HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 053 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Tuesday, April 11, 2017

Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

Tuesday, April 11, 2017

● (1555)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good afternoon, ladies and gentlemen, and welcome to this meeting of the Standing Committee on Justice and Human Rights as we resume our study of Bill S-217, an act to amend the Criminal Code (detention in custody), otherwise known as Wynn's law.

First of all, I want to apologize to our witnesses. As you know we had votes, which caused us to be late. We very much want to hear from you and want to give you as much time as we can. I apologize profusely for that, and hopefully we'll be able to get through today's meeting without more votes that will interrupt. At least, we can always hope.

I'd like to welcome Cheryl Webster, an associate professor at the University of Ottawa. She is accompanied by Tony Doob, a professor at the University of Toronto. We are welcoming Nancy Irving, a barrister and solicitor, and Jay Cameron, who is also a barrister and solicitor, representing the Justice Centre for Constitutional Freedoms.

I very much appreciate the witnesses being here. To give you as much time as possible, I'd like to move straight over to you. We're going to start with Ms. Webster and Mr. Doob. The floor is yours.

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

I'm grateful for the invitation to share my views on Bill S-217 with this committee today. Although Tony Doob and I may appear to you as two people, we're actually functioning as one witness today. As such, we've divided the eight minutes between us.

Let me begin by publicly presenting, as have others before us, our heartfelt condolences to Ms. MacInnis-Wynn and her family for the tragic origin of this bill. It's our genuine wish that Parliament continues its search for effective solutions to the growing crisis in the Canadian bail process. Indeed, over the last decade in which Tony and I have been examining pretrial detention, a new expression has taken shape whereby a growing number of academic, professional, and media reports have claimed that bail is broken.

I applaud this committee for considering a bill that proposes changes to the Canadian bail law. We differ simply in the approach. I have no doubt that we share the same objective—in this specific case, of trying to avoid the terrible tragedy that occurred in early 2015. We're simply concerned that the current bill will not meet this objective. Specifically, it seems to us to miss the mark.

We would argue that it's likely no coincidence that the proposed legislative changes were not part of the numerous recommendations made by the two Alberta reviews examining potential deficiencies in the administration of the bail system in that province. Nor could we find any similar recommendations in the numerous other governmental, non-governmental, and academic studies of bail in Canada. The problems, we would submit, are unlikely to be rooted in any purposeful or intentional failure to bring forward an accused's criminal record, outstanding charges, or failures to appear in court, which an explicit legislative obligation would now solve. Rather, the problems are multiple in nature, complex as well as intertwined, and largely systemic, embedded in the very culture of bail court.

More simply, it seems we have lost sight of what bail was originally intended to be, a summary procedure that determines whether an accused person is to be detained or released until trial while ensuring a balance between individual rights and public safety concerns. Here lies the fundamental problem that the current bill doesn't address and, perhaps ironically, may well end up contributing to.

In fact, we respectfully submit that it would be misguided to suggest that there are any easy, quick fixes on the legislative front. Strategies of intervention will likely need to be conceptualized as part of a multi-faceted, long-term solution that recognizes that isolated changes will have little effect without altering the mentality of the court more broadly. Indeed, a pervasive risk-averse mentality has been progressively adopted over the past several decades, which has set in motion a plethora of changes in the legislative framework, the court culture, and ultimately the policies and practices of the day-to-day operations of the Canadian bail court.

We're not short of evidence that bail in Canada is broken. The proportion of remand admissions who are indigenous continues to rise in most provinces and territories. In Ontario over 4,500 cases were in remand in 2013 and 2014, only to have all charges ultimately stayed, withdrawn, or dismissed. Or there's the fact that 41% of cases in this province began their criminal court lives in bail court during this same year. Of these cases, 54% had no violence.

Further, despite being conceptualized as a summary procedure, the bail process is taking longer than it did when these laws were originally introduced. In 2013-14, 37% of Ontario cases took three or more appearances to resolve the question of bail. In a study of 11 large Ontario bail courts, most cases were adjourned on any given day. Show-cause hearings have not only become more frequent but they also often resemble mini-trials.

● (1600)

My guess is that of those knowledgeable about our current bail laws, few have confidence that they are currently serving us well. More importantly, for our current purposes, Bill S-217 does not address, much less resolve, any of these issues. In fact, it may exacerbate them.

Dr. Anthony Doob (Professor, University of Toronto, As an Individual): We would agree that perhaps everyone who has expressed a view on this bill has said that the criminal record is relevant to the primary and secondary grounds for detaining a person. The question before you, however, is a simple one: was the error that everyone agrees was made in the case that led to this legislation an error that can be fixed with legislation, or was it a tragic error that can't be remedied by changing a few words in the Criminal Code?

The bill can be seen as having two parts. One changes the word “may” to “shall” in section 518. Most obviously, we would argue that one cannot legislate away human error. Even had there been an explicit obligation in the year 2015, it almost certainly would have had no impact. The bill also adds “the fact”, so we are going from “may” “prove that the accused has previously been convicted of a criminal offence” to “shall” “prove the fact that the accused has been convicted of a criminal offence”.

It has been suggested to you that it takes only seconds to print a criminal record. This may be true, but the problem, as it has been pointed out to you, is that proving that a specific accused person before the court has a criminal record takes substantially longer than the seconds it might take to print it out.

In addition, there are some provisions of this bill that would appear to be redundant but probably are not. The bill would require proving the criminal record, but it would also appear to require proving that the accused was guilty of offences that might not have been subject to a court finding. Proposed subparagraphs 518(1)(c)(iii) and (v) would appear to require proving facts. Since pretrial detention has been deemed to be a punishment, it's hard to read those sections without suggesting that the standard of proof will be rather high. Once again, considerably more time would be required. These changes are not cost-free.

The bill that you have before you will expand the bail process for everyone at a time when almost everyone agrees that court delay is a problem. Though we all agree that a mistake was almost certainly made in the case that led to this bill, maybe the problem is in the incoherence of the bail provisions that we are currently working under.

Let's look at a key section of the bail law, section 515. It describes the conditions under which a person can be detained. It is an important section. When it became law, as section 457 in January 1972, it had 701 words. It now has 2,482 words, more than three times as many.

Section 518 has grown, but not by as much. It’s only twice as long as it used to be. The problem is that we have modified, remodified, and expanded these provisions in the past 45 years. For example, section 515 alone has been changed on eight separate occasions since 2003, with seven of these sets of changes coming since 2008. Bill S-217 would only complicate an already complicated section.

Bail laws in Canada should not be seen as lenient. The rate of pretrial detention has increased considerably. Crime peaked in 1991, and has generally been drifting downwards since then. There are about half as many Criminal Code offences being reported now as in 1991. The remand population in 1991 was 18 per 100,000. Now it has more than doubled, to 38 per 100,000. We are detaining people at a very high rate.

What is needed is a rethinking and reworking of the bail laws generally. I would suggest that it would be useful for you to examine comprehensively the issue of Canada’s bail laws. I would urge you to address the very real problems of bail. The current bill before you adds incoherence, cost, and delay to a critical procedure.

It’s our understanding that the Province of Alberta has agreed that the error that was made in the case leading to this bill is best remedied by having bail hearings conducted by crown attorneys. We would suggest that you accept this conclusion, but take it as an opportunity to look seriously at this very important part of our criminal justice process. Rather than simply add new problems to the mix, this would be a valuable opportunity to make a real difference in attempting to fix Canada’s broken bail system.

● (1605)

The Chair: Thank you very much, Ms. Webster and Mr. Doob.

We will now move to Ms. Irving, who is testifying as an individual, but I do want to point out to members of the committee that she was the author of the Alberta Bail Review report that we've all seen, called “Endorsing a Call for Change”.

Ms. Irving.

Ms. Nancy Irving (Barrister and Solicitor, As an Individual): Thank you, Mr. Chair.

I will say just a few words about the Alberta Bail Review before I begin with my submissions. As you know, it was established by the Government of Alberta in 2015, in the wake of the tragic killing earlier that year of Constable David Wynn and the wounding of Auxiliary Constable Derek Bond.

As members are well aware, the officers were shot by a person with a long criminal record, who had been released on bail pending a court appearance on outstanding charges. At that bail hearing, the crown was represented by a police officer, not a prosecutor. The release of the accused was not contested by the officer. The accused was released with conditions, with the officer's consent.

The mandate of the bail review, as set by the Government of Alberta, focused on the administration of the bail system in that province. I was not asked to conduct an inquiry into the specific circumstances leading to the death of Constable Wynn, nor was I tasked with reviewing and recommending changes to the bail provisions of the Criminal Code. Nevertheless, during the course of my review, I did become aware of Bill S-217, and although I did not refer to it in my report, I did consider its potential impact on the bail system in Alberta.

On the face of it, the bill might seem helpful to the administration of the bail system. One of the pillars of my report, as I'm sure you're aware, was that justice is best served when all participants have access to complete and accurate information. But I was troubled by some of the provisions and its potential impacts on the administration of justice, and I still have those concerns today.

I'm now going to focus on two aspects of the bill in particular.

The first is the proposed new wording of paragraph 518(1)(c) of the Criminal Code. I agree with earlier witnesses you've heard from in this committee who said this clause might be interpreted by the courts as imposing a higher standard of proof than prosecutors currently must meet. It's not just the change from “may” to “shall”, which I'll address in a moment; it's also the words “prove the fact” in each of the subparagraphs 518(1)(c)(i), 518(1)(c)(ii), and 518(1)(c)(iii). I'm not aware of that phrase being used in any other section of the Criminal Code, and I think it introduces some confusion and uncertainty into the bail provisions.

It's different from subparagraph 518(1)(c)(iv), “to show the circumstances”, so judges might find that it means something different from that. This could feed the argument that it requires a higher standard of proof in bail hearings, including consent bails.

It's also different, again, from the language used in paragraph 518(1)(e) as it currently reads. This is the section that allows Justices of the Peace and judges to receive and base their decisions on evidence considered credible and trustworthy in the circumstances of each case. That language permits judges to receive hearsay evidence, and it allows prosecutors to dispense with more formal matters of proof that would have to be met at trial, such as the calling of viva voce evidence.

I share the concern that this new language could turn bail hearings into mini-trials. That would certainly make bail hearings longer, and it would likely contribute to further delays in a system already struggling to cope with the volume of bail cases and the new time requirements set by the Supreme Court of Canada in R. v. Jordan, which were released last summer.

At a minimum, I think it's reasonable to anticipate that the meaning of this new language will be litigated, perhaps all the way up to the Supreme Court of Canada, before we receive judicial guidance. That could take years. In the meantime, the crown's standard of proof will be uncertain.

● (1610)

As I suggested a moment ago, my second concern relates specifically to clause 2, and the changing of the word “may” to “shall” in proposed new section 518, subsection (1), paragraph (c), subparagraph (i). What a mouthful. This language imposes a mandatory requirement on prosecutors to put into evidence an accused person's prior criminal convictions.

If that language means all prior criminal convictions, it will impose a practical impossibility on prosecutors. They simply won't be able to meet that requirement in many cases because of the problems with CPIC, which are widely recognized throughout the criminal justice system.

At present, there is no complete, up-to-date, Canada-wide database that includes all prior records of persons convicted of criminal offences. I refer you to pages 66 to 68 of my report in this regard. To ensure that all convictions are brought to the court's attention, it might be necessary, in many cases, for the prosecutor to check with every Canadian jurisdiction, just in case a conviction has yet to be entered into CPIC. That would have to be done for every bail hearing in the country involving an accused who might have crossed provincial borders. We know today that people are generally much more mobile than they were when the bill provisions were first introduced.

If we want to close a gap in the bill system, in my opinion, we must find a solution for the CPIC problem. We must create a more effective and timely system for the sharing of information between provincial jurisdictions. That includes improving national access to all extra-provincial outstanding charges and release orders. That would be an effective way to improve the operation of the bail system and enhance public safety, in my view.

I said in my report that convenience and efficiency must not be allowed to trump the integrity of the process, but I don't think these amendments would enhance the system's integrity in a meaningful way. I worked as a federal prosecutor for close to 30 years before I retired in 2014. Maybe I'm biased, but I have sufficient faith in the ability and judgment of my former colleagues to trust them with the discretion that they now enjoy. In fact, as stated by the Ontario Court of Appeal in R. v. Nur, “The exercise of Crown discretion throughout the criminal process...is a longstanding and essential component of the fair and efficient operation of the criminal justice system:”

I would like to conclude on a more personal note. I have the deepest sympathy for Constable Wynn's wife and family, as do all the members of this committee. I understand the desire to honour his legacy through meaningful change, and to do what's required to ensure that a similar tragedy doesn't devastate another family.

However, I think the meaningful change can be found in the actions being taken by the Government of Alberta in the wake of my report and other calls for reform. I think those improvements will be more profound and less uncertain in their effects than Bill S-217. I think they could be considered a fine tribute to the memory of Constable Wynn.

Thank you.

● (1615)

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

Now we'll go to Mr. Cameron.

Mr. Jay Cameron (Barrister and Solicitor, Justice Centre for Constitutional Freedoms): Thank you, honourable members, for having me here today. I'll start by offering condolences to Constable Wynn's family, who lost a husband and a father through something that was entirely preventable, something at which Bill S-217 is indeed aimed at preventing from occurring again.

I am with the Justice Centre for Constitutional Freedoms. We are a not-for-profit, non-partisan, non-religious charity. I don't have a horse in this race. I've been watching the proceedings. I am interested in them because I am a former prosecutor. I worked in British Columbia as a prosecutor in Prince George, one of the most active places in which you can practise criminal law in our country.

I will say that as I have watched the proceedings, I have been dismayed and a little bit uncomfortable with some of the evidence that has been presented to this committee. I'm going to attempt to, from my perspective, correct some of it today.

I think that some of the witnesses who have spoken have no doubt had good intentions, but they have given at times contradictory, inaccurate, and, therefore, misleading and unhelpful evidence.

The legislation, from my perspective and in my respectful characterization, has been mis-characterized by some of the people who have given testimony here. I'm just going to cover some of the misstatements while I go through it.

Misstatement number one is that changing paragraph 518(1)(c) from “may” to “shall” negates the ability of the crown to introduce hearsay evidence. Mr. Woodburn on April 6, 2017 stated that somehow Bill S-217 removes the ability of the crown to introduce hearsay and that section 516 allows hearsay at bail hearings.

Both of those things are inaccurate and incorrect. It's not section 516 that allows the introduction of hearsay; it's paragraph 518(1)(e). It is paragraph 518(1)(e) that allows the introduction of hearsay evidence. I'm going to read you a quote from the Supreme Court of Canada, from the Toronto Star Newspapers Ltd. v. Canada case from 2010, which says that:

> According to s. 518(1)(e)...[a crown prosecutor] may lead any evidence that is “credible or trustworthy”, which might include evidence of a confession that has not been tested for voluntariness...[and include] hearsay statements,...prior convictions, untried charges.... The justice has a broad discretion to “make such inquiries, on oath or otherwise,...”.

That's on page 8 of my brief, which was submitted to the committee, but I don't think is in front of you yet because it hasn't been translated.

My point is that some of the witnesses before this committee have placed too much emphasis on the prosecutor controlling the process and not enough emphasis on the judge controlling the process. A judge at a bail hearing is able to admit and rely on any evidence that is credible and trustworthy. There is no standard of “beyond a reasonable doubt” or a higher standard of proof at a bail hearing. That's the point of a bail hearing. It's meant to be something that's impromptu and that protects the rights of the accused while allowing the crown to introduce evidence that is relevant but credible and trustworthy. That's the standard.

When a crown stands up to run a bail hearing, a crown cannot just say, “Your Honour, the accused has a record.” The crown has to introduce evidence to prove that the accused has a record. Today, across the country, hundreds of times every single week, the crown proves that the accused has a record by introducing the CPIC, just the basic CPIC. That's what it means to prove the record of the accused.

All the change from “may” to “shall” does is to require the introduction of the evidence.

Some of the people who have testified here—in fact I heard it today—said that Bill S-217 changes “may” to “shall prove”. It doesn't change it from “may” to “shall prove”. It changes from “may” to ”shall lead evidence to prove”. There is a world of difference in the legal world between the former, which is not in the bill, and the latter, which is in the bill. So that's a difference as well.

Misstatement number two is that there is no problem. There is a problem. Despite the fact that the police are not running bail hearings anymore, prosecutors make mistakes. I'll direct you to page 5 of my brief and read you the following quote from a case called R. v. Brooks:

● (1620)

The court in that case said:

> Unfortunately, [the] Crown...failed to file the document which she asserted contained a statement of the applicant's prior criminal record. Ordinarily, a CPIC printout or equivalent should be made an exhibit. What resulted was a meandering and muddled discussion in which the court and the prosecutor directed questions to the applicant through counsel as to his prior criminal record. This inquisitorial approach is to be deplored. An accused is free to acknowledge the tendered record or not.... The accused's right to silence and right against self-incrimination must be respected. Defence counsel herself, for whatever reason, failed to object and indeed participated in the exercise.

In that case, the failure of the crown to introduce the record resulted in a constitutional infringement of the accused's rights. From my perspective, it's incumbent on Parliament to pass legislation that requires the leading of the record to protect the rights of the accused, because what happened in the case of R. v. Brooks is that the accused ended up being cross-examined by the justice of the peace, the crown, and his own counsel, which violated his article 11(c), 11(e), and section 7 rights, and he was released on appeal, so there is a problem.

My third point is on Mr. Woodburn's testimony about the idea that, again, that if Bill S-217 becomes law, the crown would be required to obtain certified CPIC records. That's not so. If you have a certified CPIC record and there's a data entry error in the original, it's going to be reproduced in the certified copy. The CPIC record is admissible because it is already produced by the Canadian Police Information Centre. You don't need a certified copy. With due respect, that's a misstatement as well.

On the idea that it interferes improperly with the crown's discretion, it does interfere with crown discretion. There's not a single reason why a crown prosecutor who has decided to oppose somebody's release should have the discretion not to introduce the record of an accused. There is not a single example of where that would be justifiable in a free and democratic society. Once the crown decides to oppose release, the crown has an obligation—should have an obligation—to tender that record so that the judge has all of the facts.

In fact, Mr. Woodburn said that it's “meat and potatoes”, and that for crowns, that's the “first thing” they're taught. Then he said that it interferes with “discretion”. If it's meat and potatoes and it's the first thing that a crown is taught to do, why would anybody object to the crown having a requirement to introduce the record?

I'll conclude by saying this. Some people say that this is only symbolic. It's not symbolic. There was a tragedy that occurred, and it was the result of a flaw in the legislation. Only a fool would say, “I'm emotional about the tragedy; therefore, I'm not going to fix the flaw.” The problem is that there is a flaw. Fix the flaw and you won't again have more tragedies that result from it. That's the point.

Those are my submissions. Thank you very much.

● (1625)

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

We're now going to move to questioning of the witness panel.

We'll start with you, Mr. Cooper.

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

Thank you to the witnesses.

I'll start with you, Mr. Cameron. Perhaps you could explain how evidence is tendered at a bail application hearing. Would it be viva voce evidence?

Mr. Jay Cameron: Typically, there is not viva voce evidence. What happens is that the police generate a police report. The crown has that in a file, as well as the CPIC, and then the crown reads in the information that has been compiled by the police. That information is hearsay, but it is admissible because of paragraph 518(1)(e), just like the CPIC is. Typically, the CPIC is admitted because the accused knows what his record says or what it doesn't say and the hearing proceeds.

I will say this. I have personally seen situations where the record was not in front of the court. It's not just in the case law; I've seen it personally. What happens is that you have a crown who is busy. They have a hundred different files, they take a file apart, and part of it goes here and part of it goes there. They put it back together, they run down to court, and they leave the record upstairs.

Bill S-217 is required because it requires the crown to go upstairs, get the record, come back to the courtroom, and introduce the record. In the case of R. v. Brooks, that didn't happen.

Mr. Michael Cooper: Right. Very good. A prosecutor would typically read it into the record, and that's because, as you point out, paragraph 518(1)(e) indicates evidence may be tendered that is considered “credible” and “trustworthy”. Also, just to be clear, the record would be credible and trustworthy because it was generated by a police agency. Is that correct?

Mr. Jay Cameron: That's exactly correct, and there's a case cited in my brief that says exactly that. In the case of R. v. Brooks, the judge said that typically it should even be made an exhibit at the bail hearing. So it's “credible and trustworthy.”

Mr. Michael Cooper: So tell me how Bill S-217 changes that evidentiary burden. Does it?

Mr. Jay Cameron: Bill S-217 just changes the “may” to “shall”, as in “shall...lead evidence.”

It's not “shall prove”, as everybody keeps saying. It's “shall...lead evidence to prove”.

Now I think, and I'll tell you candidly, that the introduction of “the fact” in the legislation is unfortunate. I don't think it belongs in there, to be perfectly honest. So I think that it could be amended because I think that's partly the reason there's confusion on this point, but ultimately speaking, from my perspective, it doesn't change the evidentiary burden because it's something that the crown is doing on a daily basis. It just says “shall...lead evidence” as opposed to “may...lead evidence”. Right? We just want them to lead evidence.

Mr. Michael Cooper: Right, and of course, the intent was not to change the evidentiary burden, so I'm absolutely in agreement that, if the wording “the fact” needs to be deleted, then perhaps it should be, but of course, if you did delete it, then it wouldn't change the evidentiary burden in light of paragraph 518(1)(e), which is the applicable subsection.

Mr. Jay Cameron: There's a protection in the section, in paragraph 518(1)(e), that says that a justice can accept any “credible and trustworthy”.... It's a catch-all.

Mr. Michael Cooper: Yes, and then, to Ms. Irving's point about CPIC, do you have any comments about that, Mr. Cameron?

Mr. Jay Cameron: I'm sorry, I missed that.

Mr. Michael Cooper: It's about CPIC. She was saying you'd have to go back, pull the history, and get in touch with 10 different jurisdictions. Would you be able to comment on that?

Mr. Jay Cameron: First of all, I'll agree with her that CPIC is way behind being updated, which is really unfortunate and why prosecutors currently supplement the CPIC record with the provincial record, but no, there's no reason to go and call viva voce evidence at a bail hearing just because of Bill S-217, because the CPIC is already “credible and trustworthy”, and that's what the case law says.

Mr. Michael Cooper: Right.

Of course, because, again, you're just showing evidence. You're pulling the record. You're not proving anything. That's governed by paragraph 518(1)(e), but let's take a scenario where, for example, evidence wasn't tendered.

I would draw your attention to, for example, I believe it's subparagraph 515(6)(a)(i) where, in certain circumstances, there is a reverse onus, is there not? So if that information wasn't presented before the judge or the justice of the peace, you could have the judge or justice of the peace applying the wrong standard at a bail hearing, couldn't you?

● (1630)

Mr. Jay Cameron: Yes, and it's important that it not occur.

Mr. Michael Cooper: And that's what Bill S-217 would fix. It would ensure that it wouldn't occur.

Mr. Jay Cameron: That's correct.

Mr. Michael Cooper: In terms of crown discretion, can you think of a...? I think you highlighted it, but I would just ask you to maybe put it on the record again. Can you, as a crown attorney, think of a single instance in which you withhold the criminal history of someone seeking bail?

Mr. Jay Cameron: No, crown discretion is extremely important to the functioning of the criminal justice system. However, there are limits, and I highlight the limits in my brief, but the crown has discretion to lay a charge or not to lay a charge. The crown has discretion to oppose release or to release, but once the crown decides to oppose release, it becomes the judge's decision, and in fact, paragraph 518(1)(e) says that it is the judge's decision, and the judge is able to base his decision on anything that is “credible and trustworthy”.

There is no circumstance where the crown would be justified in withholding that information, and in fact, it not only impacts the public, as it did unfortunately with Constable Wynn's family, but it does impact the accused because it can lead to an infringement of the accused's constitutional rights.

The Chair: You're over time. Do you have a—

Mr. Michael Cooper: Okay, I'll pause, but I may have some questions after.

The Chair: Okay. Perfect.

Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thanks to all of you for your testimony today.

Let me begin by stating, Ms. Irving, that, like you, I sympathize with Constable Wynn's family on the pain and suffering they are enduring from the tragic events that have led us here. As an Albertan, I want to thank you for your seminal work in the Alberta bail review process. As somebody who does not come from the legal tradition, I found it informative. As you know, many of your recommendations are being implemented in Alberta.

I have three questions and six minutes, so if we can work together, that would be outstanding. Some of this will be just for the record.

First, in 2015 the government of the day cut funding to CPIC. What do we have to do from a government perspective, other than funding, to fix CPIC, understanding that there's a 14-month delay in getting that information up to date in English Canada and a 36-month delay in French Canada?

Ms. Nancy Irving: That's a really good question. I'm glad I'm retired from government, because that might create challenges.

I think it will really take some impetus, something driving it, some push. The fact that CPIC is outdated has been noted for years and years. I may be wrong on this—I'm at a certain age now—but I think there was a 2007 report by the Auditor General with recommendations that the CPIC system be brought up to date. That was 10 years ago. I believe there have been some subsequent discussions of CPIC's outdatedness in reports by auditors general since then, and yet still today.... I don't want to overstate it, but—as my grandson would say—seriously? In 2017 we cannot find a solution for that problem?

I'm just going to say it: it's a disgrace, in my opinion, that the system is so outdated. I heard from prosecutors in the province of Alberta when I was conducting the review about what it takes to do their best. Alberta being one of those jurisdictions where there are a lot of people coming in and leaving, it takes significant effort to gather information for a bail hearing. There's no formal way to do it. You have to pick up the phone or email, and you need to know who in the other jurisdiction you can get that information from. You have to do it quickly, because you have a bail hearing in maybe an hour. There are these patchwork ways to fill the gap created by the database.

I met with the RCMP during the review, and I know they're taking steps to bring it up to date, but still I think we'll be waiting until March—I believe I saw a date somewhere of March 2018—to clear the backlog. Of course, that doesn't solve the problem. That's the backlog of prior convictions. It doesn't solve the problem of an easy way to know about releases in extra-provincial jurisdictions on new outstanding charges and the terms of the release conditions. That information simply isn't available.

● (1635)

Mr. Randy Boissonnault: I'll move on to my second question, to something that you alluded to. I thank you for raising the “prove the fact” notion. It's the first time we've heard that it may be a higher standard of evidence. I understand your argument with regard to “may” and “shall”.

In very simple terms, the intent of Bill S-217 is to prevent criminals from being on the streets to reoffend and commit violent offences against people, including our first responders. As is, if we're not able to figure out any changes to Bill S-217, in your opinion would this cause delays in the bail hearing process, which would then have ramifications in the trial process, such that with Jordan, now being a time limit the criminal justice system has to respect, we'd actually see more criminal proceedings stayed, and thus have more criminals on the streets without having their cases heard?

Ms. Nancy Irving: I think it's reasonable to anticipate that this new language being added is different. I know I listened to some testimony that might have been given before this committee last week, by, I think it was a crown counsel, who said that every time you make a change as simple as a comma in a bill's provisions, it leads to litigation. I know that's an exaggeration, but to some extent it's true.

When I was doing the bill review, I was lucky enough to have Justice Trotter's book on bail. It's a huge volume of information, most of it case law—oodles and oodles of case law. As Professor Doob alluded to, a lot of these cases are the result of amendments that have been made over the years: tweaks here and there; change a little bit; something happens, and change it here, change it there.

Until a court of appeal, a higher court or the Supreme Court takes a look at it, it will generate litigation in the bail court. Whenever litigation is generated, when people are fighting over the interpretation of whether this does in fact—the word "shall" now, when coupled with the word "fact"—impose a higher onus, I think there's a....

Certainly if I were still practising and I were practising on the other side for the defence, I might be making that argument. I shared the view with Jay before the proceedings began. I'd probably try that on.

Mr. Randy Boissonnault: Before we conclude and I give you a question you might want to answer in further testimony, it's reasonable to assume that, as is, S-217 could end up causing more harm than good.

Ms. Nancy Irving: I think it could cause delay until the case law settles.

Maybe there won't be a lot of litigation. I don't know. I don't have a crystal ball. But I kind of have a feel for it, and my gut is telling me it's reasonable to expect litigation over it. I don't know what else I could say on that point.

You might have asked another question, but, I'm sorry, you'll have to refresh my memory.

● (1640)

Mr. Randy Boissonnault: I'll save the third question for later. Thank you.

The Chair: Or fourth. Thank you.

Mr. MacGregor.

Mr. Alistair MacGregor (Cowichan—Malahat—Langford, NDP): Thank you, Mr. Chair.

Professor Doob and Professor Webster, I'll start with you both.

We've heard much made about particular sections of this bill that amend section 518, changing "may" to "shall", and then adding that curious statement, "the fact". Mr. Cameron has also voiced his opinion, wondering why "the fact" was added in there.

Is this bill in any way salvageable, and which possible ways could this committee take when we get to the line-by-line consideration? If this committee were to consider an amendment to getting rid of "the fact", does that do anything, in your opinion, to the overall wording of the bill? I want to get your opinion on the record for that.

Dr. Cheryl Webster: In terms of the legal issues that they seem to be discussing, those are certainly outside my area of expertise. So keep that in mind when I'm answering.

Certainly in terms of the bill as it is, the first thing that struck me is that it's almost certainly not going to reduce the likelihood of the tragedy that's occurred. This tragedy seemed to me to be very clearly rooted in human error in the sense that it would be very difficult for me to even envision how the police officer involved or the justice of the peace involved purposely withheld that information. I believe if that information were there, they would have presented it.

It comes down to a question of why it wasn't there. Would a legislative obligation have produced that information? I don't believe so. I will go back to the fact that if this was, in fact, human error, legislation can't change human error. If it was just an oversight and they forgot, it seems to me that having legislation or not having legislation that says you have to present it won't change that. That is my first comment.

The second one is that this bill constitutes, for me, another cog in an already very complicated section of the bail law. I've wondered if part of the human error that I'm discussing, which was involved in the Rehn decision, might very well be rooted in the high volume of cases that the criminal justice actors are having to manage every day in bail courts. It seems that less volume may have meant more time for the police officer or the JP to ensure, as one of the witnesses said, an ability to dot all the *i*'s and cross all the *t*'s. It seems to me that this bill will very likely only add volume to an already exploding problem.

The third issue that stuck me—and as I said, I am not a legal expert—is that the higher evidentiary burden is going to add to court delays. That's particularly concerning to me, as others have mentioned, given the Jordan decision. Any additional time taken during the bail process puts cases even closer to being thrown out for violation of the constitutional right that an accused be tried within a reasonable amount of time. Again that seems very dangerous.

Mr. Alistair MacGregor: I go back to a *Globe and Mail* article from February 22 of last year, in which you are quoted. The article says that "in the realm of criminal justice, the role of the state has become one of limiting—to the greatest extent possible—the risks to public safety that offenders represent." That was in a study done by you.

There's the risk-averse mentality. I think during our last committee hearing, Mr. Woodburn, representing the Association of Crown Counsel, said they are always thinking of that. I think his testimony certainly raised some questions for this committee about trying to legislate our way through a human error issue.

Professor Doob, there was some mention made about the efficiencies that exist with the CPIC system, and we certainly heard some interesting testimony from Detective Superintendent Truax about updating that. In your opinion, is that the most prominent thing that we can be doing to tackle issues like this so that they do not arise in the future?

● (1645)

Dr. Anthony Doob: I know very little about CPIC other than what it is supposed to do and how it works. It seems to me that it's clearly necessary to have a good retrieval system for criminal records that's up to date and accurate. Whether that means just getting rid of the backlog, it would seem to me that is necessary but insufficient.

I say that because it doesn't sound to me as if CPIC is a system that we should tolerate for many more decades, because it may be one of those circumstances where what we need to do is to build a new system and run, in a sense, a parallel system for a while until we get the new system working properly. As we've mentioned in our submissions to your committee, nobody is suggesting anything but the idea that a criminal record, in most cases, is relevant for the primary and secondary grounds for detention of an accused person. We need to have that information, we need to have it easily, we need to have it in a way that is authoritative, and so on. So we do want a way to get that at the first hearing.

The difficulty at the moment is that, as Professor Webster mentioned, bail hearings are taking multiple appearances in many cases, and those multiple appearances are serving no one. It's not okay to say, well, the person is in jail so it's all right; it's not serving anyone at all. We do have substantial numbers of people—I think Cheryl gave the figures—who are detained in custody and then are released without any...where all charges are withdrawn. Well what's going on there? It's probably a lack of information, and this may contribute to it.

I will say one final thing having to do with this issue about how we, in a sense, try to correct this error. I did mention the fact that this section has been amended, re-amended, and amended again a number of times since 2003. That suggests to me that what we're trying to do is patch holes in a rotting boat, and what we really need to do is to fix it.

If you're looking for analogies what I would suggest is that you look to a completely separate section, 718.21, which has to do with the sentencing of organizations. It lays out, in one section, 10 different factors to be considered, in this case by the judge, in sentencing organizations. Some of them might be seen as mitigating, some would be seen as aggravating, but it gives direction to everybody very clearly all in one section. What we have in 515 is this peculiar thing where everything is added to it.

The Chair: Thank you.

Mr. Alistair MacGregor: Can I ask one more question?

The Chair: We'll do a short snap-around afterwards, but we're exceeding time.

Go head, Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you so much, Mr. Chair.

My first question is to professors Webster and Doob. I would like to take this down another level.

Professor Webster, you said this bill misses the mark, and you talked about additional delays. Can I ask both of you if this bill has the potential to make Canadians less safe?

Dr. Cheryl Webster: It's a good question.

It's really raising the issue of public safety. When we first started looking at this, we tried to find studies that have been able to assess the risk of letting people out on bail and their subsequently, on bail, committing a violent offence, which is really what we're worried about. We couldn't find any studies.

What we were debating is whether we can use the data on release on full parole as an analogy, so let me speak a little bit to that. Granted it's not a perfect analogy, as one would expect that the number of releases on full parole who go on to commit a violent offence would potentially be higher than with those who we would see being released on bail. Keep in mind that it could be an overestimate.

If we take the fact that 140,000 to 150,000 adults are charged with violent offences each year in Canada, we were trying to find out how many of those had their parole revoked for a violent offence. Last year it was zero. The year before, it was five. If my math is correct, it means that .00005, or less than half a per cent, of those charged with a violent offence in the last couple of years were on full parole. Within that context it would seem that the message is that release on bail is unlikely to represent serious risks to the general public.

● (1650)

Mr. Chris Bittle: I will expand in terms of if there is significant delay added to the justice system. We're seeing charges stayed under subsection 11(b) and based on the Jordan decision. Does this have the potential to make Canadians less safe?

Dr. Anthony Doob: I think what it's doing is adding one more level of complexity to both the law and to the hearings. If we were clear on what we wanted to happen at the hearings, then, if any one or two of us around the table sat down and asked what section 515 should say, my guess is we couldn't come up with 4,500 words to direct people on what to do.

My suspicion is that, as we've gone from whatever it was I said, the relatively small number of words, to the number of words we have in section 515 now, what we have done in each of those cases is say, “This will actually make it a little bit better.” My guess is that at some point we went beyond the tipping point, so we made it a less effective system. We all want the right people to be detained on the grounds that are in there, so what we're doing is making it more difficult for people to ensure that because we have to do this, and we have to do that, and we have to do something else. Why is this section so much longer, three times longer than it was when it was first enacted? It first became law in January 1972. I think it's because well-meaning people added, “Oh, we have to close this off.”

Let's assume that there are no evidentiary issues—a huge assumption—but let's assume that there are no evidentiary issues, and this is just requiring this to happen. This is ignoring the problem. It's ignoring what is really going on. In that sense, it's a distraction from addressing the real thing.

I would be very disappointed if this committee or the House of Commons were to accept this bill saying, “It can't hurt”, and then wipe its hands of the problem of bail because if you do that, it is certainly a lost opportunity.

Mr. Chris Bittle: Thank you so much.

Mr. Cameron, welcome back to the committee.

Your testimony is similar to some of the other witnesses' we've heard from—and I know you can't speak to their testimony—speaking to how this bill will make Canadians safer, but no one has explained how, and neither did you. Why haven't you given us that explanation?

You're throwing around things, and it's not symbolism, and it's going to help, but you're not giving us practical examples or evidence behind how this bill is actually going to make a difference.

Mr. Jay Cameron: Thank you for the question.

It's apparent that not having a record in front of a judge in a circumstance where an accused has a lengthy record definitely impacts on public safety, and it's also—

Mr. Chris Bittle: Let me interrupt you there. I wasn't going to, but I do have that opportunity to interrupt you. I apologize if that concerns you, but in terms of the evidence we've heard from all of the different groups—and I know you were a crown attorney yourself—this bill doesn't have any consequences for not introducing that record, and human error can happen again. How does this bill stop human error, which is what I think the intention is and what you want to see, stopping human error, and you can't point me to that fact. No other witnesses have pointed me to that fact.

Could you enlighten me as to how this bill will stop human error?

Mr. Jay Cameron: I can enlighten you if you let me speak.

The fact that there are circumstances, and there have been circumstances where an accused's record was not before the court.... I gave you an example in the jurisprudence, and I know you are a lawyer by trade. There are cases, and I've seen cases where the crown has neglected or forgotten, and in the case of R. v. Brooks, the record was not put to the judge. It is in the public's best interest that that always occur.

I disagree that you can't legislate to protect against human error. If there is a requirement that a judge be aware, that the record be in front of the judge at every single bail hearing, if it is not, the judge will require the record to be there prior to making a decision in the bail hearing. It's that simple.

● (1655)

Mr. Chris Bittle: It's already happening now. We've heard from witnesses, and I've gone back to the riding. I've spoken to police officers, and I've spoken to crowns. Putting the record in front of someone happens automatically. There are going to be instances, and we've seen it, and we've heard from the crowns who have testified. That's what they're trained to do. You even mentioned it—that's the first thing you do. I'm sure when you were a crown, the first thing you did was ensure that this document got up to the bench. Every judge wants to avoid what happened here, because the judge is the one who ultimately decides who's going on bail, so they want all the information before them.

Even if it's in the Criminal Code, you have to realize that it's a thick book. The judge can forget; the crown can forget. The defence counsel would be under no obligation to submit that record. This can happen, and changing this law cannot alter that. It will happen even if we change the law. If that's the case, what's your concern about the issues of delay? We've heard all kinds of evidence, which you seem to have sidestepped during your testimony. The possibility of delay, the unconstitutionality of this bill, the mess it could create for five to seven years until the Supreme Court decides—is all that worth the symbolism when we can't necessarily guarantee that human error won't occur again?

Mr. Jay Cameron: With all due respect, that was a speech, not a question. It's indecipherable to me what you're attempting to ask me, so I would ask that you rephrase it so that I can understand it.

The Chair: The good news for both of you right now is that Mr. Bittle is out of time.

What we're going to do is give everybody the chance to do short snappers. Whoever has questions, let me know. I know, Mr. Falk, Mr. MacGregor, Mr. Cooper, Mr. Bittle, Mr. Boissonnault, and Mr. Fraser have questions. We have a lot.

We're going to start with Mr. Falk.

Mr. Ted Falk (Provencher, CPC): Thank you, Mr. Chair, and my thanks to all our witnesses, whose testimony has been very interesting.

I've heard several times during this committee hearing—and I've heard it from my friends on the other side of the table, as well as from both Ms. Irving and Ms. Webster—references to human error, in particular in the case of Shelly MacInnis-Wynn, in which it was suggested there was human error. Would you both agree it was human error that caused the information to not be provided?

Ms. Nancy Irving: Yes, that's fair. It would be fair for me to say that's what happened.

Mr. Ted Falk: Well, I respectfully disagree, and I do it on this basis: the legislation, as it is written today, says that you “may” provide that evidence. If you inadvertently or intentionally don't provide that evidence, you haven't erred. You have a choice; you have an option. When someone says you “may” do something, it is very different from when someone says you “shall” do something. It creates a different onus on the part of the person who looks at it. I don't recognize that a human error was made. I don't think this bill seeks to address a human error. Rather, it seeks to remedy an option, and right now the option is made.

I do appreciate the comments that I think Ms. Irving made. These comments addressed the word “shall” coupled with “to prove the fact”. I don't understand the implications of using “the fact” in there, and I would agree that it seems to perhaps create something it shouldn't.

Mr. Cameron, we've heard a lot of discussion about delays, and yet we hear that everybody provides the criminal record at a bail hearing. Still, we're told that if we shall compel people to do it, it's going to create delays. Can you help me understand how this could create a delay if we're already doing it?

Mr. Jay Cameron: It's nonsensical.

Mr. Ted Falk: Okay, thank you.

I have more questions, but in the interest of time—

The Chair: Mr. Fraser, did you have a question?

● (1700)

Mr. Sean Fraser (Central Nova, Lib.): I have a quick question for Ms. Irving. After Chief Justice Wittmann's decision in the reference case that said police officers shouldn't be running bail hearings anymore, do you know whether, as a matter of practice, bail hearings are in fact still happening with officers running them in Alberta?

Ms. Nancy Irving: No, I don't. When I was working, I would often be on the phone to a lot to colleagues in the province, but since I retired, I don't do that so much anymore. I know he gave them six months. I did hear something the other day, which I think was just a rumour, that they're no longer doing it. I don't know. It seems to me it would probably take the full six months to get the change fully in place.

Mr. Sean Fraser: Mr. Cameron, moving on, whether it's mandatory or not, I do accept that human error will exist. I'm thinking of the circumstance where, for whatever reason, the criminal record is forgotten or chosen not to be put in front of the court. What happens when the criminal record isn't readily available? I come from a small community. Internet connections are sparse throughout large portions of rural Canada.

You mentioned earlier that there's a constitutional argument there. If, for whatever reason, a criminal record isn't brought forward, by mistake or otherwise, and it's not readily available, does the person simply go free?

Mr. Jay Cameron: Section 516 of the Criminal Code allows for an adjournment in certain circumstances. It's possible that the crown could apply to remand the accused for a set period of time so that the record could be obtained. That's one possibility.

In my experience, and I travelled to Williams Lake and worked in Prince George, the CPIC record was readily obtainable. I don't recall any instances where it couldn't be produced. I'm not sure how possible it is that there would be a circumstance where the CPIC is not available. It is up to an accused person to determine when they are going to ask for a show-cause hearing or apply for judicial interim release.

Mr. Sean Fraser: I have a question for Mr. Doob, and I want to follow up on one of Mr. Bittle's questions earlier.

He asked whether there is a potential, particularly in light of the Jordan decision, that because of procedural delays—whether because a number of adjournments have happened or there's a longer time to produce a record that the court feels is reliable—it could make us less safe. You responded by essentially saying that this narrow provision misses the point; we need to do an overhaul of the entire section.

I think doing an overhaul of the section is actually a great idea. If, for whatever reason, an overhaul is not done and this specific change made, with the way that the section is phrased today, I do have fear that we could be made less safe. Would you agree that's a reasonable outcome?

Dr. Anthony Doob: There are two issues that you've raised: one is the delay issue; the second issue is the less safe issue.

The delay issue is a real one. The idea of adding, even though it might be a few days to a lot of cases.... What we also have to think of is not just the two or three days, or a week, or whatever it might be, to this particular case, but that's adding another appearance. It's adding another court appearance to that process, and that court appearance is going to have effects on other cases as well.

Mr. Sean Fraser: That's right, and if I could jump in just so I can move past my question and give the microphone to someone else, the two issues I think are inextricably linked.

Dr. Anthony Doob: Yes.

Mr. Sean Fraser: Because the delay you pointed out is exactly what I have on my mind.

In light of the Jordan decision, that would require a stay, which would let the accused person go free without trial. Would that delay result in more people going free without trial?

Dr. Anthony Doob: Presumably, it's just going to add additional burden to the court.

Mr. Sean Fraser: Okay.

Dr. Anthony Doob: The problem is...and we've seen this on work we've done for the Province of Ontario on court delay. We searched for a solution for the problem of delays, as to why things are taking a long period of time. What it seems to be is a combination of things, where many things—unfortunately, there isn't a single problem—are adding a little bit.

What one has to do, it seems to me, is to say, how do we chip away at the problem rather than adding to it? My concern is that it's adding to it, with no benefit.

● (1705)

Mr. Sean Fraser: Thank you.

The Chair: Mr. MacGregor.

Mr. Alistair MacGregor: Thank you, Mr. Chair.

Mr. Cameron, I didn't get a chance to ask you any questions during the first round.

I appreciated your strong and vigorous defence of the bill, but I think you have to admit, from the committee hearings we've had, that the number of people and organizations asking us to vote against this bill is starting to mount. We now have noted academics, the chiefs of police, people representing crown counsel, and so on....

I will go through your testimony, because I want to review the evidence you cited and make sure that when we come to clause-by-clause consideration of this bill that I have all the facts at my disposal.

As some sort of a peace offering, if you will—and I don't want to prejudge this committee's outcome—if we arrive at a situation where Bill S-217 is going to proceed no further, can you at least put into the record some of your suggestions on how we tackle some of the systemic issues that are causing these kinds of things in our bail hearings? Leaving aside what Bill S-217 is, I want to give you a chance to offer your suggestions for what we in the federal Parliament can do to make the operation of our justice system more efficient, aside from a legislative solution.

Mr. Jay Cameron: I think that, first of all, I will refer to Alberta and what Alberta has done. My understanding is that they've implemented a pilot project, so that you have dedicated crowns who run the bail hearings. They are run between certain hours of the day and it's a lengthy time period, something like 12, 14, or 16 hours of a day.

All that crown counsel does is consider the release of accused persons. Sometimes they release and sometimes they oppose release, in which case there's a bail hearing.

It really cuts down when you have a dedicated justice of the peace or you have a dedicated judge and then you have dedicated crowns to run bail hearings like that. That really gets rid of backlogs.

Perhaps I can address what you said about the number of people who oppose Bill S-217. It's a classic fallacy, and no disrespect in using that word. I just mean it in the sense of logic, to say that there is a lot of people who oppose something and therefore they must be correct.

I pointed out in my brief—and I urge you to go through it—that some of the people have misstated some material aspects of the legislation, and they're not small misstatements. I'm sure they're inadvertent, but yet they're there. Just because lots of people say one thing doesn't mean they're correct.

Mr. Alistair MacGregor: That's not lots of people, but the organizations that they represent and speak for are quite prominent, would you not agree?

Mr. Jay Cameron: I can't speak to the prominence or not prominence. I can just tell you that in my respectful opinion some of the things they said before this honourable committee are inaccurate.

Mr. Alistair MacGregor: Thank you.

The Chair: Mr. Boissonnault.

Mr. Randy Boissonnault: I have another question for Ms. Irving, and if I have time I'll go to Professor Doob.

If the boat is indeed leaky when it pertains to bail hearings, if we were to redesign the boat or start over, what kinds of bail reforms would you recommend we look at from a legislative perspective, given all of the time that you spent looking at this from an Alberta lens? What should we do as legislators to overhaul the bail reform process? Where should we go next?

Ms. Nancy Irving: That's a really good question. My focus, as I said at the outset this afternoon, really wasn't on an examination of the law as it currently stands and how it might be improved. That wasn't part of my mandate.

I'll admit that I'm maybe not equipped with the knowledge to answer your question today, but I think in fairness that it is perhaps time to take a look at the entire section and to consider a lot of things that have happened over the years.

Professor Doob has talked about piecemeal amendments that have happened, sections added here, words added there. I think it might benefit from an analysis. Step back and take a look at it against the statistics, the data analysis, and the conclusions that people like professors Doob and Webster and their colleague Nicole Myers have been engaged in. I think that would be of value. I know that's a very general question.

May I add one thing? I'll leave this with you to consider because someone, I don't recall who—you can see my memory is not as good as it used to be—said, “Can you think of an example where the crown might want to exercise discretion with respect to a criminal record?”

Before coming to this committee I gave that a bit of thought. It took me a while to come to it. I think I can. I'll share my views with you on that.

Let's suppose it's 2017 and we have a gentleman in our community who's upstanding. He might even be a public figure. He has led an exemplary life; he's well regarded. He gets arrested for impaired driving. It's not unusual, I hate to say, but it happens.

This individual comes before the court. The police didn't detain him for purposes of a bail hearing, and this is really in the context of a plea at the end of the process. He's found guilty. So the crown is looking at the record, and on the record is a conviction for an offence that arose from the sweep of the Toronto bathhouses in the early 1980s, and for which he received a small fine, and that's it.

He's a prominent person and so the media is in the court that day, the day of his sentencing. They're there to listen...“Oh, what's he going to get for this impaired...?”

That's an example where I think if I were the crown I'd probably exercise discretion not to put that in, not to be forced to file the record, and to have someone else comment on it or have the defence lawyer representing this individual feel compelled to say something about it. Now it's in the public domain.

So, I share that with you.

● (1710)

The Chair: Thank you.

We'll go to Mr. Cooper next.

Mr. Michael Cooper: I have a couple of questions.

Mr. Cameron, we've heard a lot about the issue of this so-called delay, yet paragraph 518(1)(c) sets out the type of evidence that is presented at a bail hearing.

In that regard, what is new, other than changing "may" to "shall"?

Mr. Jay Cameron: That's one of the things I've been trying to discuss in my testimony and in my brief. It doesn't alter the section in a material fashion. In my respectful submission, it's a mistake to characterize the change from "may" to "shall" as being this really significant change to the act that's going to have these terrible unforeseen consequences.

In fact, one of the witnesses on April 6 said that they didn't know what was going to happen, but it was going to be bad. It's going to be bad, so we shouldn't do it.

The idea that you shouldn't change legislation because you fear litigation.... Then you'd never change faulty legislation, because you fear litigation. That's not a good reason not to fix something if it's broken, in my respectful submission.

Mr. Michael Cooper: Ms. Irving, I'll quote what you wrote in your bail review report on page 1, in the introduction:

> Most who work in the bail system, however, would be more likely to agree with the prosecutor who told this Review "a proper show cause hearing needs to have the same sense of importance and urgency as a murder prosecution." The stakes for the accused and the public can be that high.

Now, that's a pretty profound statement. It talks about how important bail hearings can be and what the consequences can be when corners are cut. That was what happened to Constable Wynn. If you read the transcript, you see that corners were cut in that bail application hearing.

I raise this in the context that we've heard a lot of concern about efficiencies and getting this over with quickly, but in your report, you say that the stakes are as high as those in a murder trial.

Maybe you could comment.

● (1715)

Ms. Nancy Irving: Well, I was quoting that. Those are the exact words. I think it came to me in an email when I was conducting the review, and it was from a prosecutor. I think what he was doing was emphasizing that in many cases the stakes are high. He was generalizing, because they won't all be at the same level of risk.

I think it's fair to say—and I may be mistaken, but I believe you've heard this from other individuals who've been here as witnesses—that everyone who is engaged in the bail process—the justice, the bail decision-maker, the judge, the prosecutor, and even the defence counsel—knows what the risk is, and the risk is high.

It's everyone's nightmare that someone who is there for spousal assault but who looks like a decent guy or girl—let's say it's a guy; more often than not it is—who doesn't fit the pattern of a repeat offender, and who doesn't have much of a criminal record is released, perhaps on consent, and he goes out and kills his spouse. That's everybody's nightmare.

I think that's what the crown was trying to convey, that not just crowns, but all individuals who are engaged in bail-making decisions every day take it seriously.

Mr. Michael Cooper: Of course, while you paraphrased the crown, in the recommendations that you put forward in your report, as you pointed out in your statement at the beginning of the committee meeting, there is a recommendation that all participants have complete and accurate information. Obviously, a participant is a judge or justice of the peace.

Also, recommendation 25, which I think you alluded to in your opening statement, is that, at the very least, the bail packages that are presented to the crown, which would then be put forward in evidence or used at a bail hearing, include "[a]n up-to-date criminal record, including both a CPIC print out and a JOIN sheet", as well as "[a]n accurate synopsis of the allegations/circumstances of the offences", among other things. Is that right?

Ms. Nancy Irving: Right. I did make that recommendation. I'm agreeing to that.

Mr. Michael Cooper: Yes, that's very good. Thank you.

The Chair: Mr. Bittle.

Mr. Chris Bittle: Thank you so much, Mr. Chair.

Mr. Cameron, first I want to commend you on answering Mr. Falk's lengthy question in the non-partisan manner, as you said, you brought to this committee. You've testified that there's really nothing new to this, that there's no material change. If there's no material change to the legislation, to the bail process, you can't possibly hope to fix a material problem with the bail system, can you?

Mr. Jay Cameron: The problem currently is that the legislation allows for crown discretion about whether or not to introduce the record. There shouldn't be any discretion to do that, in my respectful submission.

Mr. Chris Bittle: There shouldn't be, but again, you still keep skirting the fact as to how to counter this human error that will continue to exist. There are no consequences. Judges can forget. Lawyers can forget. Things happen. Years go past. It may be on the top of people's minds when this bill is passed and the change is put through the system, but going forward this is going to happen again. We've heard that from all kinds of witnesses.

Mr. Jay Cameron: No, sir. My father used to ask me, when I had a hard time understanding a math problem, if he should get the pennies out. I feel that's what I should ask you, should I get the pennies out? Because this creates a requirement for there to be a record in order to have a bail hearing. If there is no record, there is no concluded bail hearing. It's not something that occurs over and over again, because there is a requirement that the record be there. If there is no record, there's no decision, and that's what the legislation does. That's the point of it. It requires the prosecution to do something, and if they—

● (1720)

Mr. Chris Bittle: Again, Mr. Cameron—and I appreciate your analogy does include the word "shall"—there's no consequence.

Mr. Ted Falk: This isn't a cross-examination.

Mr. Chris Bittle: Mr. Falk, I can ask questions however I deem appropriate. This witness is not necessarily agreeable, but that's fine. That's his right, but I can ask questions, and if I have to cross-examine this witness, that's my right to do so, as is your right to examine other witnesses.

Again, at the end of the day, you have to admit the Criminal Code is full of "shalls", like "shall not kill", "shall not do..." whatever. You shall not do all sorts of things, and things happen. Crimes are committed. Mistakes happen. Mistakes happen in the process. We wouldn't need appeal courts if judges didn't make mistakes. We wouldn't need a supreme court. Mistakes happen at every level.

How can you say that this will prevent what happened to Constable Wynn? How can you say with certainty that it won't happen again?

Mr. Jay Cameron: I'm surprised by the question, sir, because you're a lawyer. You know, in the legal context, there is a prerequisite that can be put into the law to require that something happen as a prerequisite for something else happening. For example —

Mr. Chris Bittle: Mr. Cameron, I've appeared in court. I'm a civil lawyer, so I'm not an expert in the criminal law, but perhaps counsel shall provide an affidavit in that case. I've seen lawyers receive orders, forget to put in that affidavit. It happens, but it's in the legislation that says you shall provide that affidavit. It's a minor matter, but it goes ahead, no questions asked. Those mistakes happened. The judge didn't ask for it, neither side objected, and it went through. These things happen. They happen in other areas of the court, despite the fact it says "shall".

Mr. Jay Cameron: I think there's a basic assumption in your question which betrays the fallacy that undermines it, and it's that you're making an assumption that people are going to disobey the law or ignore the law. What is the point of having a law—

Mr. Chris Bittle: Excuse me, Mr. Cameron, no, no, no. Listen to my question.

Mr. Jay Cameron: Go ahead, sir.

Mr. Chris Bittle: I'm not saying that people will disobey the law; I'm saying that mistakes will happen. It's human error.

This constable who made the error, I'm sure lives every day of his life in the horror of this. From crowns we've heard from, including Ms. Irving, they and judges are afraid of the instance where a mistake happens, someone goes out on the street, and it happens again. These are real concerns, and real mistakes can happen. People working on the front line of the justice system understand that and are working hard on that; mistakes still happen despite that fear, despite the hard work of our prosecutors and our judges. In this case I'm sure that particular police officer was working hard that day, but a mistake happened.

Mr. Jay Cameron: He had the discretion to make the mistake. That's the difference, right? You remove the discretion to make the mistake, and you solve the problem. That's the basic problem with your question.

Mr. Chris Bittle: Thank you.

Ms. Irving, going back to the discretion issue, was it a finding in your report that it was an issue of discretion that caused the failure to produce the criminal record?

Ms. Nancy Irving: No. As I said at the outset, I had no mandate to make an inquiry into why the police officer failed to provide the record to the justice of the peace. I made some inquiries to confirm, to find out if it had been provided, and I concluded on the basis of a transcript, because that's all I was given access to. The transcript made no reference whatsoever to the record.

Now, I could guess that it might have been his practice at the time that when you agreed to a consent bill, there was no need to file the record. Maybe that was the explanation. I don't know the answer to that.

The Chair: Thank you.

Mr. Falk.

Mr. Ted Falk: Thank you, Mr. Chairman.

Again, thank you to the witnesses.

People keep talking about human error. I respectfully submit again that there was no human error made because there was no specific requirement, and just because there's no prescriptive punitive remedy for a violation of the word "shall" doesn't mean that it doesn't carry more weight when it's there.

Ms. Irving, I'd like to ask a question on a comment you made. You said that the word "shall", when coupled with "the fact", could be problematic. Can you talk to me a bit more about that phrase "the fact"? I'm having a little trouble understanding just what the consequences of that could be, and you're a lawyer and I'm not.

● (1725)

Ms. Nancy Irving: Thanks for recognizing that. I'm delighted.

I think it's an unusual choice of word to be inserted into this part of the code. As I said during my opening remarks, I don't recall seeing language like that in other parts of the Criminal Code.

It suggests that something more is required by the addition of those words, and lawyers will litigate all manner of things, including adding a couple of words like "the fact". It's certainly not there in the section now. You don't find that language.

Mr. Ted Falk: Would you have less issue with the word "shall" if the phrase "the fact" were to be removed? You did make a connection there.

Ms. Nancy Irving: I think I'd have to say that I don't think this amendment is necessary, for all the reasons I've heard today. I view it as human error. I think we're giving the officer the benefit of the doubt. I appreciate your very surgical argument that it's not human error because there was no requirement at the time on the bail presenter to file the record, but I think that for those working in the bail system.... You probably are aware of the earlier report by the Alberta Crown Prosecution Service. It's still online. It contains Mr. Rehn's record and all of his information on the prior offences and outstanding charges.

That wasn't a run-of-the-mill bail hearing. It was a complex matter and should not—in my personal opinion—have been in the hands of someone untrained in the law, and Officer Quan was up against a very experienced defence counsel.

The Chair: Thank you very much.

I don't see any other questions.

Ms. Irving and Mr. Cameron, I thank you very much for your testimony today. I think it was very helpful to the committee to hear all the different perspectives that were offered. The same is true for Ms. Webster and Mr. Doob, who, for any of you who didn't know, had to catch a train and unfortunately had to leave.

Again, it was really helpful. Thank you.

The meeting is adjourned.