffocation is involved. We know from the research that strangulation poses heightened risks of brain damage and death. It's a significant risk factor for lethality and intimate femicide, and it's used by men to terrify and subjugate women, whereby the offender communicates the message literally that her life is in his hands.

● (1825)

It's critically important as well that a conviction under this offence will show up on an offender's record as assault by strangulation or sexual assault by strangulation. I've checked that out. It appears that it will in fact appear on the record in that manner, which is really important in allowing police officers, prosecutors, and judges to understand the risk that this particular individual poses.

This addition to the code follows reforms in U.S. states as well as other jurisdictions that specifically recognize men's use of strangulation as requiring denunciation, tracking, and alleviation of the burden of proof for the Crown. However, other Criminal Code amendments are absolutely necessary to breathe life into this amendment. This is because the law is seemingly unsettled as to whether women can consent to the infliction of bodily harm that's neither trivial nor transitory once we introduce the context of sexual relations.

I can say a lot more about the legal problem here. There's a legal problem, but there's also a practical problem. The practical problem is the society in which we live. We're willing to suspend our disbelief and we're prepared to acquit someone on the possibility that even on a first date, as in the Ghomeshi case, women can somehow agree to strangulation before they even exchange a greeting and without any discussion of what's involved or at risk with strangulation.

There's simply no doubt that consent will be raised by those men charged with this new form of assault or sexual assault. I don't think there's any justification in criminal law policy to carve out an exception to the general rule that people can't consent to the infliction of bodily harm that's serious and non-transitory. I think an exemption would have sex-discriminatory impacts for women, particularly women who experience male violence and those subjected to the violence inherent in prostitution. I think Bill C-75 needs a section that anticipates and closes this avenue of defence if we are to succeed in condemning strangulation as a specific form of criminal offending.

The fourth point, on reverse-onus clauses, has been ably covered by Kathryn Smithen. It doesn't often happen to me that a lawyer says something more radical than a law professor, but she did. I was going to make the point Daisy made, that we need the reverse onus to apply to those men who are found guilty but for whom there is no conviction. However, I actually agree with Kathryn: I think we have the evidence to support a reverse onus for men charged with domestic violence offences, regardless of whether they've previously been found guilty or convicted. That's because there was a study by the Department of Justice a few years ago that specifically examined domestic violence offenders and found that they breached their conditions 50% of the time, and of those, another 50% were actually violent breaches, so this is demonstrably a high-risk category of offenders who deserve a reverse onus in order to give women some measure of safety to escape or hide while the case is adjudicated.

I will conclude there. Thank you very much.

● (1830)

The Chair: Yes, thank you. We have to get to the chamber.

Ladies, we will be back as soon as the votes are over. If you are able to stay and take questions, that is great. If not, we fully understand and we'll send you questions in writing by email.

Prof. Elizabeth Sheehy: Do you have any idea of how long you'll be?

The Chair: We have two votes. It'll be about 30 to 40 minutes. We'll be back as soon as we can.

Thank you again. We're sorry.

The meeting is suspended.

● (1831)

(Pause)

● (1905)

The Chair: We are resuming. I would like to thank our witnesses for being so patient. We're so sorry. Votes are beyond our control.

For the first question, we have Mr. Cooper.

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

Thank you to the witnesses.

Ms. Smithen, you indicated that you would support establishing a reverse onus in the case of two intimate partner charges being laid, as opposed to an actual conviction. Professor Sheehy, I believe you indicated you would be satisfied that a reverse onus would apply on a first charge. I take it, Ms. Kler, that you would also be in favour of a reverse onus, simply on a charge being laid.

Do I understand your testimony correctly?

Ms. Daisy Kler: That's the first time I have heard that argument, so I need a little more time to think that through. I'm not as quick as Professor Sheehy on that.

What I'm saying is what I—

Mr. Michael Cooper: Go ahead.

The Chair: Ms. Kler, you have the floor.

Ms. Daisy Kler: Okay, I can't see all of you, so I don't know who you're talking to unless you say my name.

What I agreed with about reverse onus is that I thought it was a good start. The flaw I saw was that men who were convicted.... In the case of this batterer of a woman I was working with, who was convicted, he received a conditional discharge, so if he battered again—

Mr. Michael Cooper: I understand your point on the conditional discharge—

Ms. Daisy Kler: Yes—

Mr. Michael Cooper: He would no longer be subject to the reverse onus, even though he has a conviction.

Ms. Smithen, you were going to clarify your position.

Ms. Kathryn Smithen: I think my concern would be that if it's a first offence, there's no history identified. Quite often, police will have history in their data banks, and not necessarily were there criminal charges laid.

My view would be that if there is a history in addition to a charge, or no history but two or more charges, it should be a reverse onus. It's where there's some evidence that there's a pattern, that this isn't the first time up at bat for this alleged offender.

Mr. Michael Cooper: Professor Sheehy, do you subscribe to that as well?

Prof. Elizabeth Sheehy: Yes, I do.

It's not where I started. I was initially noticing the fact that those offenders who plead guilty or who are found guilty but have no conviction entered would be excluded from this bill.

I agree that when there is evidence of some sort of pattern of intimate partner violence, we ought to all be on the alert. There are some important risk factors that will only be accounted for, I think, if there is a reverse-onus hearing.

● (1910)

Mr. Michael Cooper: Fair enough.

Now, I certainly support the reverse-onus provisions of this bill and I am certainly open to looking at potential amendments to broaden the scope of how those reverse-onus provisions would apply.

That said, others, including the CBA, have taken the position that there's really no need for reverse onus. In that regard, they point to the fact that Bill C-75 would provide two criteria that judges must pay attention to in making a determination on bail. They include whether an accused was charged with an offence involving violence, or the threaten or attempt of violence, and, secondly, whether an accused had been convicted of a prior offence that is broader than simply an intimate partner violent offence.

I wonder what your take on their position would be, or what your response to the CBA would be on that point.

Ms. Kathryn Smithen: I don't presume to speak for the CBA, in any stretch of the imagination, but I think that position is short-sighted.

Bail decisions are frequently made by justices of the peace, many of whom don't have legal training. I have seen it play out that bail decisions are not uniformly applied across the board. There's a lot of room for discretion. I would be concerned that if there wasn't the reverse onus, people charged with intimate partner violence offences would slip through the cracks. There needs to be recognition that this is a serious offence.

I have friends who are police officers who have told me when they get calls—homicide is obviously one, and domestic violence is the second—they take it very seriously now. I'm concerned that inside the judicial system, it's not being taken as seriously. It's not being ascribed the potential for danger that it has, particularly if there's a pattern.

Mr. Michael Cooper: Fair enough.

Professor Sheehy, you provided some statistical evidence of breaches by individuals who are charged with intimate partner violence. One aspect of Bill C-75 is the establishment of judicial referral hearings when dealing with administration of justice related offences, which could include, obviously, breaches of bail conditions imposed. Do you have any concerns about the judicial referral hearing process, at least in the context of intimate partner violence?

Prof. Elizabeth Sheehy: I don't have enough information to give you an informed opinion on that subject.

Mr. Michael Cooper: Okay.

Prof. Elizabeth Sheehy: As to whether those enhanced procedures will do anything to protect women, I don't know enough about—

Mr. Michael Cooper: That's fair. I just thought I would ask.

Prof. Elizabeth Sheehy: Yes. Thanks.

The Chair: Thank you very much.

Ms. Khalid is next.

Ms. Iqra Khalid: Thank you, Chair.

Thank you to our witnesses for really putting that gender lens onto Bill C-75 and its impact.

We've heard from previous witnesses who've come forward that the reverse onus with respect to intimate partner violence would further increase the under-reporting of intimate partner violence and domestic abuse. Do you agree with that?

That's for Ms. Smithen, Ms. Sheehy, and then Daisy.

Ms. Kathryn Smithen: I don't think it does. For a lot of the women I interview, even getting them to talk about the offence is a long process. I don't think a lot of them, or the ones I've ever met—I include myself on that list—have thought that far through it. I don't see any evidence of that at all.

Ms. Iqra Khalid: Ms. Sheehy, do you agree with that?

Prof. Elizabeth Sheehy: I just don't even understand the argument. The argument is that women won't report if they think their partner will possibly be held? I find that hard to imagine, because when women are that desperate to involve police, they are usually quite frightened.

I don't know what the basis would be for that argument.

● (1915)

Ms. Iqra Khalid: Right. I completely....

Daisy, do you want to comment as well?

Ms. Daisy Kler: Yes. It's hard to actually argue against it when we don't know what the argument is. If somebody is saying that if the reverse onus is implemented, then somehow women will report less, it's just making a statement. There is no argument.

I agree with Ms. Sheehy that if women are using the police and using the criminal justice system, they are desperate at that point and very, very fearful. Because so few women will use the criminal justice system, it's usually their last resort. Regardless of a woman's reluctance or not, the state has an obligation to protect her. I think this is much more reinforced if there's a reverse onus.

Ms. Iqra Khalid: Ms. Smithen, you indicated that you would propose an amendment that instead of a previous conviction being necessary to qualify under the reverse onus, it should be somebody who is charged with intimate partner violence. Can you describe what you think the impact of that would be? Do you think it's overbroad, or just right in terms of protecting women from intimate partner violence?

Ms. Kathryn Smithen: Again, evidence and statistics show that women are usually in the most danger when they're separating or when some sort of intervention from any part of the justice system, including family law, is involved in their lives. I would not call it a cooling-off period, but I would think that if they had a period of time when they didn't have that offender literally breathing down their neck and trying to push them to recant, it would give them that opportunity to avail themselves of resources.

Again, I'm not talking about every offender, but as I indicated earlier in my answer to the other member, where it's established or where there's evidence of a pattern, I'm suggesting there be a reverse onus.

Ms. Iqra Khalid: Thank you.

Ms. Sheehy, you spoke a little bit about the definition of "intimate partner" and perhaps expanding that definition to cover people who are not generally covered in it. You gave the example of a stalker as somebody who should be covered under that definition. We've also heard testimony that the term "dating partner", which is included under the intimate partner definition, is vague.

Prof. Elizabeth Sheehy: It's vague?

Ms. Iqra Khalid: Yes. The definition of who qualifies as a dating partner is vague. Do you think that the definition of "intimate partner" could be tightened up to be more applicable or more clear in who it applies to, or should it be broad so that it is discretionary, based on each situation?

Prof. Elizabeth Sheehy: This is our problem with using gender-neutral language to talk about a very sex-specific problem, which is men's violence against women.

I think that having broader language is probably important, because what we actually want the judge to focus on is this male violence against women. Is this the kind of dangerous situation where other people are going to be targeted and brought into it, like parents or the new boyfriend, or is this guy fixated on her? Is he actually presenting danger of male violence against women? I don't want narrower language unless it's sex-specific to identify.... This is the core of the problem that we're talking about and that we're trying to target with this legislation.

I'm not sure that's a really great answer. I'm asking for a broader definition, which is the opposite of what you were referring to in terms of narrowing the meaning of "dating partner". I would broaden that to say "men who want to date, who are rejected, who then won't leave the woman alone, and who fixate on them".

Ms. Iqra Khalid: That's a very interesting perspective.

Thank you for that. Those are the only questions I have.

The Chair: That's good, because you just hit six minutes.

Go ahead, Mr. Rankin.

Mr. Murray Rankin: Thank you to all the witnesses.

Ms. Smithen, thank you in particular for your courage in putting your personal situation in context before you began. I appreciate that.

I'm not sure I understand all this reverse-onus stuff. I'm going to try a little bit further.

My first question is for the lawyers. Is there not a concern that a reverse onus writ large would not meet charter compliance? I understand if some of you are saying that we would do that if and only if there's evidence of a pattern of behaviour. I thought I heard some say that even if there's a prior conviction or a conditional discharge.... I'm just a little confused where you land on this reverse onus. Could you perhaps enlighten me? Would you always wish to have a reverse onus in situations of intimate partner violence, or would it only be if there's an established pattern of behaviour in the past for which a person has received a conditional discharge, or been convicted, or writ large? I'm not clear where you land.

● (1920)

Ms. Kathryn Smithen: My concern is that the system the way that is now does what I call back-ending. It saves all the tough penalties in terms of sentencing and reverse onus for the end of the criminal justice system.

Frankly, in intimate partner violence cases, a lot of cases don't make it that far. It's very routine in my jurisdiction—I can't speak for any other places—that nine times out of 10 in the cases I've seen, the offender is offered a peace bond if he doesn't have a criminal record and does counselling. Counselling is good; there's value in it. In a typical situation, he'll go off to 16 weeks of PARS program where, in the context of the program, he's required to make an admission of guilt and participate in counselling. Then when he provides the Crown attorney with a certificate saying he completed the program, he is given a peace bond. There's no criminal conviction. It stops there.

Then in many cases, he comes back or goes to the family law system and says, "Oh, that wasn't really a serious offence—look, the Crown withdrew the charge." What he said to get that peace bond is very different from what he says in the future, both in the family cases and if he comes before the criminal courts again.

Mr. Murray Rankin: Excellent.

Ms. Kathryn Smithen: My concern is about putting the resources up at the front, when the complainant witness is at the most danger and where the provisions we're putting in place—safety provisions for her and for her children—will make the most difference.

Mr. Murray Rankin: Thank you. That's really helpful. I appreciate the clarification.

We had a witness here named Jonathan Rudin who was from Aboriginal Legal Services. I invite any of you to comment on his views. He claims that the reverse-onus provision on bail applications for those charged with domestic violence is misguided. In his submission he said that it particularly affects indigenous women and girls. He said that often what happens is that there's this phenomenon of dual charging, as he calls it, in which a man is charged with domestic assault and insists that his partner started it and should also be charged. That has led to more women becoming enmeshed in the criminal justice system and women ending up with convictions for assault that they should never have had.

He says:

> If these provisions go through and their partner once again alleges abuse then they may have trouble meeting the reverse onus. This means they'll be detained, and they will likely plead guilty, and the cycle will continue.

He says that's going to have a disproportionate impact on indigenous women because, as you know, they're grossly over-represented in our prison population, over 40%

I wonder if any of you have comments regarding this phenomenon that he brought to our attention. How would you react to that?

Go ahead, Ms. Kler.

Ms. Daisy Kler: First I think we do have to acknowledge that even in the male population in prison, people of colour and aboriginal men are overrepresented. The institution of racism gets reinforced within the prison system. We do see in our transition house women getting charged. Often a man calls police on a woman, and she is racialized and he is not. He's a white man. She is more likely going to be charged. That is a phenomenon.

The problem is that whenever we neutralize the gender, even in this bill, there's no analysis showing that this is male violence against women. Let's say the police wanted a pro-arrest policy; the interpretation was supposed to be pro-arrest in favour of the woman who is battered. What we see is a pro-arrest policy that has no gender analysis and arrests the woman often, and sometimes not even the man but just the woman.

He's right in saying that does happen. The answer is not to argue against reverse onus; the answer is to correct this idea of gender neutrality within the law and to recognize within the law that there is a phenomenon of male violence against women. It happens that the majority are women and the perpetrators are men. Unless we start to infuse all these bills with that, there are going to be consequences.

● (1925)

Mr. Murray Rankin: Thank you.

Am I done?

The Chair: Mr. Rankin, your time is up.

I'm very conscious of the fact that Ms. Smithen has to catch a flight.

Mr. Virani and Mr. Fraser are sharing the next six minutes.

Mr. Arif Virani: I'll have one comment and one question.

To Ms. Smithen, I want to say a distinct thank you from me and I'm sure from many members here at this committee for being so honest and for sharing so candidly and vividly and cogently about your own personal life experience. That's the kind of testimony we want to hear, and I applaud you for giving.

To Ms. Kler, I want to ask you about your own testimony and then invite your two colleagues here to comment on that.

You mentioned the potentially traumatizing effect of a PI, a preliminary inquiry, on a complainant in a sexual misconduct or sexual assault trial and how that can result in reliving the events, and going through difficult cross-examination over very minor matters which would effectively re-victimize the complainant. Could you just elaborate on that?

Then I would ask Professor Sheehy and Ms. Smithen to comment on whether they share Ms. Kler's view.

Thank you.

Ms. Daisy Kler: Certainly, historically how preliminary inquiries have worked—or not worked—for women is that the defence uses any minute difference between, say, the police statement, the pretrial hearings, and then the trial hearings. Any difference between those three gets examined, to the extent that the woman is having to, in this case, talk about whether or not she was sure she was wearing a cardigan. This went on for about 10 minutes. This particular witness was very confident and very articulate, yet she was shaken about why this difference that seemed so small kept getting relived. That's just an example—what she was wearing—but if you think about preliminary inquiries and all of the questions and everything you say, or if you stumble being questioned.... It was retraumatizing for her.

In her victim impact statement, she talked about having to be the perfect witness and having her whole life scrutinized, not just what she said. At one point, she said that she was young and a little bit insecure. That was used in the trial to say that she was really vindictive because she was just really insecure and that's why she was bringing this man forward on a charge.

Certainly in the case of women who experience sexual assault, I think the misuse of preliminary trials has been very obvious to us.

Mr. Arif Virani: Thank you.

Can I ask Professor Sheehy or Ms. Smithen if they have a comment?

Ms. Kathryn Smithen: If you wouldn't mind, Professor, I'm going to have to leave in about two minutes.

Prof. Elizabeth Sheehy: You should go ahead.

Ms. Kathryn Smithen: I can't speak for everybody. I can say from my own perspective that I actually...I wouldn't say “liked”, but having a judge listen to what I went through and acknowledge it as serious was very liberating for me, at both the preliminary hearing and the trial.

I found it very helpful to me in learning to stand up for myself, which I hadn't done for a number of years. I am smart enough to know that I don't know it all, and particularly in my work I constantly remind myself that everybody reacts to trauma differently. For my clients, I always remind myself that it's their life, not my life, and a lot of women do get re-victimized by it.

Defence counsel are there to do their job, and some of them are better at it than others. I'm sure my two colleagues will disagree with me, but I don't think preliminary hearings should be scrapped. I think they're an important part of the judicial system and should remain. I think I'd better leave before I get my head chopped off.

● (1930)

The Chair: We have about two minutes left in this round.

Go ahead, Mr. Fraser.

Mr. Colin Fraser: Thanks very much to all you for being here.

Ms. Smithen, I know you have to leave, but thanks for being here.

Ms. Kathryn Smithen: Thank you so much.

Mr. Colin Fraser: Professor Sheehy, I'd like to ask you a question because I don't understand something that came up a couple of times in the presentations. It's with regard to a distinction on sexual assaults that are proceeded with summarily. You made allusion to the fact that they are being treated distinctly. I'm not aware of that problem. Why do you think that?

Prof. Elizabeth Sheehy: I've already explained it to the analysts over there. It's just that the bill amends all the other sections that deal with summary conviction forms of assault. All of them have been amended to change the maximum sentence from either six months or 18 months to the new default, which is two years. The only one that was not amended is sexual assault. It stands at 18 months maximum.

It has it specifically in section 271 and it just hasn't been changed. I'm sure it's an oversight.

Mr. Colin Fraser: Thank you for bringing that to our attention. That's very helpful.

I'd like to pick up on a question Mr. Rankin was asking regarding the charter. Ms. Smithen was speaking to it.

Reversing the onus at a bail hearing without any fact pattern ever having been tested in court strikes me as fundamentally problematic as far as the presumption of innocence goes. I think there probably would be a charter issue in doing that.

All three of you who've presented have said that you're in favour of doing it. I wonder if you've given thought to the Charter of Rights.

Prof. Elizabeth Sheehy: There is another reverse onus in section 515, which is a reverse onus for people charged with drug trafficking offences—not convicted, but charged—and that went all the way to the Supreme Court of Canada.

The Supreme Court of Canada upheld the reverse onus on the basis that these are the kinds of offenders who are more able to abscond and in fact—in some ways drawing on common assumptions and not even necessarily evidence—a category of offenders who are well connected and able to escape jurisdiction and escape the charges.

Mr. Colin Fraser: Do you know the name of that case? I'm sorry, but I'm not familiar with it.

Prof. Elizabeth Sheehy: I didn't teach criminal law the last two fall semesters.

Mr. Colin Fraser: That's okay; we'll find it. Thank you all very much.

Prof. Elizabeth Sheehy: I'll send an email.

Mr. Colin Fraser: Thanks, Professor, thank you very much.

The Chair: Again, it was a little bit of a disjointed panel because we made you wait during that break, but I really appreciate your bearing with us. Thank you so much to both of you; it's really appreciated.

We'll take a brief recess as I ask the next panel to please come forward.

● (1930)

(Pause)

● (1935)

The Chair: We are reconvening this meeting. I would like to thank the participants in our last panel for bearing with us while we ran a little bit late because of the votes.

We are joined today by Ms. Joy Smith, the founder and president of Joy Smith Foundation Inc. and a former member of Parliament.

Welcome, Ms. Smith.

Mrs. Joy Smith (Founder and President, Joy Smith Foundation Inc.): Thank you very much. It's an honour to be here.

[*Translation*]

The Chair: We will also be hearing, by video conference from Japan, Ms. Maria Mourani, a former member of Parliament, who is also a criminologist and sociologist.

Welcome, Ms. Mourani.

Mrs. Maria Mourani (Criminologist and Sociologist, President of Mouranie-Criminologie, As an Individual): Thank you.

The Chair: We also welcome Ms. Marie-Eve Sylvestre, who is a professor at the Faculty of Law of the University of Ottawa, Civil Law Section.

Welcome, Ms. Sylvestre.

Ms. Marie-Eve Sylvestre (Full Professor, Faculty of Law, Civil Law Section, University of Ottawa, As an Individual): Good day.

[*English*]

The Chair: We're also joined by the London Abused Women's Centre. We have Ms. Megan Walker, the executive director, who is a regular at committee. Welcome.

Ms. Megan Walker (Executive Director, London Abused Women's Centre): Thank you.

[*Translation*]

The Chair: As we agreed, we will begin with the witnesses who are joining us by video conference in order not to interrupt that and not lose the communication.

[*English*]

Ms. Smith, Madam Mourani, you're going to go first. You have up to eight minutes. I won't cut you off until 10, but try to stick to eight if you can.

The first person will be Ms. Smith, and then Madam Mourani.

Ms. Smith, you're up.

Mrs. Joy Smith: Thank you, Chair. I thank the committee for examining this Bill C-75.

I also want to say hello to my colleagues. I was a member of Parliament for close to 12 years. I know how hard you all work on this committee. I'm glad to have some input into it.

I have to say that Bill C-75 concerns me greatly. I think there are some strengths in it, but I want to address the part about human trafficking.

I don't think a lot of people understand human trafficking. Human trafficking is when young girls, mostly, are targeted and groomed in such a way that they sometimes get confidence in their predators, and then they eventually end up trafficked.

When I look at Bill C-75, I have concerns. You can see through this bill that the understanding of the global and Canadian issue of human trafficking isn't here. There are a lot of things that are not addressed. There are laws that are being.... The criminals actually get a bit of a break in what they do.

I want to talk about human trafficking so that you understand it. I've dealt with hundreds of survivors of human trafficking. They live a very horrible existence. Predators target their victims.

I'll give you an example. I know of a young girl who was very beautiful. She lived in a very good family. She was very knowledgeable in her school studies and everything; she did a great job. She went to a summer program at a community centre, and some cute guys showed up.

There were five of these girls who had been friends for a lot of years. Now, people would say that only the most vulnerable or people who don't have good families are the ones who are subject to human trafficking. That wouldn't be true.

Anybody who is a girl—and boys as well, but mainly girls—can be targeted and trafficked and eventually lured into the sex trade through no fault of their own. This particular girl came from a very nice family. Her parents dropped her off at the community centre. They gave her a cellphone to call them when she went home, but what happened to this girl is typical of a lot of trafficked victims.

Some cute guys showed up and sweet-talked the girls. The girls were 14 and 15 years old, and they quickly fell in love. The traffickers took them to parties. The girls were told to tell their parents that they were at sleepovers. They weren't at their friends' places at all; they were at parties with these cute guys, or what they thought were cute guys. The guys were giving them fancy restaurant meals, taking them in limos, giving them gold chains, making them feel very special, telling them that they loved them and that someday they would get married.

The whole scenario changed one night, and the tide suddenly turned. One night the guys got together and said to the girls, “You know what? You have to pay us back for all the gifts we've given you, and this is how you're going to do it.” The girls objected, especially Malana, who objected very much, and they beat her very badly. She was threatened. They told her they were going to go to her school and that they were going to go to her parents and tell them what she'd been doing. She'd already been servicing some men for her boyfriend, because the boyfriend had told her they were trying to get some money for a house, that she had such a beautiful body, that dancing in the strip bar just meant that it was art and everyone would watch her.

This is the deceptive part of human trafficking. What happened to her eventually is that she was gang-raped. She was sold to another trafficker.

● (1940)

Five of them went through very similar experiences. The other four have disappeared. My foundation helped the fifth one through many years of rehabilitation and reschooling, getting her in school again, because a lot of these survivors of human trafficking miss a great deal of their education—four, five, six, seven years if they survive that long.

Human trafficking is very lucrative. Traffickers make between $260,000 to $280,000 a year. This is a horrible inflicted pain on very young girls. Why do they pick people who are underaged or very young girls? It's because they're easy to intimidate. They're easy to scare. They pick the very young and they can brainwash them over and over again.

When I look at Bill C-75 and I see some of the penalties that are very light, I would suggest there be another study on human trafficking, and particularly the harm it does to these young people. They are forever changed. To put it out there that prostitution is an industry is wrong: no, it's the greatest affliction against women. I haven't met any young girl who wanted to be in this at all.

The perpetrators and the others around this crime make a great deal of money out of it, and that's why they do it. I know when I was in Parliament for 12 years it was my responsibility to stand up for the most vulnerable. People have to understand.

When I look at the committee today, I see primarily men around this committee and I see a couple of women sitting at the end of it. There's Maria.

Maria, thanks. It's so nice to see you. She's done very good work on the human trafficking file. When I see Megan Walker and others who have worked so long, so many years, with victims and survivors of human trafficking, and some of the things that we see along the way.... I worked 23 years in total trying to stop it, and my foundation now still works to educate the schools and the school children about how predators work and how they can protect themselves.

To me, this Bill C-75 is building a new philosophy around human trafficking. It's almost like this is okay. The criminal charges are lighter. It seems to me there's a lot of misunderstanding about human trafficking. I would suggest it is imperative that parliamentarians actually find out about it. Talk to survivors.

There is a segment of women who make a lot of money in the prostitution field, and they lure other young girls in, but these are not the trafficking victims. These are the people who, it's been my experience, make a great deal of money off the innocence of the very young. I think when parliamentarians are around the table, they have to have a view of respect for women. It has to have a view that there is no glass ceiling. Women have a right to be safe. They have a right to be honoured. I don't see this in this bill to any great extent.

Human trafficking keeps going on. I know. I've been in schools. Our foundation now goes to schools all over the country, and I don't make any money off the foundation at all. I do it as a labour of love, because I've fallen in love with the survivors and the very many survivors who told me their stories. I've fallen in love with the people who have stood up for them for years. I think this Parliament now has to take this very seriously. I know that in the schools, no matter what school I go into, when I talk about human trafficking and how the predators work, I have several girls coming up.

● (1945)

I was in a school last week. There were a lot of students there. I spoke to grade 5 right up to grade 12. From each grade, ladies and gentlemen, students came up once they found out how predators work, and said, “You know what? I think my boyfriend is grooming me.” I asked them why they thought that, and they would tell me things. They would say, “Well, I fell in love with him. He's so wonderful.” A couple of them said that they intended to get married, but actually the boys were suggesting things that kind of shocked them.

They wanted to get some money, but—

The Chair: Ms. Smith, you're up to 11 minutes now. Could you try to wrap it up? It's because we have three other witnesses on the panel. Thanks.

Mrs. Joy Smith: Oh, sorry about that. I don't have a stopwatch here. Thank you, Mr. Chair.

Anyway, I think it's an issue that needs to be taken very seriously, and I don't think Bill C-75 reflects that the way it should.

Thank you for this time that I've been able to give input to this committee. I appreciate it.

The Chair: Thank you very much.

To refresh your recollection, you asked for a study. We are in the process of doing a study on human trafficking. We have travelled the country, meeting with people. You were, in fact, one of our witnesses on the study. We haven't yet come out with our report, but there is a study that is currently being done. Hopefully you'll be happy with that study.

[*Translation*]

Ms. Mourani, you have the floor.

Mrs. Maria Mourani: Thank you Mr. Chair.

Good evening, everyone.

It's always a great pleasure to be with you. I thank the committee for its invitation. I also want to greet my former colleague Joy Smith, with whom I worked extensively on this issue when I was an MP.

As you can probably imagine, I will not discuss all of the provisions contained in Bill C-75, which is quite long. I will simply address the provisions that concern my bill on human trafficking, which is Bill C-452, An Act to amend the Criminal Code (exploitation and trafficking in persons). The bill was tabled for first reading on October 2012, and passed unanimously at second and third readings, as you know. It then passed all of the stages in the Senate and received Royal Assent on June 18, 2015.

I will focus more specifically on clause 389 of Bill C-75, since that clause establishes the coming into force of clauses 1, 2 and 4 of Bill C-452, and stipulates that clause 3 must be the subject of an order. Its coming into force is thus subject to an order, which is to say that this depends on the government's will to do so; the government clearly expressed its opposition to this clause at the time.

I know that several members around this table are new and were not members of Parliament during the previous Parliament. So I want to provide some explanation about how this bill came into being.

The bill was the result of a consultation that lasted several years. Many groups were consulted, including women's groups, victims' aid groups, victims themselves, and police officers—several police forces were consulted. The bill was also reviewed by criminal law jurists in Quebec. And so it was studied and studied again, and developed into the bill you see now.

A criminological analysis was also done of the phenomenon of trafficking in persons in Canada, which led us to understand that there were gaps in our Criminal Code that need to be filled in. Our observations led us to the following conclusions: first, trafficking in persons is very, very lucrative. People who pursue this criminal activity make a lot of money. The phenomenon is not unique to Canada; it is global. In fact, several experts believe that the proceeds from this criminal activity are second only to drug trafficking, and that it is even more lucrative than arms dealing. It's appalling!

Not only is human trafficking lucrative, it causes incredible suffering for the victims. I can tell you that in the course of my professional work, since the end of the 90s, I have met many, many victims. What they have to say, the suffering of these victims, is unimaginable, and defies description. It can sometimes even make you wonder if it is real. You react by thinking that this can't be, how can such things happen here, in Canada?

The most common form of trafficking in persons in Canada is internal trafficking. So this directly involves our girls, girls who are moved all over Canada to be subjected to the the most prevalent form of trafficking in the country: sexual exploitation. This is what I will focus on. There is also, of course, some trafficking involving forced labour. To my knowledge, organ trafficking is not happening in Canada, but it's possible that it is. It may simply be that we haven't caught the perpetrators yet; I don't know.

Trafficking in persons for the purpose of sexual exploitation is not only the most prevalent form of trafficking, but it generates billions of dollars for the sex industry. For instance, it has been determined that 11% of men in Canada have purchased the services of prostitutes. Comparison can be comforting, as the saying goes: in the Netherlands, that figure is 60%. In Germany it is 66%, and in Cambodia, 65%. In Sweden, where the approach is completely different, it drops to 8.5%. Don't forget that when prostitution is legalized, trafficking increases, as does consumption.

● (1950)

Human trafficking in Canada and internationally mostly involves women and children. The average age of entry into prostitution in Canada is about 14. I have met victims who became prostitutes at 13. Others were forced into prostitution at 10 or 11. The average however is 14, 15, and 16. And yet we aren't in Thailand, we are in Canada.

For a five-year period, from 2007 to 2013, 40% of victims identified as such in Canada were minors. This confirms the global trend, where an increase in the statistics involving minors has been noted. The victims are of course mostly girls rather than boys.

The cities that are reputed to be trafficking hubs are Montreal, Calgary, Vancouver and Toronto. Canada is recognized as a transit country, a country where recruitment takes place, and a sex tourism destination. These observations were made by the RCMP and the American State Department. What is very compelling is that on average, a perpetrator who exploits a victim sexually can make between $168,000 to $336,000 per year from one victim. These are RCMP figures, once again. As I said, trafficking is very lucrative.

Bill C-452 had two objectives: to make trafficking less lucrative, or not lucrative at all, and to protect the victims. Our consultation made us realize that trafficking is a crime that needs a victim; we need the testimony of a victim. However, as you know, the victims are either terrorized or in love with and under the spell of their pimps. They suffer from PTSD, Stockholm syndrome and all sorts of psychological ailments. But without victims, it is extremely difficult to conduct investigations.

We also saw that when we managed to get investigations done that led to convictions, the penalties did not fit the crimes. The victims said that quite often the traffickers were charged with three or four offences and were sentenced to the full extent of the law, as that is the system we had. The victims did not understand. A pimp was charged with trafficking, pimping, aggravated assault, attempted murder, and in the end, the offender was sentenced for the most serious offence, but this was a light sentence as compared to the gravity of all of the crimes committed. Consequently the victims felt that they were subjected to another injustice at the hands of the system. They wound up feeling that there was no point denouncing the trafficker and having to go through all of that judicial process.

So basically, we had to find a way to remedy all of this. I felt—and this was supported by my various partners—that if we could make trafficking less lucrative it would be less attractive, and involve a lot of risks for the traffickers. This would create a balance. First, we had to do something that still does not exist in our system, and that is an aberration, and that is to confiscate the proceeds of criminality. This is done in the case of big drug traffickers, but not for human trafficking. So we added that.

Someone who gets caught and is convicted must demonstrate that all of his assets are not derived from trafficking and the sexual exploitation of girls. On the one hand, the state may take away everything he owns. In addition, given the reversal of the burden of proof, investigations can be held without the need for the testimony of a victim. This is due to the victim protection process. They are not obliged to testify; the police officers are the ones who must gather the necessary evidence to charge a trafficker.

● (1955)

The Chair: Ms. Mourani, the 10 minutes you had are up. I must ask you to conclude your presentation.

● (2000)

Mrs. Maria Mourani: Very well. I will conclude.

My last point is about the need for sentences to be made stricter by introducing consecutive sentences. That is the objective of the amendments to the Criminal Code contained in Bill C-452. However, those amendments must be given effect by order in council, and the government is the entity that must do that. Unfortunately, I don't have enough time left to explain the saga that followed, but I am sure that in answering your questions, I will be able to set out my arguments.

Thank you very much.

The Chair: Thank you.

I now yield the floor to Ms. Sylvestre.

Ms. Marie-Eve Sylvestre: Good evening.

Thank you for your invitation. My remarks will be exclusively concerned with interim release.

Allow me to begin by telling you the story of Martine.

At the time when our research team met her in 2014, Martine was a homeless young woman in her mid-thirties. She was undergoing treatment to curtail her addiction to opioids, and living with HIV.

In April 2008, Martine was arrested for the first time for having communicated with people for the purposes of prostitution, an offence under paragraph 213(1)(c) of the Criminal Code, the functional equivalent of current paragraph 213(1.1) of the Criminal Code which criminalizes sex work.

Because of her priors, Martine was detained by a police officer and appeared in court the next day. The Crown opposed her release and Martine was remanded until her judicial release hearing, held three days later.

Martine spent four days in a pretrial detention centre. That is a typical scenario in Quebec. In Ontario, the period is longer. This centre is overcrowded and people are detained there who often have not been convicted of any crime. Moreover, Martine had not consumed any drugs for four days. She was suffering greatly as a consequence and experiencing several withdrawal symptoms.

It was under these conditions, and attempting to merely survive, that she accepted the release conditions imposed by the prosecutor and approved by the judge. Those conditions included not consuming alcohol or drugs and not being in a area covering all of the Centre-Sud district of Montreal and Hochelaga-Maisonneuve, an area of about 12 square kilometres. That is equivalent to the distance between Parliament Hill and the Rideau River, or from Bronson Avenue to Elgin Street.

Martine was not in a position to challenge the conditions of her release, among other reasons because it is impossible for her to stop taking drugs from one day to the next; she often resides in a motel on Saint-Hubert Street and goes to get groceries at the Fondation d'aide directe-SIDA Montréal, and also goes to Méta d'Âme, an organization that helps people who are addicted to opioids, where she receives treatment for HIV and accesses social services. All of these places were located in the perimeter she could no longer be found in.

She agreed to anything because she wanted to get out of there as fast as possible.

Her trial was scheduled for the month of July. Since she does not keep an agenda on the street, Martine did not appear in court. She was accused of failing to appear and a warrant was issued.

A few months later, she was arrested and immediately detained. After having spent 48 hours in a detention centre, she appeared and pleaded guilty to the communication offence, to breaching her release conditions and to failure to appear. She was sentenced to 30 days of imprisonment, which was followed by a probation period of one year with the same conditions.

Two months later, Martine was caught in her prohibited perimeter in a state of intoxication and in the process of communicating with someone. This was a new offence and she was once again accused of breaching her release conditions. This time, Martine was excluded from the entire Island of Montreal. She was forced to take therapy in a suburb, a condition she will not respect, once again.

From one instance of non-compliance to another, from failure to appear to failure to appear, Martine over two years accumulated seven administration of justice offences for two predicate offences. During all of that period, she felt constantly watched. She experienced a lot of stress. She played a game of cat and mouse with the police. She consumed more drugs than before. She lost her apartment. In the suburbs, she told us, she was starving to death.

During the period she was banished from Montreal, she could no longer receive her HIV treatments, which were not available outside the city. Finally, she was allowed to go to her medical appointments on condition she find a means of transportation that would deliver her to the door of the medical centre. Asked to comment on her situation, Martine was very direct: “They are about to ask me to walk on my hands”, she said.

Martine's case is not exceptional in our justice system. I told you her story to illustrate the following facts.

First of all, our prisons are full of people like Martine who are detained pretrial for extremely minor offences—shoplifting, obstructing the work of police officers, misdemeanours, drug possession, common assault, and countless instances of failure to respect conditions. These people are detained longer before their court appearance than they would have been if they had been sentenced immediately. Moreover, the reversal of the burden of proof when charged with failure to respect conditions only increases their likelihood of being detained.

Although people sometimes think that the justice system really deals with serious crimes, we see that in reality administration of justice offences make up more than 25% of all cases heard by the courts every year. Forty per cent of the cases heard contain at least one of those offences.

● (2005)

These figures are even higher among indigenous persons, and more indigenous persons are in prison.

Our justice system produces repeat offenders, but they are not criminals. They are people who are unable to comply with unrealistic and arbitrary conditions.

The most common offence against the administration of justice is non-compliance with release conditions, or breach of release conditions. When people are released, judges impose conditions in 95 to 100% of cases. The conditions that are most often violated are those related to abstinence or not being at a certain place.

Bill C-75 is a step in the right direction, especially the planned addition to sections 493.1 and 492.2 of the Criminal Code. The bill does not go far enough in addressing these problems, however, to make sure that our prisons and courts are not primarily places that manage misery and poverty, to make our justice system address what is essential, and to uphold the rights of marginalized persons, especially women and often indigenous persons.

I propose a series of amendments, most of which are in my brief.

First, the term “vulnerable populations“ in the new clause 493.2 must be defined. Otherwise it would be incumbent on the person appearing to prove that they are disadvantaged.

Further, police officers must be required to issue unconditional notices to appear for persons who do not pose a real and imminent threat to the safety of victims and witnesses.

The new subclause 501(3), which pertains to the reasons for which police officers can impose conditions, must be amended to require them to consider the seriousness of the alleged offence, in particular as to the need to ensure attendance in court.

The grounds for detention set out in subclause 515(10) must absolutely be amended to prevent justices of the peace from detaining a person and imposing conditions on them to ensure their attendance in court when required by the seriousness of the offence and when the person presents a real, serious, and imminent threat to the safety of a witness or victim.

A provision must also be added to prevent the detention of a person if it is unlikely that they will be sentenced to prison.

All reversals of the burden of proof must also be eliminated, specifically as provided in paragraph 515(6)c) in the event of breach of conditions.

Additional precautions must also be taken for two types of conditions: those pertaining to abstinence and geographic conditions. For conditions pertaining to alcohol and drugs, the police officer and judge must consider the person's degree of dependence to see whether the condition imposed is realistic under the circumstances. Further, a harm reduction approach must be taken in all cases. On October 17, cannabis will be decriminalized in Canada, but there is a risk that it could be criminalized again by the back door if it is included in release conditions.

The power of police officers to impose geographic conditions must also be eliminated unless the safety of a person or victim is at risk.

Finally, the parallel procedure in clause 523 pertaining to minor breaches must be eliminated; in my view, it is not a good idea. People will continue to appear before judges and overload the courts. That is already the case in provinces such as British Columbia, where defendants appear before judges, are given a warning, leave, but keep appearing before the courts again. The way the procedure is structured could increase the number of individuals who previously had no charges against them. Finally, activities related to drugs, and not just cannabis, and sex work, must be decriminalized so that the life and safety of persons is not endangered.

This is the first time in 50 years that Parliament has had the opportunity to amend statutory provisions regarding release. Every effort must be made to reduce the pretrial detention of persons who are not dangerous and eliminate the pointless conditions that discriminate against marginalized persons. In its present form, Bill C-75 does not go far enough.

● (2010)

The Chair: Thank you very much.

[*English*]

We're going to go to Ms. Walker.

Ms. Megan Walker: Thank you so much for having me here today. It's lovely to see you and lovely to have London North Centre MP Peter Fragiskatos with us at the table today.

The London Abused Women's Shelter provides advocacy, support, and counselling to women and girls over the age of 12 who experience male violence in their intimate relationships, by their pimps and/or sex purchasers, and in the workplace.

We are a very small organization with 11 staff and a mandate to ensure that all women have immediate access to service. Last year, our small office served 6,045 women and girls. During the last three years, our prostitution and trafficking-specific programs have been attended by 1,664 trafficked, prostituted, sexually exploited, and at-risk women and girls. That is probably more than anywhere else in the country. Our programs are very popular, and we are grateful that we can provide them.

We also support families from across the country. Last year, we supported 140 family members, who sometimes just flew in from other provinces, or sometimes even from the territories, looking for their daughters who have gone missing into this horrible world of trafficking.

Two-thirds of all trafficking in Canada originates in the province of Ontario. Girls are recruited into trafficking for the purpose of prostitution and pornography. They're recruited at bars, at universities, in high schools, and in their workplaces.

London, as Peter will attest, is a hub of trafficking activity. Girls and women are recruited both from and to London. The lead with our London Police Service human trafficking unit recently said that trafficking is an epidemic in society.

The trafficking unit provided service to many girls between the ages of 11 and 17. These girls and women are trafficked by their boyfriends, family members, and organized crime. By organized crime, we often think of bikers or the Mafia, but I'm talking about small gangs that exist in communities across the country.

We need to recognize that there is a relationship between organized crime, male violence against women in intimate relationships, and trafficking. As has been stated already, trafficking of women and girls is highly profitable, unlike trafficking of weapons or drugs, where the trafficker has to continue to spend more money to get more supplies. Traffickers can make money off of the same woman over and over again.

Many women we work with have been forced by their pimps to bring home every day between $1,500 and $2,000. This means that they are providing sexual services and fulfilling the porn-fuelled fantasies of anywhere between 15 and 20 men per day.

We ask that you please try to understand and acknowledge that there is a relationship between prostitution and trafficking and that prostitution is inherently harmful, violent, and dehumanizing. Prostitution fuels trafficking.

Our current legislation in Canada criminalizes pimps, brothel owners, and sex purchasers and has been identified by many police services across this country as a valuable tool to help them in their fight against trafficking. On a side note, a recent Ipsos poll on Canada's prostitution legislation found that 58% of those living in Ontario support the current legislation.

I know how difficult it is for people to hear about repeated torture that is experienced by prostituted, trafficked, and sexually exploited women and girls, but to understand the significance of the issues, it's important that you hear about it.

Most trafficked girls have no idea what their trafficker has negotiated with the sex purchaser. When men appear to fulfill a rape fantasy, as an example, the woman has no idea. The man is given a card to get into her room, comes in, and literally rapes her as his fantasy. That experience for her leaves her feeling as if she was just raped, and she's left deeply traumatized.

● (2015)

We know some of the experiences women and girls share with us, particularly when they're trafficked into pornography. They are waterboarded. They are strung from the ceilings by their feet while being whipped, beaten, and electroshocked on their labia and in their vaginas. Their feet are repeatedly beaten until they are swollen and bleeding, and their nipples are nailed to wooden boards to stop them from moving.

This is torture. It can be called nothing but torture. It's torture in the private sphere, and it does require legislation to acknowledge it as non-state torture, so that women's experiences are validated.

We know that Liberal MP Peter Fragiskatos tabled a bill in the House of Commons to amend the Criminal Code regarding the inflicting of torture. It was known as Bill C-242. We felt that it was minimized when it came to this committee and minimized at the House of Commons in Parliament. Only two experts in non-state torture were called, no victims, and it was then sent back to Parliament, where on November 29, 2016, its status became known as dead. It's appropriate to call it dead. “Dead” is the exact word used when tortured women and girls are asked how they feel, and of course it's the word we all use when women are killed as a result of torture—“She's dead.”

Pornography today is extremely violent and has resulted in the murder of women on film. Men who watch pornography learn that women are nothing more than disposable objects who exist solely to satisfy male fetishes. The average child will watch pornography at age 11. When I go into school grounds and I see a group of kids huddled, I go over—it takes only one kid with a phone—and they're all watching pornography. These are kids in grades 2, 3, and 4.

In pornography, women are pulled by their hair to a bathroom where their heads are shoved into the toilet while it is repeatedly flushed. Women are shown in the videos fighting to live and gasping to breathe while inhaling water and choking, yet the more they fight, the longer their heads remain in the toilets.

Men in pornography, like many men in society, want women and girls to know they have both the power to kill them and the power to bring them back to life. Women and girls are forced to endure multiple men ejaculating on their faces, and unprotected anal-to-oral sex is the norm. These women and girls suffer from trauma and significant health issues like syphilis, gonorrhea of the eye, and prolapsed anus.

M-47 was a motion introduced by Conservative member Arnold Viersen. It was referred to the Standing Committee on Health to examine the public health impacts of pornography. The committee provided a response that failed to address the systemic public health issues in pornography. Instead, the committee addressed it as an issue of sexual health to be resolved by education. That's not appropriate.

I'm getting to the recommendations. Are you about to tell me I'm at 10 minutes? I say I'm at eight.

The Chair: You're at about nine minutes, 10 seconds.

Ms. Megan Walker: Oh, all right. I'm almost done.

The Chair: You'll have to get to your recommendations on Bill C-75.

Ms. Megan Walker: Bill C-75 is very difficult to wade through, which makes it inaccessible to almost all victims, and particularly women who've experienced violence or sexual exploitation. For the most part, sexually assaulted, tortured, prostituted, and trafficked girls and women have no idea that the government is even discussing these issues at this moment.

We do have some recommendations.

We would like you to develop a consultation tool to allow women's voices to be heard, particularly those impacted by prostitution, trafficking, exploitation, and male violence, so you can incorporate their feedback into the legislation. We know how to do those tools for you. We need you to reach out to these women and girls.

We're asking you to re-examine the issue of legislating non-state torture as a criminal offence. We're asking that you legislate an opt-in process for online pornography, so that, similar to online gambling, only those over the age of 18 can access it. We're asking you to address the systemic failures that discriminate against women, preventing them from either accessing the criminal justice system or remaining involved in it. At the very least, we ask that you stop using the term “gender-based violence” and call it what it is: it's male violence against women, and women have been invisible for too long. The time has come to continue to talk about them.

I'll just get to the final one. We'd like to see a strong appeal by the House of Commons to the Senate to quickly pass the amendments to the Judges Act. It was a unanimous vote in the House of Commons, and it's been stuck in the Senate now for about two years. Women are anxiously waiting to have judges who are trained to address sexual violence.

It is difficult to discuss our problems around male violence against women, oppression, and human rights violations in front of a committee with 11 male members and one woman. That's hard, because as well-meaning as all of you are, as men you have power and privilege that women don't have.

The term “nevertheless we persist” is valid, because women have to fight every day to be heard and to survive and to be believed. I appreciate the opportunity to be here, and to present some facts around trafficking and some recommendations.

● (2020)

The Chair: Thank you very much.

We're going to go to questions from Mr. Clement or Mr. Cooper, whoever would like to go.

Hon. Tony Clement: This is my first meeting.

Ms. Megan Walker: Welcome.

Hon. Tony Clement: I want to thank all of the presenters, of course. It's a very harrowing topic. It's very upsetting to all of us—more than upsetting.

I don't know whether this is appropriate: I am a male but I also have a wife, a mother, a sister, and two daughters. This affects all of us. I know obviously I cannot speak from the experiences that all of you have come across, but it's important to have this on the record, so thank you, all of you, for doing that.

I'm trying to figure out how. You've all offered some prescriptions. Some of them have differed in their remedies. In terms of our consideration of Bill C-75, I think we're hearing that either through this legislation or through a companion piece of legislation, there have to be more remedies than are provided.

I understand, Chair, as I've heard around the table at my first meeting ever that as a committee you have been doing some work on human trafficking and you're working on a report.

The Chair: Yes, we are.

Hon. Tony Clement: I think that's important to put on the record as well.

Ms. Walker has been quite prescriptive in the things she's wanted to see.

[*Translation*]

The same applies for Ms. Sylvestre.

[*English*]

Maybe I'll just throw it over to Joy Smith.

You identified, Joy, some areas where you felt that the bill wasn't taking these things seriously, so whether it's through this bill or through other legislation, could you just expand a little bit on how, in an ideal world—which is what we all aspire to on both sides of boardroom table—things could be made better so that you don't have to exist any more in the great work that you are doing for women and girls in our society?

● (2025)

Mrs. Joy Smith: Thank you, Tony, for that question. I'm used to calling you Minister Clement, so it will have to be Tony tonight.

Hon. Tony Clement: In a galaxy far, far away....

Mrs. Joy Smith: This is a very serious issue. What Megan described is just so dead-on. There needs to be a consultation greater than what we're hearing right now in terms of going across the country and talking to different people. You know, there needs to be an in-depth consultation specifically with survivors of human trafficking to understand what they really go through and what they need to have to be rehabilitated.

l believe the third piece is prevention. We just took it over in the foundation, and we've developed school programs, but this has to be a government-supported initiative throughout post-secondary and elementary schools. The kids that are being subjected to this trafficking are very young. The youngest one that I ever dealt with was five years old. No child ever gets over that kind of thing, no matter what kind of rehabilitation is done. They have triggers—smells, words, everything—that bring it up over a lifetime, so the prevention piece is something that needs to be addressed as well. I think the federal government has to take a look at that.

I think also that enhancing the charges against these people would help, because if there's light sentencing, the perpetrators just keep on doing it, and they leave the whole community in a wake of destroyed young lives. The recommendations that Megan brought forward, I thought, were very good.

However, in addition to that, there needs to be the prevention piece as well, and the federal government is in charge of post-secondary schools. I know in some of the conferences that I've done.... At one conference, I was in Calgary. There was a young girl that came up, and she had been trafficked and controlled within the university itself, so it's all over the place, and this awareness is far too little. People in Canada now still do not understand human trafficking.

[*Translation*]

Hon. Tony Clement: Ms. Mourani, do you have anything to add is this regard?

Mrs. Maria Mourani: Certainly.

As to the recommendations, let me repeat what victims and the police told me. Victims are waiting for Bill C-452 to come into force, which received royal assent in 2015. For three years, the government has refused to bring this law into force.

Having been a minister, Mr. Clement, you know that it takes more than a day for a ministerial order to be issued to bring a law into force. As you also know, the House voted unanimously twice, at second reading and at third reading of this bill. Even Mr. Trudeau, who is now the prime minister, voted for the bill.

The current Minister of Justice says Bill C-36 would create problems for consecutive sentences. I would like to take the opportunity to congratulate the previous government for passing this major piece of legislation on prostitution. You will recall that Bill C-36 received royal assent on November 6, 2014, while Bill C-245 received royal assent on June 18, 2015, nearly a year later.

Everyone voted for it. Why does Mr. Trudeau seem to be changing his mind now that he is prime minister? Victims are very frustrated by this, especially families with children who have run away or who are in prostitution networks, and who are told by police officers that they cannot take action without testimony or a complaint, even in the case of girls who are minors. The government must declare this act to be in force immediately without waiting for Bill C-75 to be passed or receive royal assent.

● (2030)

The Chair: Thank you very much.

I will now give the floor to Mr. Virani.

Mr. Arif Virani: Thank you, everyone. The testimony we have heard has made me and my colleagues realize that the committee members are all men, except for Ms. Khalid. So it is important for us to listen to you and for you to inform us well.

This week and last week, we heard testimony about the overrepresentation of indigenous persons and persons from visible minorities. Yet our committee has no indigenous members, and just two members of a visible minority. So there are certain gaps in our membership.

I would like to talk about three things. If you don't mind, I will ask my questions in English. You may of course answer in French, Ms. Sylvestre. I read your summary in English.

[*English*]

You highlighted something that is very important right now, which is harm reduction. You talked about it in the context of the homeless woman, Martine, whose story you outlined, and it's something that's very much in the news right now because some governments—including the Conservative government in my very own province—are now challenging all the well-established evidence we've seen on harm reduction.

We have an overdose prevention site in my riding of Parkdale—High Park that is operating extralegally because Premier Ford, in his infinite wisdom, has seen fit to withdraw the approval of it, at least on a temporary basis. The police don't agree with it, the mayor doesn't agree with it, and our federal government certainly doesn't agree with it, but what's important from your *témoignage*, if I understood it well, is that if you really want to apply harm reduction, it needs to apply across the board.

It even needs to inform judicial determinations and court determinations about things such as conditions on bail. If you impose too restrictive a condition, you prevent people from accessing a geographic area or a service—or in this case a supervised injection site—and getting the assistance they need. Instead of rehabilitating people, you're actually criminalizing them and trapping them in the system.

Did I understand you well? Can you elaborate on that point in particular, about how that should inform our approach to bail?

Ms. Marie-Eve Sylvestre: I guess one of my main arguments is that abstinence clauses and red zones, or no-go orders, are preventing marginalized people from getting the health services and the social services they need, including harm reduction services. Part of our research was conducted in Vancouver's Downtown Eastside, where people need to have access to harm reduction services, including safe injection sites. The red zones are almost automatically applied in cases of drug offenders, including for possession but also trafficking, so they were prevented from getting access to these vital services in a time of crisis in Canada.

It's really important, when we think about imposing conditions, that we think about the consequences on marginalized people in getting the health and social services they need. It's also important in terms of thinking about drafting conditions related to alcohol and drugs. If we impose abstinence clauses on people who, because of their addiction, are unable to comply with those conditions and are forced to systematically violate those conditions and build up a very heavy criminal record, then we're obviously not helping those people get out of the social problems they're involved in.

I guess my main message to you, members of the committee, is that the criminalization of minor offenders and marginalized communities is probably the worst solution or the worst means to deal with social problems and, to get back to your question, for them to get access to harm reduction services.

● (2035)

Mr. Arif Virani: In that vein, just to continue with that thought, one aspect of this legislation that we've heard evidence on is the administration of justice offences and the rethink we're doing with respect to that. Again, you have minor breaches of conditions that don't result in danger to society but do result in, as you said, six infractions for bail, whereas the original infraction for the original crime was much more minor. You get a sort of knock-on multiplier effect.

I'm wondering if you can comment on the administration of justice changes we're proposing in Bill C-75, and in particular how it connects to the indigenous community, the racialized communities, women, and other people you mentioned in terms of this group of vulnerability.

Ms. Marie-Eve Sylvestre: I think Bill C-75 is not going far enough in terms of preventing those breaches and the accumulation of offences against the administration of justice. Many changes would need to be made, one of them being the reverse onus on people who have breached a condition. That's putting some pressure on people to be held in custody, so that's highly problematic.

There's another thing that would need to be changed. That's the imposition of unrealistic conditions in cases of people who don't pose a serious threat to the public, to victims, and to witnesses. In our study, for instance, one of the most important predictors of breach was the number of conditions imposed. The more conditions imposed, the more likely you are to breach them, which seems logical, right? We know that on average, seven or eight conditions per bail order are imposed on people. That's a lot of conditions to comply with. Many of them have nothing to do with the offence. Many of them are not criminal offences in themselves, but just become so because they're entrenched in the bail orders.

We really have to release people unconditionally when they're not posing any threat. That's what the Criminal Code has been saying since 1970. The Supreme Court of Canada has been saying it and the Canadian charter has been saying it. It's still not applied by judges and peace officers. I think we have to strengthen the language in Bill C-75 to make sure we get rid of these many offences against the administration of justice.

The Chair: Thank you so much.

Go ahead, Mr. Rankin.

Mr. Murray Rankin: Thanks to all the witnesses.

Dr. Sylvestre, I will focus on you, if I may. I want to say to you that I thought your submission was first-rate. I really appreciated the empirical work that led to it and all of your research. I thought the specific recommendations were exactly what we needed, so bravo. You gave us an amazingly helpful brief.

I simply want to give you the opportunity to elaborate on some of the points you made. There are so many of them that I'm afraid we won't do justice to them in the amount of time we have. For example, you suggest that we define the term "vulnerable populations", as it's too vague. Interestingly, the chiefs of police witness made the same suggestion earlier today.

What I really want you to elaborate is on page 2 of the English version of your submission, where you talk about the requirement that "conditions imposed by peace officers be reasonable and proportionate considering the nature and seriousness of the alleged offence".

First, isn't that exactly what the courts have said is to happen—the Antic ladder principles, and so forth?

Second, are you just not importing charter language in "reasonable and proportionate"? Will the whole thing essentially be one big charter argument if we adopt your amendment?

Ms. Marie-Eve Sylvestre: I want to make sure I understand exactly your point.

Mr. Murray Rankin: According to you, the conditions that are to be imposed by peace officers have to be "reasonable and proportionate considering...seriousness". That sounds a lot like what we already have in place—

Ms. Marie-Eve Sylvestre: Right.

Mr. Murray Rankin: —and it sounds a lot like a charter test to me.

Ms. Marie-Eve Sylvestre: For sure, the conditions have to be reasonable. That's the charter test right now, subsection 11(e), and the Supreme Court of Canada has mentioned it, but proportionate to the gravity of the offence is not something that we find in those decisions. I think it should be part of it.

The two main grounds for detention and for the imposition of conditions are to make sure the person will show up in court and to make sure the person won't be committing another criminal offence, right? In terms of showing up in court, what we found in our study is that often homeless people and street-level or street-involved individuals such as drug had committed very minor offences, but they were released on bail with very strict conditions because they had no address to report to, no guarantee to provide the court they would come back. It seems to me we have to make sure the conditions imposed are proportionate to the gravity of the offence. When the offence is so minor, we have to relax the conditions that we're imposing because we're just setting people up for failure.

● (2040)

Mr. Murray Rankin: You make a similar point on the next page about "the accused's level of dependence on alcohol or drugs". You made that point during your presentation. I think you're talking about the futility of these conditions when people come back and forth because they're addicted, and so on, and they never are going to be able to meet those conditions. You've made some helpful recommendations about that, including drug paraphernalia definitions and so on.

On page 3 of your brief there are two other things that I'm not sure, frankly, are in the mandate of this committee. I wish they were. The chair may have a different view.

The first is "Eliminate all mandatory minimum sentences". Many witnesses have referred to that as the elephant in the room of our study, and you recognize the importance of that. Second is the repeal of certain sections that criminalize sex work. Again, I'm not sure we can do that—I'm looking forward to the chair's ruling on that—but I agree that would hang together very well in terms of the principles that you've articulated.

I want to drill down a little bit more. On page 6 of your submission, you talk about the "Generalized imposition of unreasonable conditions leading to repeated breaches of conditions". You talk about the very high rates of conditions on release: seven conditions on average in British Columbia, and eight in Alberta. How do we avoid the ridiculous situation of people continually breaching these provisions and finding themselves incarcerated for things that, as you point out, are geographic or have to do with their addictions? What's the solution? What's your grand design here for this committee?

Ms. Marie-Eve Sylvestre: First of all, we release them unconditionally in many cases. That's what the law is telling us. That's what the principle of restraint that this bill has introduced tells us to do. It seems to me that so far we're thinking the options are either we're holding someone in custody or we're releasing them on condition, whereas the option should be we're releasing people unconditionally, especially given that most offences are very minor, or we're releasing them on conditions. However, when we're releasing them on conditions, we have to be very strict and the conditions have to be realistic and reasonable. I think releasing them unconditionally is a serious alternative that we ought to consider, as well as making inquiries into whether the conditions imposed are realistic, given the life circumstances of the individual.

Mr. Murray Rankin: You're thinking of addictions and so forth. The geographic restrictions might make sense for domestic violence, but they certainly don't make any sense for drug charges. I think you've made that point very clearly.

Ms. Marie-Eve Sylvestre: Exactly.

Mr. Murray Rankin: Thank you very much.

The Chair: Thank you very much.

The last questioner is Mr. Fraser.

[*Translation*]

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

I will share my speaking time with Mr. Fragiskatos.

Professor Sylvestre, I have two questions for you. First, you called for the term "vulnerable populations" to be defined. Would you like to suggest a definition to the committee?

Ms. Marie-Eve Sylvestre: Certainly.

Thank you for the question. I list the specific groups in my brief. They are homeless persons, drug users, sex workers, and persons with mental health problems and addictions. These groups are overrepresented. Further, there are minorities and racialized minorities. There is a specific provision for indigenous persons, but none for racialized minorities. Research has shown that these groups are overrepresented in the justice system. They should not have to prove to the court every time that they belong to these groups or to present empirical evidence of that overrepresentation.

Mr. Colin Fraser: Thank you.

[*English*]

I'd like to change to English but still stick with you, Professor.

We heard earlier today some thoughts that the intimate partner reverse-onus condition in Bill C-75 doesn't go far enough and that in fact it should be changed to allow for a reverse onus if somebody, for example, is charged with two offences of intimate partner violence but doesn't have any previous convictions. Can you tell this committee what you would think of that kind of change?

● (2045)

Ms. Marie-Eve Sylvestre: Generally speaking, I oppose reverse onuses. I tend to agree with the brief that was submitted by Aboriginal Legal Services before this committee, which says that this could also apply against women, and it actually does apply against women. I think Mr. Rankin referred to that earlier.

I think release should be a decision that is made based on evidence of a serious threat that individuals are posing to victims and witnesses and that there shouldn't be any reverse onus, because whenever we're putting any restrictive provisions in the Criminal Code, they always fall back on over-incarcerated and overrepresented groups, including indigenous people, racialized minorities, and in some cases women.

Mr. Colin Fraser: You're saying that in a situation where somebody is charged, if they don't have a criminal record but they pose a threat—for example, to a witness or to the person alleged to have been assaulted—that's already considered with regard to bail. Is that right?

Ms. Marie-Eve Sylvestre: Exactly.

Mr. Colin Fraser: Thank you.

I'll turn it over to Mr. Fragiskatos now.

The Chair: You have two minutes.

Mr. Peter Fragiskatos: Thank you, Mr. Chair.

I will ask a question about preliminary inquiries. I'm not a full member of this committee. I'm simply filling in for a colleague, but I'm following along with great interest when it comes it to this and other issues related to the bill.

We have heard today that preliminary inquiries hold a potential of retraumatizing victims. I'd like to ask Ms. Walker and Professor Sylvestre whether they agree with that perspective that's been offered to the committee and if there is a way to avoid the potential of retraumatizing victims of violence through preliminary inquiries, if indeed that is the view.

Ms. Megan Walker: I can't comment on that. I am not a lawyer, and it's not my area of specialty.

Mr. Peter Fragiskatos: Okay.

Ms. Marie-Eve Sylvestre: What I am hearing from defence lawyers and Crown prosecutors alike is that in many cases, preliminary inquiries allow the courts to deal with many matters and to better organize the trial that's coming. I don't hear that it's a useless procedure.

In terms of cases of domestic violence in particular, very few of them get to the criminal justice system. I think that speaks to the fact that criminalization is often not the answer we should be getting at in terms of dealing with domestic violence and that we should think about other means.

Other people have talked about prevention. I would also add to the discussion restorative justice. I've been conducting research with indigenous women in an indigenous community in Quebec. They want to deal with domestic violence through their indigenous legal traditions. They want to introduce more restorative justice procedures. I'm not sure that the criminal justice system is responding to their needs right now. I understand and I have been going in another direction, but I think it's important to put that on the table as well.

Ms. Megan Walker: I can actually respond to that really quickly. Very few women do come forward, because of fear. They're fearful of the police. They're fearful of being killed, because they've been threatened with murder. Also, the criminal justice system is not a woman-centred system. It has numerous systemic failures that discriminate against women and question women's stories.

We know that the average number of times women will be abused before they even go to the police is sometimes 30 to 40. Women do appreciate mandatory charge policies, because they are fearful that if they have to say, "Yes, charge him", they'll be beaten after for doing that.

What we really need, in my opinion, is to develop a system whereby we can charge people and lead to convictions without relying on the victims' testimony all the time, because of fear. We've seen the enhanced investigations in San Diego and we've also seen interviewing of witnesses being very successful.

Mr. Peter Fragiskatos: You're referring to.... You and I have talked in the past about the Philadelphia model.

Ms. Megan Walker: That's a different situation. That's about sexual violence cases.

Mr. Peter Fragiskatos: Okay, fair enough. Thank you.

Thanks to all of you for the work you're doing.

The Chair: I'd like to thank this panel of witnesses.

[*Translation*]

Your testimony has been very useful and we thank you for the patience you have shown.

● (2050)

[*English*]

Thank you again, and have a wonderful rest of the day.

The meeting is adjourned.