HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 071 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Monday, October 23, 2017

Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good afternoon, ladies and gentlemen.

It is a pleasure to have you here with us at the justice and human rights committee as we resume our study of Bill C-51, an act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another act.

I am pleased to greet our witnesses today. We're very lucky to have with us, as an individual, Ms. Breese Davies, who is a lawyer at Breese Davies Law.

Welcome, Ms. Davies. Thank you for agreeing to go at the end of the testimony so that we can make sure we get everybody on video conference before anything can happen.

We have Mr. Faisal Mirza, who is an advocacy committee member and criminal law barrister representing the South Asian Bar Association. Welcome, Mr. Mirza.

Then we have the Centre for Free Expression, at Ryerson University, represented by Prof. Lisa Taylor, who is a professor of journalism, Ms. Jamie Cameron, who is a professor of law, and Prof. James Turks, who is director and distinguished visiting professor in the faculty of communications and design. Welcome, Ms. Taylor, Ms. Cameron, and Mr. Turk.

We're going to start with Mr. Mirza. All witnesses, please try to speak to the act itself and to potential amendments to the act, and not to general principles that go far outside the act. Thank you.

Mr. Mirza, the floor is yours. You have up to 10 minutes.

Mr. Faisal Mirza (Advocacy Committee Member and Criminal Law Barrister, South Asian Bar Association): Thank you.

Good afternoon. On behalf of the South Asian Bar Association thank you for the invitation to speak this afternoon. Let me start with the background of the organization that I'm here to represent today. We are the largest diverse bar association in Canada. SABA is also the largest organization of south Asian lawyers in North America, and we are coming up on our 11th anniversary.

In terms of advocacy we seek to protect the rights and liberties of diverse communities across Ontario. Our underlying goal is to work toward a justice system that is just and equitable and contributes to a legal profession that is inclusive and progressive. SABA has been involved in a number of consultations in the past with the government, and with various stakeholders in the legal community in Ontario. We are often with other equity groups in the broader community such as the Canadian Association of Black Lawyers, the Federation of Asian Canadian Lawyers, and the Canadian Muslim Lawyers Association.

In terms of my personal background, I am a criminal lawyer with 15 years' experience litigating cases at all levels of court. Exemplary that SABA is an inclusive group that works with other able organizations, in addition to being a contributor to SABA's advocacy group, I am also the chair of the Canadian Muslim Lawyers Association, and a contributing member of the Criminal Lawyers' Association. I'm pleased to hear that you have invited them in order to hear their views as well.

With respect to my contribution today, I wish to address one specific area of the bill, the proposed repeal of section 176 of the Criminal Code. The Minister of Justice's office has come to the conclusion that, one, this law's protection for ministers and clergy under paragraphs 176(1)(a) and 176(1)(b) is under-inclusive, and two, that it is redundant in the sense that other provisions of the Criminal Code are capable of meeting the same objective by way of criminal offences such as threats and assault.

My goal today is to provide some objective input about the pros and cons of the proposed repeal. First, let me turn to the issue of the under-inclusivity of this section. I agree that the language in paragraphs 176(1)(a) and (b) could be more inclusive. To better reflect the multicultural heritage of our nation the words “clergy-men” or “minister” could be amended to state “a religious leader”. This way the section would read “everyone who (a) by threats or force unlawfully obstructs or prevents, or endeavours to obstruct or prevent, a religious leader from celebrating divine service, or performing any other function in connection with his calling”. That is a straightforward way to bridge the gap and make this provision more inclusive.

Second, let me address the issue of redundancy. In that context I'll speak about paragraphs 176(1)(a) and 176(1)(b) first. The Minister of Justice is correct that the Criminal Code already covers assaults and threats, and that the sentencing sections in the code indicate that crimes committed for bias or hate are aggravating factors on sentencing. As a criminal barrister I embrace the repeal of redundant criminal laws, but timing is everything. We cannot be blind that the current climate of increased incidents of hate, specifically at places of worship, supports that religious leaders may be in need of more, not less, focused protection. There is no doubt that synagogues, mosques, and temples are being targeted by hate groups. Those institutions also house schools where many children spend their days.

For instance, in March 2017 a bomb threat was called into Toronto's Downtown Jewish Community School, a kindergarten to grade 6 school located inside Miles Nadal Jewish Community Centre. In the preceding weeks, 20 bomb threats were called in across North America to various Jewish centres, including in Vancouver. Similarly, the massacre at the Centre culturel islamique de Québec, which killed six and injured 19 in January 2017, is a stark reminder that religious institutions and their leaders are a focal point of hatred. Some people may counter that other criminal laws are able to deal with those heinous acts. However, keep in mind that the mass shooting at the mosque in Quebec was predated by a pig's head being left at the door of the same mosque six months earlier.

The mistreatment of religious minorities is a growing problem in the greater society of Canada. For instance, racist comments inscribed on the walls at York University and Concordia University and the vandalism at synagogues and mosques are stark reminders.

Bill 62 in Quebec may add fuel to this fire. Indeed, this is becoming a North American problem, and something for which the greater context has to be considered. The 2012 shooting massacre at a Wisconsin Sikh temple and another shooting a few weeks ago at a church in Tennessee are further illustrations that more protection may be required at this critical time in history. Although this law has been infrequently applied in the past, it is hard to deny its relevance in the current climate. The application of the law may become more helpful if policing agencies are educated about it and the public is made aware that it exists.

In contrast, the removal of this section at this juncture may be viewed as an invitation to persons engaging in discriminatory acts to be more aggressive. That being said, if this section were to be deleted, there are additional subsections that continue to be relevant, subsections 176(2) and 176(3), and they are valuable in that they prohibit wilfully disturbing or interrupting persons gathering for religious, social, or benevolent purposes.

In other words, if paragraphs 176(1)(a) and 176(1)(b) are the source of controversy, then their deletion may not require the deletions of subsections 176(2) and 176(3). I'm also mindful of the motion 103, which is a useful platform to study discrimination in various segments of society. It may be appropriate for the government to press pause and allow that study to take its place, for the results to come forward, and then determine whether or not this section should remain.

Thank you.

● (1540)

The Chair: Thank you very much for your testimony. We will now move to the Centre for Free Expression. The floor is yours.

Professor James L. Turk (Distinguished Visiting Professor, Faculty of Communications and Design, and Director, Centre for Free Expression, Ryerson University): Thank you very much, Mr. Chair. We'd like to thank you and the members of the committee for inviting us.

I'd like to turn to my colleague Jamie Cameron, who will make our presentation.

Professor Jamie Cameron (Professor of Law, Osgoode Hall Law School, Centre for Free Expression, Ryerson University): Thank you, and thank you, Dr. Turk.

I am the designated spokesperson for the Centre for Free Expression this afternoon. I'm a professor at Osgoode Hall law school at York University.

To members of the committee, we have prepared some speaking notes that were provided to you, and I'll just move to some of the highlights from those speaking notes.

Our presentation this afternoon concerns the status of criminal libel in the Criminal Code. There are three forms of criminal libel that are currently penalized in the Criminal Code: blasphemous libel, seditious libel, and defamatory libel.

Bill C-51 proposes to repeal the offence of blasphemous libel. In the Minister of Justice's charter statement, we learned that this was in part to enhance the protection of free expression. However, while Bill C-51 proposes to repeal blasphemous libel, it does not propose to repeal seditious libel or defamatory libel. There's a minor amendment proposed to defamatory libel, but in the main, the other offences remain intact.

The Centre for Free Expression supports and applauds the repeal of section 296, the blasphemous libel offence, on the grounds that it is either obsolete or that it contains risk elements related to the charter. We submit, however, that all forms of criminal libel should be repealed together. In particular, we submit to the committee that seditious libel and defamatory libel both fall within the rationale for repealing Criminal Code provisions in Bill C-51. Specifically, either the provisions are obsolete or they pose risks to the protection of expressive freedom under the charter.

I'll say a couple of words about blasphemous and seditious libel. These two are somewhat alike, because both of these Criminal Code offences are effectively or essentially obsolete. The last prosecution for blasphemous libel, I believe, was in 1936, and according to our research, the last major conviction for seditious libel occurred in 1950. I think both of these provisions are somewhat obsolete, and both pose charter risks to freedom of expression, as the minister acknowledged in the case of blasphemous libel.

In our view, defamatory libel raises particular concerns. Specifically, defamatory libel—there are two offences in the Criminal Code—is not obsolete. Far from being obsolete, the defamatory libel offences pose worrying risks and concerns for freedom of expression. My colleague Professor Taylor's research reveals worrying patterns for the prosecution of these offences under the Criminal Code.

I'll now turn to a couple of key issues about the defamatory libel offences. First of all, two defamatory libel offences in the Criminal Code are found in sections 300 and 301 of the code. Section 301 is notable because this provision has been found unconstitutional by lower courts in at least five different provinces across the country. That's the first significant point. Second, it's important to note that sections 300 and 301 are both more harsh in their approach to the questions of defamation and defamatory statements than the civil law of defamation.

The third point is that the Criminal Code's definition of "defamation" is particularly problematic because it's overbroad. Here I would point to the inclusion of the word "ridicule" in the definition of "defamation" in the code and the words "designed to insult" as elements of the criminal offence, which we would not find in the civil law definition of defamation. Moreover, words that ridicule or insult another person are not necessarily defamatory.

● (1545)

A fourth point, and it's a very important one for the Centre for Free Expression, is that these provisions in sections 301 and 30 are too often used by the police as a tool to silence and punish those who are harshly critical of different kinds of public actors. These can include police officers, prison wardens, municipal officials, and other kinds of state actors who have been harshly criticized by individuals from time to time.

In our submission, the defamatory libel offences, for a variety of reasons, pose very extreme charter risks to freedom of expression and fall within the minister's rationale for repeal under Bill C-51.

I would also like to state, because it's important, that there are other alternatives open under the Criminal Code should there be transgressive activity that needs to be addressed by the criminal justice system. There is a whole list of Criminal Code offences that can be used in lieu of defamatory libel to deal with this kind of conduct. There's criminal harassment, uttering threats, and the range of offences that deal with different kinds of cyber-smearing. Should there be time in the question period, my colleague Professor Taylor would be happy to speak to that.

I just have a couple of closing notes for the committee. The first is that, for the centre, it's significant to note that in 1984 the Law Reform Commission of Canada did a fairly extensive study of the whole subject of defamatory libel and the Law Reform Commission came to the conclusion and made the recommendation that defamatory libel should be abolished as a criminal law offence in Canada.

It's useful to note that more recently, in 2009, the United Kingdom made the decision to abolish all forms of common law criminal libel. That included seditious libel, defamatory libel, and something that is known in the U.K. as obscene libel.

I think that report and the U.K. reform initiative support our view that criminal libel offences in the code are really artifacts from another day and age, and do not belong in the criminal law at this point in time.

This has been a brief submission. We're happy to answer questions, but in closing, we urge the committee to consider amendments to Bill C-51 that would include the repeal of seditious libel and defamatory libel, together with blasphemous libel.

Thank you for your attention.

● (1550)

The Chair: Thank you very much, both of you, for your very clear testimonies.

Now we'll move to Ms. Davies.

Ms. Breese Davies (Lawyer, Breese Davies Law, As an Individual): Thank you. I, too, would like to thank the committee for inviting me to address you today. It's a real privilege to be here.

By way of my background, I'm a criminal lawyer who practises in Toronto. I've been practising for 17 years at all levels of court. I'm also a vice-president of the Criminal Lawyers' Association—I know you're going to hear from them in the next hour. I'm an adjunct professor at the faculty of law at U of T and at Osgoode Hall law school. In addition to that, I prosecute sexual abuse cases in the regulatory context, so it's within that frame that I'll make my submissions today.

As you know, broadly speaking, Bill C-51 has a number of classes of amendments. I want to focus my comments today on the provisions that create the new procedure for determining the admissibility of private records in the hands of the accused, so that would be proposed section 278.92. I know you have submissions on this from the Criminal Lawyers' Association and I obviously support those. I just want to address a few of the issues. We've tried to coordinate our comments so we don't duplicate what we say.

Both the Minister of Justice in her comments before you last week, and the parliamentary secretary in his comments during first reading, made it clear that the goals of this new procedural regime about the admissibility of private records is twofold: first, to ensure that sexual assault complainants are treated with respect; and second, to respond to the public concern there may be about how sexual assault cases are prosecuted, defended, and judged. Those are obviously two very important objectives, so I will keep those in mind when I make my comments.

I also want to preface my comments by saying that I acknowledge and recognize that the Supreme Court of Canada has said that the defence does not have the right to a trial by ambush, that it is open to Parliament to enact procedures that would control the way in which defence counsel can put forward a case, but there has to be a balancing of the rights, a balancing of the accused's rights with the interests of the complainant. It's in that spirit that I'm going to make my comments. It's in that spirit of the balancing that I still have some concerns about the new regime as it's drafted.

In particular, I have two concerns I want to talk about today. The first is that the provision is overly broad, even taking into consideration what the stated objectives are. The second is the lack of corresponding resources to deal with these more complex procedural issues, and the potential unintended consequences of creating complexity in criminal trials that I think you should be alive to when you're considering the bill.

Let me deal with the overbreadth. In my submission there are two ways in which the provisions as drafted are overly broad. The first one I can deal with fairly quickly, I think, because it's a fairly narrow point.

The proposed amendment makes it clear that no record relating to a complainant or a witness is admissible unless the procedure is followed. It strikes me, from all of the commentary that has been made, that the concern is really around the manner in which complainants are addressed in criminal trials, so my concern is that the inclusion of the words “or a witness” will make this enormously broad in terms of its application. That would apply to any crown witness, whether they are connected to the complainant or not, and in my submission that extends the reach of this new provision beyond the stated goal or the purpose. I think it's unnecessary to achieve the objectives.

I also think there would be a real concern on constitutional grounds about there being no rational connection between the stated purpose and that language, and that it wouldn't survive a minimal impairment analysis. I would urge you, in your discussions, to delete references to witnesses and continue to focus on complainants. That's the narrow one.

My second comment is around the definition of the record for the purpose of this regime. I know, from the legislation, that the definition of “record” that is being used for the new regime is the same definition that applies for the third-party records application, but in my submission it has very different connotations in the context of a record that's in the hands of an accused person already. I think you have to look at whether or not the definition of a record is too broad for the purposes that have been articulated.

● (1555)

The definition of “record” is “any form of record that contains personal information for which there is a reasonable expectation of privacy”. There is a list, but the starting point is whether it is a record for which there is a reasonable expectation of privacy. In my submission, that is going to cover potentially an enormously broad group of records, and it would significantly increase the complexity and length of sexual assault cases.

I want to give you five examples of records that I think would be captured in this definition that perhaps weren't intended to be captured, and certainly I think in the context of constitutional considerations should not be included.

One is personal communications between the accused and a complainant. If a complainant sends an email to an accused person, that is a private communication. The case law is very unclear on whether or not that is a record over which there's a reasonable expectation of privacy. The British Columbia Court of Appeal, in a case called Craig, said that you do retain a reasonable expectation of privacy over a private communication that you send to another person, even if it's in their hands. Even in the hands of an accused person, there would be a reasonable expectation of privacy over text messages, emails, or Facebook posts that you send to one another. The Ontario Court of Appeal came to the exact opposite conclusion.

This issue is before the Supreme Court of Canada, but if the Supreme Court of Canada sides with the B.C. Court of Appeal and says there is a reasonable expectation of privacy, any communication, any electronic communication that goes between an accused person and a complainant would now be subject to this regime. If the issue is about avoiding trial by ambush, you don't need that protection for things that a complainant wrote his or herself and sent to an accused person. There's no element of surprise, or there ought not to be an element of surprise in communications that initiated from the complainant or were received by the complainant. Certainly those are records that the complainant should have themselves, or the crown and the police can have access to and can get if they're deleted. That's one area that I think ought to be excluded.

There's also concern about joint records. Sometimes complainants and accused people have joint counselling records, joint cellphone records, joint bank accounts to which they both have a reasonable expectation of privacy but are equally entitled to have access. I think there's a real concern about requiring the accused to go through this procedural hoop when there are joint records. Private records filed in other proceedings, sometimes family courts, sometimes civil proceedings, sometimes related criminal proceedings, the type of private information which I think is quite rightly the subject of this, is already in the public domain and ought to be available, and this procedure shouldn't apply.

Also, it may include records that are part of disclosure, so records that the crown obtained, everybody knows about. If there's a reasonable expectation of privacy over those records, they still could be covered, and records that were produced through a third-party records application where the issues have already been adjudicated by a judge.

My suggestion is that there ought to be an amendment to the existing language that expressly exempts certain categories of communications, certain categories of records that ought not to be subject to this regime. I would suggest communications between complainants and the accused, records that are accessible to both the complainant and the accused, information that is otherwise publicly available, and records that have previously been disclosed through a third-party records application. For example, if I bring a third-party records application and I get a complainant's therapeutic records, I ought not to be required to go through a second application, once everybody knows what they are, in order to use those in a trial. Obviously every question, every line of cross-examination, will be subject to the discretion of the trial judge to stop the defence counsel if they're using it improperly.

Those are my broad suggestions in terms of narrowing the scope of what this applies to.

I want to just speak very briefly in the minute I have left about some unintended practical consequences.

One of the concerns is to ensure that responsible, experienced counsel are involved in all of these cases for the accused, and I know there are provisions for the complainant to have counsel as well. You do not want to create mechanisms that will either result in more unrepresented accused or more under-represented accused.

● (1600)

If there aren't additional resources allocated to fund these complicated procedures, you will have more and more experienced senior counsel not taking on these cases on legal aid, which most of these cases are. You will end up in situations where you have more unrepresented accused people who cannot navigate these proceeding or under-represented accused people who don't have adequate senior counsel to deal with these complex issues.

I think you have to be concerned as well that, as you increase the complexity of criminal trials, you obviously run up against the concerns that the case from the Supreme Court of Canada in R v. Jordan created, in terms of not the hard caps but the presumptive caps on delay. If you turn every trial that is now a one-day trial into a two-day trial, you're going to run up against serious considerations in terms of delay.

Those are my comments and I'm happy to take questions about them.

The Chair: Thank you very much to all of our witnesses. You were very helpful. We will start with questions and we're going to start with Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much. I'm very pleased to have all of your testimony. I think it was all very helpful.

Ms. Davies, you gave us a suggestion of about four or five different ways in which we could clarify the area with respect to the reasonable expectation of privacy. Would that change your view of the bill? The Canadian Criminal Lawyers' Association is going to be coming. They say the bill that's drafted is unconstitutional and ineffective. That may or may not be your view, but would that change your opinion if those amendments were drafted? Would you be more satisfied with the bill?

Ms. Breese Davies: I think, as drafted, there are concerns about the constitutionality of it and I know those submissions are before you so I didn't address that. I think narrowing the focus so that it is very clear that it is a narrow range of records over which there is a high expectation of privacy.... Those are the sorts of restrictions that the courts would say Parliament is entitled to put on the means by which accused people defend themselves. I think the broader it is the less likely it would sustain constitutional scrutiny.

Yes, if you narrow it to a small category of records, it would go a long way to address concerns about constitutionality.

Hon. Rob Nicholson: I appreciate that very much.

Mr. Mirza, thank you very much for your comments with respect to the repeal of section 176. Thank you for splitting that and talking about two different sections of it. With respect to the first part, the definition of a “minister” or a “clergyman”, has it been your experience in the criminal justice system that when courts interpret that they haven't continuously made their interpretation of the Criminal Code more narrow? Or have you found that over the years, and certainly since the Charter of Rights and Freedoms has come in, that the courts have in fact expanded the definitions of various sections of the Criminal Code?

Mr. Faisal Mirza: If we're talking specifically about this section, I think that any reasonable jurist would look at the term “minister” or “clergyman” and view that as also encompassing other religious leaders. That being said, I think if you want to bring greater clarity to the law, it's easy to fix it. That's why I provided a suggestion.

Hon. Rob Nicholson: Thank you for that suggestion. Just to let you know, the Government of Canada already has expanded that definition in other departments. For instance, the Department of National Defence, while they may refer to members of the clergy in terms of the services they provide to members of the armed forces, that term includes rabbis, and other religious officials. Even the government itself has expanded the definition of what a member of the clergy is. Thank you very much for that.

We don't have much time, I know, but to the Centre for Free Expression, thank you very much for pointing out those other types of libel. Now that this has been brought to our attention we will have a look at that and see if that can and should be contained in the amendments here removing the other types of libel.

Those are my comments, Mr. Chair.

The Chair: Thank you very much.

You have some time left. Does anybody else from the Conservative side want to ask a question? You're good?

We're next going to move to Mr. Ehsassi.

● (1605)

Mr. Ali Ehsassi (Willowdale, Lib.): Thank you, Mr. Chair.

My first question is for Ms. Davies. Thank you very much for your testimony. It was very clear, very comprehensive, and very helpful.

As you are very well aware, conviction rates for sexual assaults are very low at this point. One of the concerns that we have heard is that victims fear that the justice system, in going through with proceedings, will lead to revictimization.

Now in light of that and the concern that we certainly have, what are your thoughts on changes to clause 21 of Bill C-51? That, of course, is the clause that clarifies the circumstances under which a complainant's sexual history could be admitted as evidence.

Ms. Breese Davies: I haven't spent a lot of time looking at that because I know the Criminal Lawyers' Association is going to give you some submissions about that. My understanding of the amendment is that it is broadening the scope of what constitutes sexual behaviour or sexual activity for the purposes of one of those applications to include communications.

From my experience, trial judges are already alive to that issue of whether or not sexual communication is sexual activity for the purpose of that provision. I think the big concern from the defence perspective and from the perspective of balancing the rights, which is what you always have to be concerned about, is whether or not communications around the transaction that forms the subject matter of the offence are caught by that provision. I think that's the real concern. If you define it too narrowly, you will include in the requirement for an application the communications around the transaction.

I think it needs to be drafted in a way that ensures that communications on the same evening of or in anticipation of whatever the transaction is that leads to the event don't get excluded. Therefore, the courts and the defence are able to freely examine the full circumstances of the events that led to the offence, and what you're requiring an application for are truly additional communications that are not connected to the offence. I think that's the concern about how broad that section may be, that it would include or that it would be seen to apply to communications around the offence itself.

I hope that's helpful.

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

My second question is for the witnesses from the Centre for Free Expression. Again, thank you very much for your testimony. It was very helpful, especially the reference to the Law Reform Commission in the 1980s that I'd never heard of.

Now, in terms of full disclosure, I should say that I had the honour of having Professor Cameron at Osgoode Hall law school. Once again, I find myself here with a notebook and a pen to take notes as you guide us.

Professor Cameron, could you kindly comment on the changes in Bill C-51 that have to do with changes to the Department of Justice Act? It now requires the Minister of Justice to issue a charter statement with respect to every proposed bill. Could you tell us how significant that is?

Prof. Jamie Cameron: It's not part of my mandate in being here this afternoon, but I am aware that it is part of the proposal for Bill C-51. I applaud the initiative. I think it's a useful, constructive, and important addition to the legislation. The charter statements, of course, provide important guidance to everyone who's looking at the kinds of legislative measures that are being brought forward. We paid attention to the charter statement on the blasphemous libel in thinking that perhaps this might be time to bring the other forms of libel forward as well.

Mr. Ali Ehsassi: Absolutely.

As you stated, Bill C-51 really doesn't deal with the issue of defamatory libel. However, there is a change in the requirement for publishing. Could you speak to the significance of that, whether that's a good development or whether it will make a tangible difference?

Prof. Jamie Cameron: I don't think it will make a tangible difference, because it really just picks up a small part of the Supreme Court of Canada's decision in R. v. Lucas, which confirmed that in order for the offensive defamation to be made out, the publication has to be to a third party and not only to the victim of the defamatory statement. I don't see it as very significant.

If you don't mind my adding a comment, because I didn't get a chance to say it in my primary submission, Bill C-51 is a very important initiative. What the Minister of Justice has done is take a look through the Criminal Code in its entirety and try to identify critical provisions that are either obsolete or raise charter risks.

What the centre would simply like the committee to know is that it would be unfortunate if blasphemous libel were identified when the other forms of libel that share the rationales that are operative for Bill C-51 were not included in the inquiry. That's really why we're here.

To answer your question a bit more directly, the proposed amendment to the definition of defamatory libel really doesn't address the issues that are of concern to us, which have to do with the existence of the offences.

● (1610)

The Chair: Thank you very much. We're going to now move to Mr. Johns.

Mr. Johns, welcome to the committee.

Mr. Gord Johns (Courtenay—Alberni, NDP): Thanks, Chair.

My question is for Professor Taylor.

Professor Taylor, could you continue to expand on how the Criminal Code provisions have related to defamatory libel in Canada, and why is that of concern? You discussed some alternatives, so feel free to expand on that.

Professor Lisa Taylor (Professor of Journalism, Ryerson University, Centre for Free Expression, Ryerson University): First and foremost, I will tell you that defamatory libel is being used far more often than most people understand. At the time that the Law Reform Commission of Canada wrote about this, we were seeing about two or three charges per year. Around 2000, it was at 20 charges per year. Now it appears that we're at 40 per year. Those are just the numbers that I can gather by going through the secondary and primary sources. No doubt there are some that have escaped my attention. We're talking about 40 cases a year, despite the conventional wisdom that says this is barely used, a little-used provision in the Criminal Code.

I have to divide the cases into two categories. There are two-thirds that deal with essentially crimes that are born of the Internet, and I'll come back to those in a minute. A full one-third of the cases target political dissent. They are individuals who are upset with the police, judges, lawyers, or Revenue Canada field agents, and who say inelegant and often harsh things about those individuals in their professional capacity. The criticism of public entities is core in its consistency with our guarantee of freedom of expression.

The other interesting thing that happens with this is that a disproportionate number of charges are laid under the criminal defamatory libel provisions and later dropped or withdrawn or other charges are used in their stead.

What we're seeing is the appearance that the police are using this charge to harass individuals who have the temerity to criticize the state. Once you know that you're under investigation or you're charged, you hire a lawyer, you think about your defence, and you have your cellphone and computer seized. In this sense, the very investigative process becomes the punishment, even if ultimately the charges do not go to trial.

Unlike in other democracies that still have criminal defamatory libel, and we're seeing fewer of them as we go forward, the individuals who are targeted are never journalists, high profile, or powerful individuals. They're one of the little guys, if I can use that term, who is upset with Revenue Canada, or who doesn't think the judge should have awarded custody to her ex-husband. Those are the individuals who are being charged.

Just one example is a man in Thunder Bay who dared to put up a poster with a Revenue Canada agent's photo and said, “This man is known to be working for an insidious organization.... Protect yourself from organized crime. If you are approached by this man be prepared to defend yourself.” He was convicted and sentenced to seven months house arrest for something that was equal parts angry and fanciful.

That's the one-third. There are the two-thirds that are born, as I said, of Internet shaming and what we call cyber-smearing, or if I may say it, slut shaming. We have seen an increase in those cases, there's no denying that. They are not core to free expression values. What those cases have is a full list of alternate provisions in the Criminal Code from intimidation to harassment, and others. In fact, the Department of Justice published earlier this year a list of 12 Criminal Code provisions that can be used to respond to those kinds of cases. Given how well protected individuals are who find themselves as victims of those particular transgressions, there is no need for a law being used to attack our core freedom of expression rights.

If I can elaborate any more, I will. There are cases upon cases.

● (1615)

Mr. Gord Johns: Thank you.

My next question is for Professor Cameron. Please elaborate on why it's important to repeal all three criminal libel provisions in the Criminal Code.

Prof. Jamie Cameron: I would say that it's important to repeal all three because all three relate directly to the rationale of Bill C-51. I would say, in particular, that blasphemous libel is like seditious libel in that both are essentially obsolete. They're inactive as Criminal Code offences, and if blasphemous libel is obsolete enough to be within the purview of Bill C-51, then seditious libel is as well.

In addition, both of those forms of libel pose charter risks in the terminology of the minister, because of the wording and the way in which they threaten freedom of expression under section 2(b) of the charter. Defamatory libel is not obsolete, but sections 300 and 301 are frequently misused to target those who criticize public actors in an uncivil or vehement way. As my colleague Professor Taylor noted, there are alternative offences available to prosecute this kind of transgressive conduct.

Section 301 has been found unconstitutional by several lower courts in several provinces. The definition of “defamatory libel” in the Criminal Code is highly problematic. Finally, I would just repeat and rely on, in particular, the Law Reform Commission's report of 1984 and the U.K. initiative, which recognized that all forms of common law or criminal libel are essentially artifacts that have come and gone and been replaced by other forms of criminal offences that can address whatever criminal behaviour needs to be prosecuted that is similar to, or a default from, those kinds of criminal acts.

I hope that answered your question.

Mr. Gord Johns: Thank you.

The Chair: Thanks very much.

Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair, and thank you to our very informative panel today who are talking about three very distinct areas that Bill C-51 covers.

Mr. Mirza, you spoke about section 176 of the Criminal Code, specifically about clergymen. You mentioned repealing it and what the impact would be on Canadian society. Do you know if this provision has been used recently, and if so, has it been frequently used?

Mr. Faisal Mirza: It's an infrequently used provision. The danger that I'm trying to cite for this committee is that, if you put it in the context of current events, the current acts of hate and the rise of nationalism, which through media is uninhibited by borders, what you have is the potential for this provision to be more relevant than it was in the past. My suggestion is that the government take some time to study further, in conjunction with motion 103, whether or not the results support repealing it or perhaps putting forward an appropriate amendment.

That being said, I take the minister's point. I think it's valid that there are other criminal law provisions capable of dealing with the same type of underlying mischief, if I can call it that. The real tension here is that you have this provision, which is focused on a vulnerable sector right now, and you have to determine whether the timing is right to repeal it.

That's why I provided my input, in what I hope was a balanced way, to give you both sides of the argument.

● (1620)

Ms. Iqra Khalid: It was a clear way of positioning yourself. I take your point, but I wonder if there are other provisions of the Criminal Code and if this has not been frequently used, would the change have as big of an impact as you think?

Are we talking about a direct impact on somebody who could be charged with this, or an impact on the greater society, in that it gives a green signal, as you said earlier? Can you expand a little on that difference?

Mr. Faisal Mirza: There are a few ways to look at this. One that politicians in the room are well acquainted with is that criminal laws are often passed to send a message of accountability to the public, but also as an implicit deterrent. This type of provision could arguably send a message—particularly if police agencies were better educated about its applicability—that could be used as a basis to deter future misconduct in relation to synagogues, temples, and mosques, which unquestionably are on the rise. That's why I provided those examples.

It has that benefit in terms of dealing with protecting religious leaders, which is the terminology that I support, because I think it's more inclusive. We're in 2017 and it makes sense to be more inclusive. I take Mr. Nicholson's point that for jurists and other members of the government maybe this is including rabbis, imams, and other religious leaders, but at the end of the day we might as well get it right. If you're looking at amending it, you might as well get the language right so that it reflects the multicultural heritage of our country.

In terms of law enforcement, it may also come down to educating them about its applicability. The reason it may not have been used in the numerous examples I have provided is that it does have a level of obscurity to it in the Criminal Code. The first impulse of any police agency, and similarly of a prosecutor or criminal lawyer, would be to look at the assault provision, the threats provision, and the mischief provision, and not to think of section 176.

I can tell you, to be perfectly candid, that when I was asked to give testimony on this and it was referenced to section 176, despite having practised criminal law for 15 years this was the first time I came across this section. That's where there is some life to the argument of whether we really need this. However, I think you have to put it in the social context of today and not be blind to that reality.

Ms. Iqra Khalid: Thank you, Mr. Mirza.

Ms. Davies, you raised a very interesting point with respect to the inclusion of witnesses as well as complainants with respect to records. As well, you said that this was maybe overbroad in terms of its applicability. Can you describe some instances where witnesses as well as complainants would need to be protected when dealing with sexual assault cases?

Ms. Breese Davies: I think the problem with the language is that, if your intention is to protect complainants to deal with what's already been referenced, the under-reporting of incidents of sexual violence, making complainants feel like the process is more fair to them, I can't actually think of a scenario where you also need to extend that protection to a witness—a complainant is a witness, but a particular category of witnesses—for any of the purposes that have been articulated for this legislation.

That is precisely the problem. As drafted, it would apply to everybody. It would apply to police officers, family members of complainants, the friends who were with complainants earlier in the evening when something.... There are all sorts of people who testify in criminal trials, and as drafted it would apply to everybody. I cannot think of a scenario where you would need to extend that protection to address the goals and objectives that have been set out for this legislation.

Ms. Iqra Khalid: Thank you very much.

● (1625)

The Chair: Thank you.

We only have a couple more minutes left with this panel today. Does anybody have any very short questions they would like to ask?

If not, I want to thank all three panels of witnesses. You were all incredibly clear. You came exactly as we asked, and you gave amendments and suggested amendments that were appropriate based on what you had talked about, and we really appreciate that.

We'll take a short break as we move to the next panel.

Again, thank you so much for coming to join us today.

● (1625)

(Pause)

● (1630)

The Chair: We will call the meeting back into session. It is a pleasure to be joined now by our second illustrious group of panellists, some of whom are returning and some of whom are first-timers.

We are joined by Acumen Law Corporation, with Kyla Lee and Sarah Leamon; as an individual, Michael Spratt; from the Criminal Lawyers' Association, Anthony Moustacalis, the president, and Megan Savard, who is an attorney there; and finally by Christine Silverberg, barrister and solicitor from Silverberg Legal, and a retired chief of police from the Calgary Police Service. Welcome, everyone.

The Chair: We're going to go through your statements one at a time. We'll start with Acumen Law Corporation.

Ms. Kyla Lee (Associate Lawyer, Acumen Law Corporation): Thank you.

On my behalf and that of my colleague, Ms. Leamon, I'd like to thank the committee for having us here today.

I'm going to deal with the provisions of Bill C-51 that address the sexual assault changes to the law. In particular, one of the elements that concern us is the change to the "mistaken belief in consent" defence that effectively eliminates that defence by adding a provision to the legislation that requires an individual to have actual consent, either through actions or words. It has the effect of eliminating the defence of mistaken belief in consent and a significant problem in our criminal justice system of essentially eliminating the *mens rea* component from any sexual assault case, as long as it is proven that somebody was essentially engaged in sex that they then say was non-consensual.

The burden shifts to the defence to show that there was actual consent, and they can't say they thought she was consenting unless they have proof that he or she was consenting to the act. That's significantly concerning because it either eliminates the ability of individuals who are innocent to raise their innocence or to raise that issue. It's also completely out of step with the realities of human sexual interaction, which are dynamic, which are not normal.... Most people when they are engaging in sexual situations are not asking if you would like to do this, with the response being, yes, they would, and then creating a record of that, so it's going to create practical hurdles for the defence that are going to be impossible to meet in the trial process.

My other main concern with this legislation is the manner in which it's going to enhance trial delays. In particular, this is going to disproportionately affect small communities and circuit courts where these cases are often more troubling because they affect the community at large.

Because of the way the applications to introduce the records that the defence intends to rely upon have to be made, it requires the seizing of a judge, who then has to come back and hear the subsequent application after deciding the written application, and then because they hear factual issues, may well become seized on the trial itself. That's going to lead to extreme problems for courthouses across this country, but most particularly in rural communities, which are understaffed, have fewer judicial resources, and have fewer judges, or sometimes only one judge. It's going to make it practically impossible for those cases to proceed in a timely fashion. It's also going to detract from other cases taking place in those courthouses, whatever they may be, and it's going to lead to delays in those cases because the judicial resources are going to be taken up dealing with all these pretrial applications with a seized judge who's now required to decide this particular issue.

One amendment I would suggest if this portion of the bill is passed is to allow those applications to be made before any judge. The judge who decides the written application shouldn't necessarily have to be the judge who then decides the in-person hearing, and shouldn't necessarily have to be the trial judge. That will allow for easier scheduling, particularly for communities affected by circuit courts where you might not have the judge returning for another six or eight months, and it then might not be the same judge.

I'll turn it over to my colleague, Ms. Leamon, to add her comments.

● (1635)

Ms. Sarah Leamon (Associate Lawyer, Acumen Law Corporation): As my colleague Ms. Lee has stated, the problems with this bill are numerous, and while we all accept the seriousness of sex assault and the effect it has on our communities, this bill relies on the mistaken assumption that amendments to the Criminal Code will somehow significantly solve the problem.

It is misguided in that it seeks to solve a social problem that cannot be remedied through the criminal justice system alone. Not only will the rights of the accused person be unduly compromised, but it will also, in my view, have some significant issues with respect to the rights of complainants. That's particularly so for complainants from marginalized and disadvantaged backgrounds.

The amendment that seeks to allow a complainant to access counsel raises significant concerns in this regard. Without answers as to how such counsel will be provided for, access to counsel can be compromised when complainants do not have the monetary resources to secure such counsel. It has the effect of creating a two-tier system, in a sense, for sex assault cases. Complainants who can afford the services of a lawyer will receive the best representation, while those without it will be left in the cold. That's made all the more concerning by the fact that there is a relationship between sexual victimization and marginalization.

In my view, it's also concerning when we consider that this exceptional measure is only extended to complainants in sex assault cases and not any others. If we consider, for example, the very complex and difficult circumstances that are often involved in domestic assault allegations, for instance, it makes no sense to me that a complainant in a domestic assault case would not be afforded the same kinds of resources as one who's involved in a sex assault case solely on the basis of those allegations. It, again, has the effect of creating essentially a two-tier system within our criminal justice system.

There are significant concerns, as well, about how public funding could potentially pay for access to counsel if this is going to be provided through the public purse. We already have very serious concerns with legal aid. It is chronically underfunded, and without increasing funding to legal aid, I don't see how it's possible to fund further access to counsel for complainants in sex assault cases. The practical result would be that if we don't increase funding to legal aid first, but provide public funding for counsel for complainants of sex assault cases, we could have an accused person who ends up either unrepresented or under-represented, while the complainant is represented by their own counsel and also has crown, as well.

Complainants' access to counsel is also further likely to contribute to delays. In my view, it will also frustrate the role of crown counsel in making their case. It could lead to an increase in stays, mistrials, and delay to access of justice on a whole. In my view, it is contrary to the objectives that are achieved in this bill.

In my view, it would be amiss not to consider how restorative justice programs may better fit the needs of this community in terms of dealing with a very serious social problem of sex assault. Our brief does go through one of those programs, RESTORE, at length, so I won't discuss that any further now due to the limited time.

I'd also like to very quickly touch on the eradication of these so-called “zombie laws”. In my view, this is in line and consistent with modernizing our Criminal Code with principles of clarity and consistency.

With respect to section 176, again this is covered by more general application sections of the code, and crimes motivated by religious intolerance will be treated as aggravated in any event. If this is to remain, then I would suggest that we do expand the wording to be more inclusive and again to expand beyond “clergyman” and include any kind of religious leader, and that is keeping in line, of course, again, with Canadian values of multiculturalism and inclusivity.

Thank you.

● (1640)

The Chair: Thank you very much.

We will move to Mr. Spratt.

Mr. Michael Spratt (Lawyer, Abergel Goldstein and Partners, As an Individual): Thank you very much for the opportunity to appear before you and make submissions on this important bill.

Bill C-51 seeks to amend the Criminal Code to remove or repeal provisions that have been ruled unconstitutional or that raise issues with the Canadian Charter of Rights and Freedoms, as well as provisions that are obsolete or redundant.

It also modifies provisions in the Criminal Code relating to sexual assault, to clarify their application and to provide a procedure for the admissibility of records when they're in the possession of an accused person.

I'm going to do something different and start with some positive things, because there are some positive aspects of this bill.

Hon. Rob Nicholson: That's allowed here in this committee.

Mr. Michael Spratt: That's great. It's going to be the first time.

One of those positive aspects is the removal of reverse onus provisions. A fundamental principle of our justice system is that the crown and the state must prove all elements of the offence beyond a reasonable doubt. Reverse onus provisions have the effect of imposing legal burdens on an accused person. Presumptions of those types, a reversal of the burden like that, can conflict with the Canadian Charter of Rights and Freedoms and the constitutional right to be presumed innocent until proven guilty. Removing those reverse onus provisions is good, but practically speaking, that's pretty low-hanging fruit. It's not something that comes up on a daily basis, and it's not something that is going to change too much in our court.

The repeal of outdated offences, similarly, is a good thing. The Criminal Code should be a simple document. It should be a general document that we can apply to specific situations. We are all, after all, presumed to know the law. The more complex and, literally, weighty the Criminal Code becomes, the more mistakes will be made by members of the public, judges, and triers of facts. Offences like alarming Her Majesty, possessing crime comic books, or disrupting religious services are simply unnecessary and add to the complexity that ought to be avoided.

Any harm caused by those activities—for example, disrupting a religious service—is covered by other sections of the Criminal Code: general public disturbance sections, harassment sections, and sections dealing with threats or assaults. Of course, as my colleague said, any actions that are motivated by hate, prejudice, or extreme ideology can be adequately dealt with as an aggravating factor on sentencing, and they already are. The only people who are really upset about removing those zombie laws and outdated laws are law professors, who are going to have one less funny story to tell their students about outdated and absurd Criminal Code sections. It's good that those are being repealed.

This bill doesn't repeal all outdated or unconstitutional sections, nor does Bill C-39, which I'm sure this committee will be dealing with as well. For example, the unconstitutional mandatory minimum sentences, which have been found to violate the charter at various courts of appeal, and by the Supreme Court in the case of Nur, are left untouched by both of those bills. If we are really serious about taking out sections that have been found to be unconstitutional, there is no principled reason not to include those sections as well. The bill should be amended to include that. That's a glaring omission that should be corrected.

The other aspect of this bill is about sexual assault. It codifies some existing law with respect to sexual assault. I don't see too much of a problem with that. Too often, common law developments are hidden from the public. You have to have a subscription to CanLII or Quicklaw, or to be following a case, to actually see those developments in court. I think it's a good thing to codify some of those sections. It would be really good if we had a law reform commission again, which could take a broad look at our Criminal Code.

For example, the Supreme Court has made it clear that an unconscious person can't consent to sexual activity. That's the law. It's common sense, but it's also currently the law. Bill C-51 doesn't change that, but it makes it clear, and I don't think anyone could be faulted for that. It's a good thing as well.

One of the changes in this bill is unlike all the others, and that is the process for reverse disclosure—in my view, an unconstitutional expansion of the Mills regime with respect to documents in the possession of an accused person. It's a major fault of this bill. There are three issues with that. The first is the reverse disclosure problems. The second is overbreadth issues, which was touched upon by the previous panel, and the third is the impact that this would have on access to justice and to trial delays in our courts.

Dealing with the reverse disclosure aspect.... An accused has to bring this application within 60 days of their trial, and they have to disclose on the record, as part of that application, not only the record and the detailed particulars of the record and the information that they want to adduce, but also their trial strategy, why that's important. This is all prior to hearing the crown's case, prior to the complainant testifying. That's unprecedented in Canadian law. It infringes upon the right to silence.

The Supreme Court has confirmed that disclosure flows from the state to the accused. In the context of the adversarial system, the defence need not disclose any material to the crown. This isn't a civil system, after all; life, liberty, and security of the person are at stake.

● (1645)

This change also impacts the right to a full answer and defence in a fair trial. It undermines the process of cross-examination, which is a crucible for the discovery of truth. The Supreme Court of Canada has said that Canadian courts, as in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenets of our justice system that an innocent person must not be convicted. It follows from this that the prejudice must be substantially outweighed by the value of the evidence before courts can interfere. We cannot assume in our courts that all complainants are honest and credible. We can hashtag and believe all survivors outside of court, but not in court. That's a recipe for wrongful conviction. That is the fundamental tension with this process of reverse disclosure.

What we have to realize is that when the defence discloses this information, if a complainant is not telling the truth, if they are lying —and that happens—then you're disclosing that information to a liar. You're disclosing the information that could prove they're lying to a liar before they testify in court, so that they have time to change their stories and they have time to shade the truth. That is not the crucible of cross-examination that will result in accurate findings. It's a legislative woodshed for false allegations.

You can think of examples. For instance, a complainant who says that they were stabbed in the past and has the scars and shows them to the police, but the accused has lawfully obtained medical records showing that the scars came from surgery; or the example of a text message that the complainant sends to a third party, and that message is then forwarded to the accused and it is damning evidence that the complainant is not telling the truth. It's not in the interests of justice to disclose that information in advance.

I'd be happy to answer any questions about the other issues, with respect to trial delays and the like, but I would like to echo what Ms. Davies said in the previous panel, that this is also overbroad. There's a case before the Supreme Court right now touching on this issue, and for anyone who says that text messages aren't covered, we can turn to the B.C. Court of Appeal, which said they probably are, so we might have answers soon.

But in terms of breadth, I think this committee should take a hard look at that. I have some amendments that I can suggest when I'm questioned.

● (1650)

The Chair: Thank you very much.

We'll move to the Criminal Lawyers' Association, with Ms. Savard.

Ms. Megan Savard (Lawyer, Criminal Lawyers' Association): Good afternoon. It's an honour to speak before the committee for the first time.

I am a criminal lawyer, as is my co-presenter, Mr. Anthony Moustacalis. Mr. Moustacalis is the president of the Criminal Lawyers' Association. I am just a member. My practice is largely focused on sexual offence cases. I act for defendants. I also provide legal advice to complainants. Mr. Moustacalis in his past life was a crown attorney who focused on sexual prosecutions and child abuse cases.

The organization's history and expertise in this area is set out in my written brief, so I won't go into it. I would like to talk about some practical implications of the proposed procedural amendments to sexual offence law.

Before I do that, I want to echo what Ms. Davies said. It is absolutely within Parliament's power—and it's Parliament's job—to limit what defence lawyers can do. I'm not here to whine about tools being taken out of the defendant's tool box. I am here to say that you should only take an important tool away—a tool that, as Mr. Spratt said, strikes right at the heart of the right to silence and the right to full answer and defence—if you're going to do so with something that meaningfully protects the rights of complainants, which is the stated purpose of this bill.

I want to talk about how the proposed amendments not only are neutral in that respect, in that the current law, properly applied, provides all the protections that these amendments would provide, but are also harmful in a way that's been touched on by some members of the panel.

The first of the proposed amendments that I would like to focus on is the requirement that defence counsel apply to a court for a prior determination of admissibility for records that they intend to use. That's been addressed by other members of this panel and the previously panel. The second thing I'd like to talk about is the new requirement or the new rule that complainants would have a participatory right and a right to counsel for the first time ever in decisions about admissibility. They have the right already in third-party production applications where they have something to bring to the table as the third party, but this would be the first time in criminal law that a third party would be allowed to participate in evidentiary decision-making in a proceeding that has significant liberty consequences to the accused.

I'd like to start with what Mr. Spratt called the defence disclosure obligation, or the requirement that the defence have the admissibility of its materials vetted by the trial judge in advance of the trial.

My first practical request is that the committee look at clarifying exactly what type of use would trigger the application of this procedural mechanism because there are a number of different ways that we use records in our possession when we're preparing our defence. I'll use an example. Let's say we have a sex assault case where identity is an issue and I have a medical record showing that the complainant is legally blind.

First, I might use that record only to inform my preparation for the defence. I might draft a line of cross-examination in which I put to the complainant that they can't see and I expect them to agree. It's three steps back from admitting the document, but there's no question that I'm using the information in order to prepare my defence.

Secondly, I might use the record itself without ever applying or intending to admit it into evidence. For example, if the complainant doesn't remember they're legally blind, I might just silently put the document before them after they've had a chance to put on their glasses and ask them if that refreshes their memory about whether or not they have trouble seeing. No one ever needs to know what that record is, but I'm definitely using the document.

The third way, the way that seems to be captured by the proposed section 278.92, is introducing the record itself into evidence. Only that third scenario clearly triggers the new admissibility regime, but if Parliament's intent is in fact to go beyond regulating the admission of records to regulate their use by defence counsel in formulating theory and developing lines of cross-examination, then that should be clearly stated. Right now the word “adduce” is used in proposed section 278.92, which has a very unclear legal meaning. That provision should be clarified so that the scope of what triggers the application is clear.

● (1655)

My submission suggests that it should be restricted to scenarios where the defence intends to introduce the record itself into evidence. Anything further is, as Ms. Davies put it, an overbroad reach that goes beyond protecting complainants or protecting privacy interests. If I show a document to the witness, and no one needs to know what it is, and all it's doing is refreshing their memory, I should be entitled to do that without having to jump through the procedural hoops of having its admissibility assessed when no one wants it admitted anyway.

If I am going to ask a complainant a question about their eyesight, and I expect them to answer honestly—why wouldn't they?—then I shouldn't need to bring a pretrial application saying, “By the way, here's where that question came from, and here are all the other questions I might ask, and here's my thinking underlying those things as well”. It's really, I would suggest, the third scenario, the scenario where you're introducing a record itself into evidence or there's a risk that might happen, where the pretrial application process should be triggered. That would be my first suggestion for an amendment that could narrow the scope of the bill.

My second request on behalf of the Criminal Lawyers' Association is that the proposed section 278.92 pretrial procedure be reimagined as a mid-trial application. What I mean by that is, make it less complicated, and make it the kind of admissibility ruling that can be dealt with mid-trial, because experience shows us that this is when most of these applications are going to arise.

Let me make two points about that.

First is that nobody knows what the evidence at a criminal trial is going to be until the evidence comes out. I have no reason to think that a complainant is going to lie about being legally blind in a criminal trial. The first time that's likely to come out is in the middle of the evidence. Whether it's a 60-day notice requirement or a seven-day notice requirement, I can't possibly know in advance that my record about her eyesight is going to become relevant. It's the middle of the trial when that kind of issue is likely to crystalize.

The second point I would make is that it's at that point when the trial judge, the person who has to decide these applications, has the maximum amount of information about what the evidence's probative value is, what its prejudicial effect is, and what its legal relevance is. The test for admitting evidence, when the defence seeks to put it in, is “does its probative value exceed its prejudicial effect?” To make that decision, the trial judge should know as much as possible about what the live issues are and how the record might be used in the trial, which can't be done in a effective way on a pretrial application. If you make defence counsel do it, and we try to guess at what might happen, and then the evidence comes out differently, all we're going to do is renew our application in the middle of trial, and it's still a mid-trial application.

What amendment would accommodate that reality, when you're talking in real life about the kind of application that's going to come up in the middle of a trial and ideally should be dealt with in an afternoon or a couple of days?

Let's turn to what the law already offers. Here I would echo what Mr. Spratt has to say about the Criminal Code being a tool for communicating a message for educating people: judges, prosecutors, and defence lawyers. What you can do is codify the existing common law rules for dealing with this kind of mid-trial voir dire instead of creating a whole new procedure. I've set out in my speaking notes what the current law does. I would suggest that be codified in the Criminal Code as a way of sending a message, number one, to complainants that the law protects them, and number two, to defence lawyers that, by the way, you and other parties to the trial have a job to do in making sure that privacy isn't invaded needlessly.

I won't go into the steps of that because they are set out in my submissions, but it's simple. Counsel raises the issue, the witness is excluded, the trial judge hears submissions, the trial judge gets to see the document and hear about the proposed line of cross, and the trial judge makes a ruling. Defence counsel and crown have an ethical obligation to raise the issue if it's likely to come up.

● (1700)

To the extent that the current law is not protecting complainants, that is a failure in our education as defence lawyers and in the crowns' education as prosecutors. By the way, crowns actually have a positive duty to protect complainant privacy as part of their quasi-judicial role as quasi-ministers of justice. If you educate us, allocate funding to making sure we know what the rules are and set those rules out in the Criminal Code. That will go a long way to preserving the goals that you stated are the objectives of the bill without removing the flexibility that we need as defence lawyers to stop trials from grinding to a halt in the middle of the evidence.

I'm out of time, so I'm happy to answer further questions about that. Thanks again for this opportunity.

The Chair: Thank you very much.

Ms. Silverberg.

Ms. Christine Silverberg (Barrister and Solicitor, Chief of Police (Retired), As an Individual): Thank you. I am very glad to have all of these criminal defence lawyers here who have articulated some of the issues so well. The comments that I have reflect what my colleagues have already said.

There is a different issue that I want to address, but let me say at the outset that, viewed as a whole, Bill C-51 should be commended as an effort to modernize the Criminal Code. The government should be applauded for that, for taking the initiative to develop a legal framework, imperfect as it is, to ensure that our communities are protected and victims are treated with respect and so on. It's a laudable goal.

I want to first of all address the so-called “rape shield” provisions. I agree with my colleagues that it upsets the delicate balance between the rights of the accused and those of the victims. These rights are at the very basis of our rule of law. I cannot support the proposed amendments that create what are described as “reverse disclosure” obligations, requiring, as Megan has said, the provision of certain records at a juncture that wouldn't be appropriate, or at all.

Causing the accused to make disclosure may seem at first blush to be a laudable approach, but this disclosure will be tendered during an application where the criteria that are actually set out in the bill for judicial discretion read more like a social policy framework. Those criteria suffer from drafting so broad that, in my view, they are actually rendered as meaningless platitudes. I have a really hard time going through that list of criteria while saying to myself, “This is going to really extend the length of trials while these issues are all being considered.”

What is the real consequence? The real consequence is that the victim intentionally or unintentionally governs her own evidence based on these known records. Whatever happened to testing evidence through effective cross-examination?

I practise civil litigation. I don't practise criminal law other than in parallel proceedings. I'm well used to the relevant and material disclosure by both parties, but the civil law, as has been said, is fundamentally different from the criminal law. What is it that we are trying to fix, exactly? Is it inadequate or under-resourced police investigations, or overworked crown prosecutors?

So far as I understand it, these provisions were made by the justice department without any consultation with major stakeholders such as LEAF or the Barbra Schlifer Clinic. Many stakeholders feel blindsided by having these kinds of substantive changes to sexual assault provisions sandwiched in the middle of a bill that has as a primary goal the cleaning up of the Criminal Code. I encourage the committee to rectify that anomaly by integrating the input of these valuable stakeholders before proceeding further.

Further, these so-called “rape shield” provisions—and frankly I'm old enough to know that's a pretty anachronistic term—would likely not survive a charter challenge. I won't go into why because it's already been set out. If we start to require this reverse disclosure for sexual assault offences but not for other egregious offences, we begin to erode the basic principles of our criminal justice system. These unprecedented provisions on the disclosure may inadvertently lead to wrongful convictions.

The stakes are high for both accused and victims. For both parties there is a high risk of social condemnation and stigmatization. Yes, we must support the rights of sexual assault victims who suffer untold consequences. But in my view, this must not be at the expense of the fundamental rights of the accused, or by weakening the social fabric because of a lack of forethought. While protecting the rights of both victims and accused may pose substantial challenges, it is, in my view, a challenge that this government should and can embrace. For all of these reasons, I cannot support the proposed reverse disclosure amendments to the sexual assault provisions.

● (1705)

I want to turn briefly to policy frameworks, leadership, and capacity.

In my view, a significant failure in enforcing sanctions against sexual assault is not a failure of the law. Rather, the failure is in the capacities of, implementation by, and performance standards of both the police and prosecutorial branches, and dare I say, the lack of particular knowledge and training of the judiciary.

As I'm sure is well known, this was aptly illustrated by the Ghomeshi trial where, given the evidence that was later produced in the defence in cross-examination, the crown failed to adequately prepare its case and probe the likely evidence regarding three key witnesses, which led to a finding by the trial judge that the witnesses were not credible, and indeed, were “deceptive and manipulative”. Was there a systemic failure in the crown's hands, or was the crown handicapped by lack of solid police work in gathering the evidence and vetting these witnesses?

This is not only a Ghomeshi issue. We have all witnessed the rather startling comments of judges across the country in sexual assault trials. We have specialized training, protocols, and required knowledge for other types of offences, such as domestic assault, and even, indeed, for bankruptcy, economic crime, and organized crime matters, among others. Surely specialized training and knowledge should be required for police, crown prosecutors, and the judiciary dealing with sexual assault proceedings.

After almost 30 years in policing, after serving as chief of police of a major city in this country and after some 15 or 16 years in the study and practice of law, there are some things that I know about. I know that there must be a broader examination of organizational systems, and structure, and leadership, if we are to avoid a crisis of social values, particularly in this area.

The fact of the matter, in my view, is that changing a law doesn't always get us where we want to be. We have to look at the supports that make our laws work for the benefit of all. We also need to make more resources available to support crown prosecutors. In my view, this is a major, though not only, issue of capacity. While acknowledging that the crown is not prosecuting on behalf of a sexual assault complainant per se, but rather on behalf of the state, we still have to allocate sufficient funds, training, and other supports to make sure that sexual assault victims are not revictimized by the system. We have long advocated this in Canada on behalf of domestic assault victims. The same should be done for victims of sexual assault.

Laws must not only be responsive and meaningful, but be effective. The proposed revision to the sexual assault laws that provide for a complainant's right to legal counsel is the first step. What is required, however, is more funding—government, quasi-government, and institutional—to be put in place to allow for, by way of example, reasonable and appropriate legal aid or alternative funding for this kind of representation.

But this is not simply a matter of funding. Sexual assault victims must be supported in other ways as well. For example, such victims may need counselling and other mental health services, as well as more knowledge of how the system works. We need a collaboration between the many professionals supporting sexual assault victims, federal and provincial authorities, and between the public and the private sector, all to create a sustaining attitude to support victims of sexual assault. Thus, a full infrastructure of support should be provided for sexual assault victims in addition to the proposed independent legal representation.

I cannot imagine much worse than putting a law in place that doesn't have the grounding required to make it work for all parties. This is not about or should not be about feel-good law. It is about getting down to the grassroots to meet the needs of those who are truly victimized, children or adult.

I want to very briefly touch on the unconscious person business. With specific reference to that amendment, it purports to clarify that an unconscious person cannot provide consent. I agree with the position submitted by LEAF that such a provision is not necessary, as this principle is well established in our common law.

● (1710)

The introduction of such a statutory section might create a bright line, short of which a lack of consent might not be found. Determination of whether consent has been given is a matter for the trial judge, and his or her discretion shouldn't be shackled in that manner, in my view.

There are numerous circumstances that I can think of beyond unconsciousness, and while one might say we covered that off in the drafting of the bill, I just don't know why it's there at all. I don't think it needs to be there. I think that issue of consent should be left to the court, where the facts can be considered.

That's all I'm going to say, and I'm happy to answer questions.

The Chair: Thank you very much.

Each of the witnesses was very helpful. We'll start with Mr. Cooper.

Go ahead.

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

Thank you to the witnesses.

I'm going to direct my first question to Ms. Savard or Mr. Moustacalis. I agree with Mr. Spratt when he stated that the reverse disclosure requirements for defence could potentially tip their hand to a liar who would then be given an opportunity, as a result of sitting in and getting access to those records and having an understanding of the defence's litigation strategy, to explain away inconsistencies and contradictions.

There is another component to this, which is that of course for these section 276 applications, the complainant would be entitled to counsel. It raises the question therefore that not only would these reverse disclosure requirements potentially tip the defence's hand to someone who is not being truthful, but they might also make it much more difficult for a defendant to cross-examine the complainant on the basis of how that complainant prepared in light of the fact that part of that would be subject to solicitor-client privilege.

Ms. Megan Savard: That's entirely correct. It is a point that's made in the Criminal Lawyers' Association's brief. Right now, section 276 applications that require the defence to vet questions about other sexual activity with the trial judge before trial are a limited exception to the rule that the defence does not have to disclose its case strategy. That was something Parliament was allowed to do. They did it, but unsurprisingly, the history of that provision has always kind of walked a fine line between constitutionality and unconstitutionality because it is so unique.

One of the things that I would say make it constitutional now is that it is the crown that can share the defence's case strategy with the complainant, and the crown that solicits the complainant's input on a section 276 application. None of those discussions is subject to privilege. There's a police officer present, and if I want to explore the degree to which a complainant used my section 276 materials to prepare, I can ask him or her about it in cross-examination.

If the complainant has his or her own counsel, that's no longer something I can do. We will never know. It will frustrate the search for truth, whether the complainant has in fact prepared in an ethical way just reminding themselves of things they forgot or if they prepared in a more woodshedding kind of way, trying to tailor their evidence to material that exists. That's not something we can look into if the complainant is represented.

● (1715)

Mr. Anthony Moustacalis (President, Criminal Lawyers' Association): The only thing I would add is that this could be exacerbated by the proposals to reduce or eliminate preliminary hearings, which would allow for the gathering of some evidence from complainants that could also avoid some of the complications of mid-trial applications. The opportunity that's lost through the potential reduction of preliminary hearings would make this worse.

Mr. Michael Cooper: Thank you.

If any other witness wants to address that point, I'd certainly provide an opportunity.

Mr. Michael Spratt: I know the committee is looking for helpful suggestions to make this bill better. Assuming that this is the final version that passes, there is one thing that can be done to alleviate some of those concerns. If this application is brought mid-trial, and if there are provisions to have an in-camera hearing at which there is statutorily mandated non-disclosure of that information by the crown or the state to the complainant, a trial judge would still, much as under the current section 276 applications, be able to vet those questions ahead of time.

The defence counsel will know to a better extent what is relevant and what is not relevant, because it won't be brought so far in advance, and some of those concerns we've raised about tailoring of evidence may not arise because that information will not be disclosed to the complainant.

Mr. Michael Cooper: Maybe I'll direct this to you, Mr. Spratt, because you did raise it in your evidence. It's your belief that the reverse disclosure requirements are unconstitutional. The government has said in their charter statement that this is really no different from Mills. Could you perhaps comment on that?

Mr. Michael Spratt: Yes. It's interesting to look at the charter statement, because there's not very much detail there.

It's very different from Mills, because of course in Mills it's the defence looking for information or bringing an application to get information. Mills is a protection from the complainant against the coercive power of a subpoena, that subpoena power.

Also, of course, there are different stages involved in Mills, and none necessarily involve the type of disclosure that would be engaged by the defence, particularly if you look at some types of materials that the defence may already have in their possession that might be distinguishable from Mills. It may not be looking for medical records or things that are the subject of Mills, but it may be other statements the complainant made to other people that were passed on to the accused.

The subject matter is different. The purpose is different. None of that is really detailed in the charter statement.

Ms. Kyla Lee: If I could jump in on that as well, one concern that arises there, too, as expressed by the previous panel, is this issue that the disclosure obligation is for a record that's going to be related to any witness, which arguably includes the accused themselves.

You can read that in light of the amendment to the section on mistaken belief and consent, for example, and take the example of a sex tape. If somebody has a sex tape showing active consent to the act that is alleged to be non-consensual, they then have to disclose that and go through this whole application procedure, even though it's something in their possession that relates to them and that the accused would bring up as part of their testimony. When you look at the interplay between these sections, it raises really significant problems.

It's very different from Mills. It's very different from what was being contemplated, because it's not, as Mr. Spratt says, about looking for information. It's now about a proactive obligation on the defence to disclose what, in the example I've provided, could be the very defence to the allegation.

The Chair: Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, Mr. Chair.

Thanks very much to all of you for being here. I enjoyed your presentations.

If I could, I'll start with Acumen Law first. You indicated—and I can't remember if it was you, Ms. Leamon, or you, Ms. Lee, who said it—that this bill essentially would eliminate the mistaken belief in consent, but as far as I understand it, it codifies Ewanchuk, which basically eliminates the mistaken belief in consent as far as a mistaken belief in the law goes, but not necessarily a mistaken belief in the facts.

The facts would still allow somebody to raise a reasonable and honest belief in mistaken consent if the facts bore that out, but not insomuch as believing that, for example, the person consented even though she was unconscious, which Ewanchuk says is a mistake of law. I'd like your comment on that, please.

● (1720)

Ms. Kyla Lee: I think this is very different from Ewanchuk, because it relies on an absence of evidence of actual consent. The way the wording is provided is where “there is no evidence” of actual consent, either “by words” or by actions on the part of the person who would be giving the consent.

To rely on the absence of evidence as supportive of the fact that consent wasn't obtained, and as preventative of arguing the issue of mistaken belief in consent, puts an impossible hurdle in front of the defence in these types of situations, because it's watering it down to an issue of just the facts, and if the facts aren't even disclosed by the complainant.... While the crown has a proactive obligation to disclose all of the evidence in their possession, the complainant doesn't.

We saw this in Ghomeshi. We see this in cases all the time where there's information the complainants don't reveal to the crown that comes up in the course of trial.

If you say you can rely on “no evidence” to substantiate essentially a conviction, then you're allowing complainants to get away with not disclosing things that might undermine the validity of their complaint, and hamstringing the crown into a position of not being able to disclose a case because there's no obligation on the complainant to disclose it to the crown, to then disclose it to the defence. I think the way it's worded—and perhaps it's an issue of tweaking the wording—makes it an issue about the factual circumstances, not the legal circumstances.

Mr. Colin Fraser: Okay. That's interesting. For the sake of time, I will have to leave it there, but I appreciate your thoughts.

I will turn to you, Ms. Savard. You talked about the fact that the application the accused could bring for adducing evidence of a complainant's personal records would have to happen pre-trial. Maybe I'm not understanding it, but in proposed subsection 278.93 (4) I see the seven-day notice requirement, but it doesn't say anything about it having to be before trial, and in fact it gives the judge the ability to do it for a shorter interval if deemed appropriate in the circumstance.

Wouldn't that allow it to happen during a trial? If not, why not?

Ms. Megan Savard: It would. I actually don't have any problem with that provision in and of itself apart from the fact that most sexual offence prosecutions don't take seven days, so in most cases you would be taking advantage of the short turnaround if you want to keep the rest of your scheduled trial dates.

Mr. Colin Fraser: But that would assume the judge would take that.... Obviously, if it's a shorter period, the judge would be able to abridge it for that purpose.

Ms. Megan Savard: Yes, that's exactly right. The concern the association has is with the rest of the procedural mechanisms. For example, if this arises in a mid-trial application, there's actually a requirement that the complainant have the opportunity to be represented and have standing on these applications as well.

That means the complainant, who up until now has had no reason to have a lawyer, has to go off, figure out if they have funding, secure the funding if they have it—hiring a lawyer is expensive—and go out and retain a lawyer. That lawyer needs time to prepare to address the issue that's arisen because now they have standing and are entitled to make submissions. Then you have to get that lawyer's availability because they are probably also dealing with a busy criminal practice. Then all three lawyers and the assigned trial judge have to get back into a courthouse where, as this committee knows from dealing with recent developments in the law of delay, often requires an eight- or 10-month wait, sometimes shorter if you're jumping up against the Jordan ceiling, but not necessarily.

It's not the notice requirement that is in itself problematic. It's the practical implications of the procedure as currently worded.

Mr. Colin Fraser: Okay.

Can you help me understand? Mr. Spratt, you've alluded to this as well with the 60-day notice period, but as I understand it, that's for notice for production of documents, not notice to intend to adduce certain evidence.

Isn't there a distinct difference there?

Mr. Michael Spratt: Megan's quite right on this point. There's always discretion for the judges to abridge any of the notice requirements, and that happens quite routinely. Already questions about prior sexual history may only become relevant in the middle of the trial, and that's happened on a few occasions when I've been counsel, and they are argued as a mid-trial ruling.

That's quite right. Every time this procedure is invoked, and it will be invoked every time, it is going to result in a delay of six months or more. In Ottawa, we're looking at eight to 10 months to secure a date. That's the reality.

That is going to be the de facto delay occasioned by each occasion. I think you also have to take into consideration what Ms. Leamon has said, and that is that lawyers are expensive, and there's going to be a difference in justice that complainants can receive, if that is the purpose here, based on whether they can afford a lawyer or not.

Provincial legal aid plans may help fund that. There's a limited pot of money there, and that's going to come out of money that can go to accused people to assist in their defence. What you actually are going to be seeing here probably is individuals who are accused who don't have a lawyer, or maybe have a lawyer appointed to ask the complainant questions for that limited purpose, and complainants who will receive funding on a good day, or on a bad day, if they are impoverished and marginalized, maybe not. Either way, you're looking at a delay of six to eight months from the date this application is brought.

● (1725)

Mr. Colin Fraser: Is that my time? Okay.

Thank you.

The Chair: We'll have another chance at the end of the first round.

Mr. Johns.

Mr. Gord Johns: First, thank you to all the witnesses for your important testimony.

We know Bill C-51 seeks to remove unconstitutional provisions from the Criminal Code.

I'll start with Mr. Spratt. Do you believe it goes far enough? I know there was no mention of removing minimum sentence provisions. Could you please speak further to that?

Mr. Michael Spratt: We know that the Supreme Court declared some minimum sentences of no force and effect in a case called Nur. Those remain in the Criminal Code despite the fact that they're unconstitutional and don't apply, much like the provisions in the Travis Vader case that the judge relied upon. Those were of no force and effect, and they were in the Criminal Code. We saw the mischief that caused. They're not touched here.

The other things we don't see are the other decisions from appellate courts across the country that have found constitutional infirmities with other sections of the code. They're not in there. Perhaps the reason is that there hasn't been a final determination of the Supreme Court. Only that one province has....

We know that's not the case, however, for the minimum sentence that was at the heart of the Nur case. That is a glaring omission from this bill. If we're truly going to remove unconstitutional sections that have been found to be unconstitutional, finally, then we should actually remove them all.

Mr. Gord Johns: Ms. Lee or Ms. Leamon, would you like to comment?

Ms. Sarah Leamon: I would echo what Mr. Spratt said. Again, if the purpose of this bill is to provide consistency and clarity with respect to our criminal law, and to ensure that it is being applied in a consistent manner from jurisdiction to jurisdiction, then certainly we would want to see those portions of the code removed. There's no reason not to remove them.

Mr. Gord Johns: Ms. Lee, do you have a comment?

Ms. Kyla Lee: From a practical perspective of being a defence lawyer and advising your client, let's say a case comes to you on something that you're not super familiar with and you resort to the Criminal Code to try to give an answer really quickly to somebody who's saying "What am I looking at here?" If you're not up to date on what has been declared unconstitutional in every single section of the code, and the code is not being cleaned up to keep in line with what the Supreme Court has ruled, then we're going to run into situations where bad legal advice is given to people. They'll then make decisions about how to conduct their trials, or who to hire as their lawyers, based on that bad legal advice that is not up to date.

I've encountered situations—I've seen them happen in court—where people are given illegal sentences, or where prosecutors who aren't aware of findings of unconstitutionality or the elimination of certain sentencing provisions take a position on sentencing that then leads to a trial taking longer, or leads to a plea being entered, God forbid, in circumstances where perhaps the resolution agreed to between crown and defence isn't available any longer. If the code is not being amended to keep up with that, then you'll have people getting advice that will not be the correct advice.

No one defence lawyer can memorize every single section of the code and follow every single case that comes out to know what's unconstitutional. It's impossible for us—I swear.

The Chair: I actually think Michael can.

Hon. Rob Nicholson: Yes, I think he can.

Voices: Oh, oh!

The Chair: Sorry. Go ahead, Mr. Johns.

● (1730)

Mr. Gord Johns: Mr. Spratt, you touched on the reverse disclosure provisions for sexual assault. Can you please elaborate on this section of the bill and expand on what you talked about earlier?

Mr. Michael Spratt: Besides the fundamental shift from the state disclosing information to the defence providing this information, I think there might be some room to clarify in this bill what exactly is meant through that disclosure. What does it mean when we talk about "detailed particulars"? Does that mean, if we're relying on text message communications, just the date and the time and the general subject matter? Does it mean that the specific details of those text messages need to be communicated?

Above and beyond that, I think there needs to be some definition about what we mean when we say a "record" that there's some privacy interest in. Unless you want to leave it to the Supreme Court or to judges to make that law for you, I think it might be good to demarcate exactly what we're talking about. If there are joint insurance documents, if there are joint bills, if there is information that is lawfully held but someone still might have a residual privacy interest in, what exactly is included and what's not included? There's a lack of specificity there that makes it, I think, very dangerous. It's going to lead to litigation. It's going to lead to disparate results from various courts, and it's going to lead to a lot of appeal lawyers making a lot of arguments about what exactly is meant here.

The Chair: Thank you very much.

Mr. McKinnon.

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

In regard to proposed subsection 278.92(1) which seems to be the subject of the bulk of this discussion, Ms. Davies from the previous panel suggested a number of changes that could be made to that provision. One of them was that "no record relating to a complainant or a witness" could be changed to "no record relating to a complainant", dropping the words "or a witness". Would that go any distance towards making you happier with the provision?

I'll start with Ms. Savard please.

Ms. Megan Savard: The short answer is yes, but it wouldn't go far enough. You would also have to clarify the use to which defence counsel proposed to put the record in order to trigger the application. The first step is clarifying what you mean by a "record". Narrowing it to the complainant is one step, but then it is also necessary to clarify what you mean when you say that defence counsel intending to use this record has to bring an application.

You can narrow it further at that stage by saying that it's only when defence counsel actually wants to put the private record into evidence that these applications are triggered. This would remove a lot of ambiguity about other ways in which we sometimes rely on material in our possession to prepare our defences.

Mr. Ron McKinnon: Would anyone else like to comment on this?

Ms. Savard, you commented that you had a problem with the word "adduce" in that section, and that you would like to see better language. Instead of "adduce", would you like to see language such as "and which the accused intends to introduce into evidence", or could that whole phrase between the em dashes be removed entirely?

Ms. Megan Savard: I think replacing “adduce” with “intends to introduce into evidence” would clarify, and it would be consistent with the subsequent application, which is all about assessing admissibility. It doesn't seem to make sense to me to go through the hoops of assessing admissibility when all you're doing is relying on the document to prepare a draft cross-examination. You should only be assessing the admissibility of documents that you want to admit.

Mr. Ron McKinnon: Okay.

Going back to Ms. Davies' testimony, she had suggested that the categories of documents should be changed to exclude—I believe she said—documents that should be expected to be already in the possession of or known by the complainant. For example, emails to the complainant or from the complainant should be excluded from this because the crown should already have them or know of them. Would you agree with that?

Ms. Megan Savard: Yes, absolutely.

Mr. Ron McKinnon: With these several small amendments, is this provision salvageable in your view?

● (1735)

Ms. Megan Savard: Almost. I can't promise I wouldn't bring a constitutional challenge.

In my view, the remaining failing that hasn't been addressed by the changes you just went through would be the complexity of these motions. If we can take the three party, the notice requirement, and the separate in-camera hearing, and condense them down into a codification of the common law rules for a mid-trial application, then that, on top of the changes that you all suggest, will go a long way towards minimizing the constitutional problems, the problems for the complainant, and the problems for the administration of justice generally of having these things drag out to potentially unconstitutional lengths.

Mr. Ron McKinnon: Thank you.

My other questions relate to the provision of the right to counsel for a complainant. This pertains, I believe, only to the hearings in relation to the evidence. Several of you expressed concern that this puts a burden on the complainant. I don't see that. I think that right now there is no right to be represented in these hearings, but having the right is not the same as having an obligation to do so.

Ms. Leamon, I think, is looking to comment on that one.

Ms. Sarah Leamon: Yes, Mr. McKinnon, I would love to answer that question.

I can tell you that in addition to my role as a criminal defence lawyer, I also work extensively with marginalized communities in the non-profit sector in Vancouver's Downtown Eastside, so I have very close dealings with many individuals who are highly marginalized. It makes me uncomfortable—not only as a lawyer but as a Canadian citizen and as a human—to think about this two-tier system, whereby a complainant who is privileged, has a good income, has support, perhaps of his or her family, and has all the advantages in life to hire a lawyer, can access counsel, receive legal advice, and get better representation.

That's wonderful, but when you put that into the reality of the world, we have marginalized people who disproportionately fall victim to sexual assault. The mere perception that they aren't going to access the same kind of representation in the judicial system—let alone the practical reality of it—in my view, is enough to deter them from even coming forward, let alone their experience with the system itself, feeling further disenfranchised, further marginalized.

Yes, it is an action, but it's an action that has to be accessible to every complainant. Again, practically speaking, I don't see how we can use the public purse to adequately fund that when we're seeing legal aid programs being so underfunded. I have a lot of problems with how that's going to be implemented, and a lot of concerns about how people who are less advantaged will experience the system.

Mr. Ron McKinnon: I think we have a chicken-and-egg problem here. I can't see legal aid being expanded to support this kind of activity if there is no right to such counsel. It's a question of whether or not you create the right and then bring legal aid on board as the different provinces upgrade their legal aid. Legal aid isn't going to respond unless there's a need for it.

Ms. Sarah Leamon: Even if we can find the public funds to do it, I still feel there would essentially be a two-tier system in place. We have these marginalized people who are now accessing legal aid lawyers. As we know, legal aid lawyers are unfortunately very overworked. Then we have more privileged complainants who are able to access their own private counsel.

Again, this is a situation where there's going to be a two-tier system. We're essentially allowing marginalized people to be further marginalized. There are serious problems about those optics, and also how it's going to play out in people's experience of the justice system. If we're looking to support and help complainants in feeling as though they are having better access to justice, this isn't the way to do it.

Crown counsel is there to assist them, and crown counsel should have better training. I believe Ms. Savard brought that up earlier. This can be properly addressed and properly dealt with through crown counsel. Creating a right for a third-party lawyer not only frustrates the system and frustrates the role of the crown, but also creates a system whereby we have a two-tier system.

● (1740)

The Chair: Thank you very much.

Now, colleagues, we're going to deal with shorter questions. Does anyone have any shorter questions they want to ask this panel?

Mr. Nicholson, and then Mr. Fraser.

Hon. Rob Nicholson: Thank you very much.

With respect to judicial training in this area, as you are probably aware, Rona Ambrose's private member's bill was passed by the House of Commons and apparently is being held up in the Senate. It is directly focused on the whole question of judicial training.

Ms. Leamon and Mr. Spratt, both of you made a point that section 176 is not necessary. Ms. Leamon, you said that more general sections could perhaps be used. Mr Spratt, you said there are public disturbance sections. First of all, just earlier this year, about six blocks from here, a woman was charged under this section for what took place in a church. As much as people's religious rights are one of the fundamental freedoms of this country, is it so unreasonable or so unnecessary to have a specific section of the Criminal Code that protects religious services?

Many people may not be part of any religion but probably would agree that disturbing a religious service is more serious than causing a commotion in an arena, say, or in a meeting somewhere else. What do you think?

Mr. Michael Spratt: That's why it would be viewed as an aggravating factor. A judge, undoubtedly, would view causing a disturbance and interrupting a baptism, a bar mitzvah, or another solemn religious service much differently than he would someone screaming on the corner of a busy street. That is, I submit, the appropriate place where that aggravation would be taken into account. The trade-off is that we have a Criminal Code with that section and other sections, and sections on theft—on theft from a clam bed, on theft of firefighter equipment, on theft of cattle—and then we get into an unwieldy code that has other issues.

I take your point, and I think your point would be of much more moment if there were no other way or no other mechanism in the Criminal Code to address the situation that you spoke of.

Ms. Sarah Leamon: Perhaps I could elaborate very quickly. I agree with Mr. Spratt's submissions on that point, but if section 176 is to remain, I would encourage that it be amended to be more inclusive. Remove that language of “clergyman” and use better language instead.

Hon. Rob Nicholson: It has actually been expanded. I mentioned that even the federal government has expanded the definition in terms of national defence, but thank you for your input.

Ms. Sarah Leamon: Thank you.

The Chair: Thank you very much.

Mr. Fraser.

Mr. Colin Fraser: I have just a quick point.

I just want to go back a moment ago, Ms. Leamon, to your exchange with Mr. McKinnon. I take your point, but we rely on legal aid to represent criminal defendants oftentimes in cases such as this. I don't think it's fair to say that it would create a two-tier system where if a legal aid lawyer were representing a complainant in this case, that would be somehow completely unfair and an affront to our way of thinking of fairness, when many times accused are represented by lawyers who work for legal aid.

I just want your comment on that because I do think it's important to recognize the important work that legal aid performs in our country. I take your point on the issue of resources, but I don't think it's fair to say that it would be a two-tier system and indicate that they would be receiving a lesser service when we rely, of course, on accused people being represented by these people all the time when their liberty is at stake.

Ms. Sarah Leamon: Absolutely, I agree with you, and I do take your point on that. Certainly, my comments are not meant to undermine the hard work that legal aid lawyers do every single day. I certainly don't want to be misconstrued on that point, but an accused person is up against the criminal justice system. That person is up against serious allegations, and when it comes to sexual assault, those are some of the most stigmatizing allegations that are possible to be brought forward. It forecloses numerous opportunities for that person—sometimes even just being accused, let alone being convicted—so the need for representation when accused of a criminal offence is paramount.

When it comes to a complainant, however, this endeavour to allow complainants to be now represented by counsel is exceptional. It has never happened before in criminal law in this country. Again, I have concerns about extending already underfunded services in legal aid to complainants as well. Complainants have the assistance of crown counsel. They have the assistance of victim services. In my view, there is no reason to further complicate the process and have them be further represented by counsel.

Again, I made the point earlier and I would like to reiterate it as to why this is being extended only for complainants in sexual assault cases. Not extending it for complainants in other cases where there are interpersonal relationships and very complex dynamics—for instance, in spousal assault situations—marginalizes people who experience that violence. It trivializes people who experience that violence because there is no sexual component to it, which is unfair, so—

● (1745)

Mr. Colin Fraser: That isn't the point, though. There is a specialized regime that's being proposed with regard to hearings; that's why it's different.

Ms. Sarah Leamon: Yes, but why wouldn't that be extended then to complainants in, say, for instance, spousal assault cases?

Mr. Colin Fraser: It's because here isn't the specialized regime for the hearing with the purpose of allowing the person to be represented to ensure their procedural rights and personal integrity is respected.

Ms. Sarah Leamon: Yes, of course.

The Chair: Colleagues, does anyone else have any questions? If not, I have a short one.

By the way, I just wanted to note this for the witnesses. People were suggesting that additional zombie laws should be attacked in this law, and I just want you to understand that it would be unreceivable for us to simply add new provisions that weren't mentioned in the original bill. Much as maybe we would like to include some, we as a committee cannot. I just wanted it to be understood that, if we don't act upon your suggestions, it is because we're not empowered to. They would be unreceivable.

I have a question for Ms. Savard because I got your point about replacing the word “adduce” with “intends to introduce into evidence”. I just want to go back to the premise of the three-pronged different types. You introduce, for example, a document that would certify that a witness was legally blind without wearing glasses. You gave three options.

First, you would learn information from that document and you would ask the question to the witness if he or she was indeed blind. Alternatively, should the witness then fail to answer the question appropriately by not being truthful, you would then perhaps put the document in front of the witness in order to refresh his or her recollection and say, “Does this document assist you in answering that question?” If the witness were still to lie in both of those circumstances, then the eventual intention would be to produce the document because you would be impeaching the credibility of the witness.

I understand the sequential approach, but in any of these cases, there would be an intention, if something happened, to introduce this into evidence. While I appreciate it—and I do think we have to really look very seriously at the approach—I'm not sure that actually works to separate it because in the end result, in all of these, if the witness is going to lie, you're going to introduce the document into evidence, would you not?

Ms. Megan Savard: Yes. The thing currently in proposed subsection 278.92(1) that triggers the application is the defence intent to adduce into evidence. "Adduce” is confusing.

The Chair: Yes, I completely agree.

Ms. Megan Savard: If we change it to “intends to introduce into evidence”, it clarifies what I think was the underlying intent, but I may be wrong about that.

The Chair: I think you would probably be right. I think that is correct. At least that's how I would read the intention there.

Ms. Megan Savard: You've also accurately captured the dynamic process of a criminal trial. The problem is that you don't form the intent as defence counsel to introduce a document into evidence. In fact, it is inadmissible in evidence up until the point where the witness, number one, says something unexpected on the stand, and number two, then doubles down on it in cross examination even after being confronted with the document.

I think it may be contrary to the message that Parliament wants to send to complainants that we're going to require defence counsel to bring these applications on the assumption that all complainants will lie and then double down on it. I think that is not the message you want to send.

The way to address the issue that you've raised, which is that eventually it might all come to it, is to recognize that the time at which it will all come to admitting into evidence is in the middle of trial, and the process should be flexible and streamlined enough to deal with the fact that it's a mid-trial application.

The Chair: Thank you. That's really helpful.

If no colleagues have any other questions, I just wanted to advise my colleagues on the committee that on Wednesday we have three panels. Because of votes, we're going to have the first two hours at our normal meeting time, then we're going to have the votes, and then we'll have our third panel immediately after the votes.

Thank you so much to all of the witnesses. You've been, as always, enormously helpful. It is very much appreciated. Thank you so much for coming.

The meeting is adjourned.