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Chair

Mr. Anthony Housefather

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Colleagues and guests, we are going to start today's meeting.

I'd like to welcome our witnesses to the Standing Committee on Justice and Human Rights as we resume our study of Bill C-51.

Today we are delighted to welcome, as individuals, Ms. Laurelly Dale, barrister and solicitor of the Dale law firm. Welcome, Ms. Dale.

Ms. Laurelly Dale (Barrister and Solicitor, Dale Legal Firm, As an Individual): Thank you for having me.

The Chair: We have Ms. Carissima Mathen, who is the vice-dean, associate professor of the faculty of law in the common law section of the University of Ottawa. Welcome, Ms. Mathen.

Professor Carissima Mathen (Vice-Dean, Associate Professor of Law, Faculty of Law, Common Law Section, University of Ottawa , As an Individual): Thank you.

The Chair: Here today also is Ms. Elizabeth Sheehy, who is a professor also at the faculty of law in the common law section of the University of Ottawa. Welcome, Ms. Sheehy.

Professor Elizabeth Sheehy (Professor, Faculty of Law, Common Law Section, University of Ottawa, As an Individual): Thank you.

The Chair: Representing the Vancouver Rape Relief and Women's Shelter, we have Ms. Hilla Kerner, who is a collective member. Welcome, Ms. Kerner.

Ms. Hilla Kerner (Collective Member, Vancouver Rape Relief and Women's Shelter): Thank you.

The Chair: I understand that Ms. Kerner has requested to go first.

Ms. Kerner, the floor is yours.

Ms. Hilla Kerner: Thank you.

I'm hoping my accent will be clearer in the beginning.

The women who work in a rape crisis centre did not need the “Me too” campaign to know how common it is for women to experience sexual assault and rape. Being a girl and a woman in this world means we are likely to be sexually assaulted. If we are poor, indigenous, women of colour, or women with cognitive or physical disabilities, we are even more likely to be sexually assaulted. I would say it's almost guaranteed and, yes, me too.

In preparation for this submission, we looked at almost 6,000 cases of sexual assault and rape of women who called our rape crisis centre in the last five years. Twenty-five hundred women were raped by their husbands, boyfriends, or lovers, and another 422 women were raped by their ex-male partner after they broke up with him. Two hundred and thirty-four women were sexually assaulted, most often raped, by their male supervisor or co-worker. Eleven hundred women were sexually assaulted by someone they knew superficially, often through social circumstances like a party, mutual friends, or someone they had a first or a second date with. Three hundred and thirty women were raped by their own fathers when they were young, and another 471 women were sexually assaulted or raped by other family members or family friends. Five hundred and nine women were assaulted by men who were a stranger to them.

We appreciate the Minister of Justice's efforts to advance sexual assault provisions with the amendments proposed in Bill C-51. We have one objection, and that is to the addition of “no consent is obtained if the complainant is unconscious”. Of course an unconscious woman cannot consent, but this is already captured under the existing law which says, “No consent is obtained” if the “complainant is incapable of consenting to the activity”.

The addition can be misused by defence counsels to argue that unconsciousness is a threshold for incapability, and since we too often see cases where judges do not know sexual assault laws, the intent behind the laws, and the intent of Supreme Court judgments instructing the application of the law, there is a serious danger that the judges will accept the defence arguments in this matter.

We support the proposed articulation that no consent is obtained if there is “no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct”.

We also support the expansion of rape shield provisions to include communication of a sexual nature or communication for a sexual purpose. We support the right to legal representation for victims in rape shield proceedings.

About the amendment concerning victims' private records, it has been exactly 20 years since the passing of Bill C-46 which amended the Criminal Code with specific provisions regarding the production and disclosure of records of the accused in sexual assault proceedings.

We have been members of CASAC, the Canadian Association of Sexual Assault Centres, since 1978. Early on, members of CASAC faced the need to protect a record; so in 1981 CASAC members passed a resolution to protect the confidentiality of records and to protect the confidentiality of what women told us regardless of legislation. Seeking women's records from rape crisis centres is a clear and blunt attempt to undermine a victim's credibility and violates their privacy and dignity. It is also a direct attack on rape crisis centres and our role in supporting individual victims, our demands that violent men be held accountable, and our overall fight for women's equality and liberty.

When Bill C-46 passed, the feminists who advocated for it described it as second best, because the full demand was for no records at any time. The current proposed amendments regarding women's records in the possession of the accused gets us closer to that demand, and we support this.

Alas, good laws mean nothing when judges do not know the law and therefore do not uphold the law. We are aware of the recent attempt by Parliament to address this issue, and we are looking forward to speaking to the matter when Bill C-337 is discussed at the relevant committee in the Senate.

● (1535)

Judges' ignorance is only one element in the utter failure of the criminal justice system as a whole to hold men who commit violence against women accountable. Of the 6,000 cases that I mentioned earlier, 1,800 were reported to the police. About 30 resulted in charges, and fewer in convictions.

The common sexism and diminishment of women in all aspects of our private and public lives teach men to see and treat us as things and not as full human beings. Pornography is a devastating and effective promotion and reinforcement of men's sexualized violence against women. Prostitution is a devastating and effective promotion of the sexual commodification of women, where women are used as a commodity that can be bought and sold by men.

The problem is not that men do not know if a woman really consented or if she really wanted to have sex with them; the problem is that they don't care. They are allowed not to care, because they know they can rape women with impunity.

We often use the term rape culture to mean the acceptance, the collusion, the promotion of male violence against women. Men use rape culture to sustain rape structure, a structure that keeps men in domination and keeps us women in submission. The accumulation and the impact of all the individual rapes that men commit against individual women sustain all men's power over all women.

Of course, we know it's not all men. We know that not all men are wife beaters, sex buyers, rapists, or pornographers, but for sure, many are. We know that because of all the women who call our and other rape crisis centres, and because of all the women who are living in our and other transition houses. And now,anyone who pays attention knows it too, because of all the women who say “Me too.”

We believe men can change, but not as long as they get permission and encouragement to violate our bodily integrity and autonomy. We need to shake the pillars of the rape structure and start by holding men who commit violence against women accountable. So far, the Canadian state and its criminal justice system has been failing to do so.

The Canadian Charter of Rights and Freedoms promises us, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law.” It is now 2017, and we women still do not have it, not the equal protection nor the equal benefit of the law.

Thank you.

The Chair: *Todah rabah*.

Ms. Dale, the floor is yours.

Ms. Laurelly Dale: Thank you, Mr. Chair and committee members. It is my honour and privilege to be here.

My name is Laurelly Dale. I'm a criminal defence lawyer of Dale Legal Firm. I've been practising for more than 10 years. I practise in two areas: downtown Toronto and northwestern Ontario, covering the large district of Kenora. I attend today to focus on clause 25 of the proposed amendments in Bill C-51, specifically the amendments to add proposed new sections 278.92, 278.93, 278.94.

I've listened to the testimony of Breese Davies and the Criminal Lawyers' Association. I'm a member of the Criminal Lawyers' Association; however, I attend today as an individual. I'm not here to repeat their submissions. Ms. Davies takes a position that the amendments are overly broad and should be specified. I can indicate that I am in opposition of the proposed amendments in their latest form, entirely.

Our laws are progressive. They must be fair. They must uphold the principles of our supreme laws, namely the Canadian Charter of Rights and Freedoms. They must not be reduced to social media hashtags. We must not feed into the myth that all complainants of sexual assault are survivors of sexual abuse and therefore are always to be believed.

The amendments that I am here today to discuss have also been referred to as the Ghomeshi amendments. They violate section 7 and section 11(b) and (d) of the charter, ultimately allowing for the conviction of the innocent. Violations occur in a variety of ways. Today I'll focus on the main three.

First are the section 7 and section 11(d) violations to the accused's presumption of innocence and fair trial by declaring these records inadmissible and requiring defence disclosure.

The second major area of concern is the section 7 violations as, for the first time ever, they interject the complainant as a party to the criminal proceedings against the accused. It is the state versus the accused, not the state and the complainant versus the accused. Tied into this is the violation arising from allowing the complainant to be part of this hearing, usurping the very valid reasons for excluding witnesses, and allowing them to make submissions.

The last violation relates to the potential delays that this will ultimately cause, violating the recent Supreme Court of Canada decision in Jordan, upheld by Cody, by creating at the very least an additional three- to four-day pretrial hearing for the accused, and by the addition of the third party.

The onus is on the crown to prove allegations of sex offences. It is its obligation to prove each and every element to the offence. The accused is not required to do anything. The crown attempts to prove its case by putting forth the evidence of the complainant. Sexual assault cases are most often about the credibility of the complainant, as there is no other evidence. Crown evidence of the offence is presented to court on the basis that what the complainant is saying is true. The defence is then allowed the opportunity to test the evidence of the crown and demonstrate that the complainant is not credible.

Testing is through cross-examination and must always be relevant. The accused can then choose to testify or call other evidence. The crown is then able to cross-examine as well. The trier of fact, considering all admissible evidence, makes the decision.

Minister of Justice Jody Wilson-Raybould claims that the amendments will boost protections for sex assault victims and ensure trial fairness. I ask how this can be achieved in light of these charter violations. The justice minister indicated in committee last week that the amendments would not create defence disclosure obligations. I ask how this would be possible when this is clearly the procedure set out in the section.

Relevancy and materiality can be canvassed at the time of introducing the material during cross-examination. Why must the accused disclose evidence that he or she wishes to use in cross-examination? We must not water down reasonable doubt in these cases. The presumption of innocence is the cornerstone of our criminal justice system.

Under clause 25, all correspondence in the possession of the accused is presumptively inadmissible unless they can persuade the judge that it should be disclosed in accordance with eight substantive factors. I point out that seven out of eight of these factors are drafted with the purpose of protecting the complainant, and only one references the accused's right to make full answer and defence. I concede this is not a popular perspective, but it's one that must be stated, that the accused is presumed innocent and we must protect their charter rights.

● (1540)

As well, it's important to note in interpreting this section that the information in the possession of defence is communication that's authored by the complainants themselves. This is information that the complainant has intentionally chosen to withhold from the police and the crown attorney that is relevant to the alleged incident.

The Ghomeshi amendment requires defence to give this information to the complainant and the crown ahead of trial. To notify the complainant in advance that defence can expose their dishonesty invites the complainant to come up with a fabricated answer. The amendment serves to allow the complainant to correct their mistakes at the expense of trial fairness to the accused.

In acquitting three accused of sexual assault, in a recent decision in 2017, Ontario Superior Court Justice Molloy in Nyznik states at paragraph 17 the following:

> Although the slogan 'Believe the victim' has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence.

The current system works. In the recent case of D.A.E., found at tab 5 of my materials, defence counsel utilized the material in their possession, and based on the totality of evidence, considering that this was utilized during cross-examination, the judge still convicted the accused.

Found at tab 5 is a recent Ontario Superior Court case, where it was held that myths about victims and sex offenders have no place in our criminal justice system. At paragraph 60 the judge states:

> I agree with the trial judge that we must be vigilant to reject...stereotypical thinking about the behavior of women. At the same time, we must not adopt... assumptions about men and their tendency to rape.

The public outcry from Ghomeshi should not be used to undermine the presumption of innocence. Trial by media should not invade the rights of the accused.

I'll briefly touch on the second major amendment, as previously stated.

A criminal trial, by its nature, is the state against the individual. No one else is a party to these proceedings in any case. The complainant is not a party to the proceedings. The consequences of a criminal judgment do not apply to them. It is a slippery slope, allowing the complainant to participate in other aspects of the case against the accused, such as crown or judicial pretrials. There is, therefore, a risk that innocent people will be convicted.

Further, it is routine at the commencement of a criminal trial for a judge to make an order excluding witnesses. The reason is obvious. It is essential for the discovery of truth. As Justice Abbey stated in Jenkins:

> The general and overriding principle which lies behind an exclusion order is to maintain, to the degree possible, in the search for the truth, the purity of the evidence.

Section 7 of the charter is violated, as this amendment permits the complainant to testify knowing what the evidence is beforehand, undermining the accused's trial fairness. Chapters of cross-examination are revealed, and the opportunity exists to resolve issues with their testimony.

The last violation relates to potential delays this will inevitably cause by creating an additional three- to five-day hearing 60 days in advance of the trial.

As noted at tab 9, the Jordan case is the law upheld by the Supreme Court of Canada that relates to delay that is presumptively unreasonable when it is longer than 18 months at the provincial court level, or 30 months at the superior court level. The resources allotted to the accused are not the same as those allotted to the complainant. It is not known whether, post these amendments, other resources would be available, such as legal aid, and whether these pretrial applications would be funded. I echo the comments of Breese Davies with respect to her concern about imbalance of resources.

Last, in my materials I have included a number of materials relating to the consequences of conviction for sexual assault that must be at the back of minds when considering these amendments as well as wrongful convictions. If accepted, the balance of the trial will be entirely upset. Charter violations will occur, and it will ultimately result in the conviction of innocent people.

Those are my submissions. Thank you.

● (1545)

The Chair: Thank you very much.

Ms. Mathen.

Prof. Carissima Mathen: Thank you.

In recent months, there has been a great deal of debate over Canada's sexual assault laws. Dramatic events have provoked calls for the law to be completely overhauled. While understandable, such calls are overstated. In fact, Canada has one of the most progressive sexual assault frameworks in the world. Nonetheless, there are some changes that would ensure greater consistency between the Criminal Code and Supreme Court jurisprudence, better reflect parliamentary intent, and promote optimal responses to sexualized violence.

Bill C-51 contains a number of such changes, which I am pleased to support. I will focus on the proposed changes to the law of consent in section 273, and to the impermissible uses of past sexual history in section 276. These changes are contained in clause 19, clause 20, and the first part of clause 21.

Clause 19 clarifies the conditions, already set out in section 273.1, under which no consent to sexual touching is legally possible. I agree with the proposal to include a specific reference to unconsciousness and to make clear that other forms of incapacity, short of that state, can impair a person's legal ability to consent.

Some have argued that, given Supreme Court case law, this change is redundant. I disagree. It is always appropriate—indeed, it is laudatory and even essential—for Parliament to confirm common-law rulings with which it agrees. This is especially true in criminal law. Such clear expression of legislative intent protects important principles from later judicial change. I would remind the committee that the court's important decision in Regina v. J.A., in which it rejected the idea of advance consent to unconscious sex, was a majority ruling that was attended by a vigorous, three-judge dissent.

Some have also argued that this change could lead trial judges to insisting on complete unconsciousness before the rule against consent is operative. To the extent that there is such a risk, a proposition I do not necessarily accept, I think that the new subparagraph (b) addresses it.

Let me move now to clause 20 and its proposed change to section 273.2. One of the most important and distinctive aspects of Canada's sexual assault law is that it narrows the accused's ability to argue an honest but mistaken belief in consent, a defence that negatives *mens rea*.

In its unanimous decision in Regina v. Ewanchuk, the Supreme Court stated that an accused may not rely on mistakes of law about consent as a basis for honest but mistaken belief. The court gave a number of examples, such as the belief that consent is demonstrated by passive or ambiguous conduct.

In my opinion, the limitations on the definition of consent set out in section 273.1 are properly regarded as mistakes of law. I therefore support the move in clause 20 to specify those limitations as ineligible for the defence of honest but mistaken belief. I am, though, concerned that the current wording of proposed subparagraph 273.2 (a)(iii), which refers to “any circumstance in which no consent is obtained,” could confuse the distinction between fact and law in relation to consent.

Assuming that the intent is to remove the accused's ability to rely on legal as opposed to factual mistakes, I would recommend either inserting into this new clause some reference to the term “mistake of law”, or making it clear that these are circumstances where consent is deemed not to obtain. Using the word “deemed” would clarify that the intent here is to prohibit the accused from relying on legally impermissible understandings of consent. It would also be a very powerful message from Parliament about the nature of the limitations on consent in section 273.1.

I also agree with the proposal in subclause 20(3) to ensure that an honest but mistaken belief in consent must rest in some way on evidence that consent was communicated. This change is consistent with the Supreme Court's reasoning in R. v. Ewanchuk. Such evidentiary thresholds are not uncommon. I think it is appropriate to ensure that the defence is based on evidence that relates in some way to how Parliament has defined consent for the purposes of sexual touching.

Finally, let me move to one change contained in clause 21 that relates to sexual history, or what is colloquially known as the “rape shield” provision.

● (1550)

The treatment of the complainant's prior sexual history has been a persistent challenge for the criminal justice system. Current section 276 of the code was part of a groundbreaking law reform effort in 1992. Subsection 276(1) states that sexual activity evidence is inadmissible to support an inference that, by virtue of her past sexual conduct, a complainant is more likely to have consented to the alleged assault or that she is less credible as a witness. These are called the twin myths of sexual assault. It is important to understand that the use of such evidence for such purposes is prohibited.

Under subsections 276(2) and 276(3), there is a separate process for considering the admissibility of past sexual activity that is offered to support different inferences. Unfortunately, the distinction between subsection 276(1) and the rest of section 276 has become blurred. Some judges have applied the framework outlined in the later subsections, subsections 276(2) and 276(3), to inferences that are clearly prohibited by subsection 276(1).

There is no balancing process capable of supporting the admission of evidence intended to advance the twin myths. By clarifying that subsections 276(1) and 276(2) cover distinct uses of sexual history evidence, the proposed change addresses this problem. It is consistent with the specific, unanimous, and complete rejection of the twin myths in R. v. Seaboyer, later affirmed in R. v. Darrach, and with the original animating intent of Parliament.

That concludes my prepared remarks. Thank you.

● (1555)

The Chair: Thank you very much.

Ms. Sheehy, the floor is yours.

Ms. Elizabeth Sheehy: Honourable members, I am testifying on this bill as an individual with expertise in sexual assault law. I was just asked this morning as a representative of the Ottawa Rape Crisis Centre. Our executive director was unable to be here. She is travelling across Ontario working with 11 police forces, trying to persuade them of the benefits of what's called the Philadelphia model in terms of policing. She asked me, as secretary of the board, to speak on their behalf. I am a law professor and an expert in the area of sexual assault law, with over 30 years of experience teaching, researching, and advocating for the rights of women who have experienced sexual violence.

The Ottawa Rape Crisis Centre is the third-oldest rape crisis centre in Canada. It was established in 1974. For 43 years, they have been providing crisis line support, face-to-face counselling, and group counselling to thousands of survivors annually. In the current climate, those numbers are increasing exponentially. It's a feminist organization that has fought tirelessly for legal and policy change at the local, provincial, and national level to secure women's rights to report sexual assault, and for these crimes against women to be investigated, prosecuted, and adjudicated with professionalism and attention to women's equality rights.

The Ottawa Rape Crisis Centre has challenged police practices of unfounding of women's sexual assault reports and documented police failures as early as 1975. Currently, our executive director, Sunny Marriner, has led the country in successfully advocating for the Philadelphia model, a model that requires review of police files on sexual assault investigations by independent violence against women advocates.

To speak for myself and the Ottawa Rape Crisis Centre, we support the bill overall. We read it as a significant effort by government to remedy discriminatory practices in the criminal justice system and to inspire trust on the part of women to report sexual violence. There is some urgency to this reform, as women flood traditional and social media with their disclosures of perpetration, yet the reporting rate by women has plummeted from one in 10 to one in 20 in the last several years. We are therefore at a crisis point in terms of the credibility of the criminal justice system for crimes of sexual violence.

I start by noting that we support the provision requiring that all bills include a charter statement assessing compliance with the Constitution of Canada. We trust that this compliance review will include an assessment of each bill's impact on women's equality rights protected by section 15, and women's section 7 rights to security of the person and to trial fairness. When assessing criminal laws that will impact an accused person's rights, the charter requires us to also consider the countervailing charter-protected interests of complainants.

We see the bill as modernizing the criminal law in keeping with current social realities in terms of the role that social media plays in both sexual activity and sexual violence by men against women. We thus support the provision that characterizes communications that are sexual in content or purpose as sexual activity for the purposes of the rules governing the admissibility of sexual history evidence. Moreover, this provision is consistent with legal decisions from some courts in advance of the bill that have interpreted sexualized text messages as sexual activity for the purposes of the rape shield provision, so in some ways this is not a major change in law.

We also support the provisions that provide legal standing and access to legal representation for complainants who face defence applications to introduce their prior sexual activity as evidence into the trial. The provision mirrors the provisions regarding complainants' rights to standing and representation to respond to defence applications to admit their private records. It was previously inexplicable to us why women had standing to defend the privacy of their confidential records but not their private sexual activities.

We think that the bill's extension of the records regime to private records in the hands of the accused, even those without sexual content or purpose, is also an important advance in terms of protecting women's privacy. Although we recognize that the provision has a broader reach, it means that no advantage can be gained by extrajudicial interception of private diaries or other such records. It's true that the defence will lose the element of surprise when required to have such records vetted for admissibility, but it must also be recognized that complainants in sexual assault trials themselves experience forms of jeopardy that require recognition and accommodation.

● (1600)

Bill C-51 also serves to codify some aspects of sexual assault law already established by the Supreme Court of Canada in interpreting the statutory regime. While strictly unnecessary, we support the amendments that do not add confusion to the already exceedingly complex law of sexual assault.

For example, the Ottawa Rape Crisis Centre supports the provision requiring evidence that a complainant expressed her voluntary agreement to sexual contact in order for an accused to rely on the defence of mistaken belief in consent, even though this is not a legal change, but simply a reiteration of the law interpreted by the Supreme Court of Canada almost 20 years ago in Ewanchuk.

We do have serious concerns, however, that the provision purporting to codify the J.A. decision misses the mark. It introduces the potential for confusion and may inadvertently limit legal interpretations on the meaning of incapacity. We say this because the introductory notes to the bill describe this provision as a codification of J.A. However, long before J.A., courts had ruled that unconscious people cannot consent—how could it possibly be otherwise—and, in fact, J.A. stands for a much more significant principle: that you cannot consent in advance of a sexual activity during which you are unconscious.

It would be wonderful if the bill actually codified J.A. and put that principle into law, particularly because, as Professor Mathen noted, it was a majority decision, not a unanimous decision. I think it would be wonderful if, in fact, this law codified J.A. It does not at the current moment.

The other problem that we worry about.... It's true that the bill does not foreclose the possibility that incapacity can include states approaching, but not reaching, unconsciousness. I think the bill ought to go further and explicitly state that proposition. It does not at the current moment. It simply leaves open the possibility that there are other ways in which one could be incapable. In fact, we think it ought to go further and begin to map out the considerations that judges should look at in determining incapacity short of complete unconsciousness.

Those are my submissions. Thank you.

The Chair: Thank you very much for those very cogent statements from all of our witnesses. It was excellent testimony.

Now we're going to start with Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much.

Thank you very much for your testimony. It was very helpful on one hand, but it actually underlines how complicated these areas can be.

Ms. Kerner, thank you very much again for your testimony. One of the things that you pointed out is the codification of the provisions that sexual activity can't take place when the complainant is unconscious. You were concerned about that, that it might be limiting. You may notice that Ms. Mathen did point out that there's a second part to that section which says that the complainant is incapable of consenting to the activity for any reason other than the one referred to in previous paragraph.

Wouldn't you agree that it's not really limiting it to that, but it is codifying that? On the other hand, I think it's very clear in the next subparagraph that, in fact, it's not exclusive to that, that there are other ways that consent can be—

● (1605)

Ms. Hilla Kerner: I think it's true, but as Liz Sheehy said on behalf of the Ottawa Rape Crisis Centre, we share the same position as other women's groups. In general, the current system actually does not work. The Alberta Court of Appeal judgment that was released a few months ago ordering a new trial for the acquittal of Bradley Barton, who, by his own admission, killed Cindy Gladue, shows how many stereotypes, myths, and actual ignorance judges have in their interpretation and understanding of sexual assault law.

Until we fix that, until we have a system that works properly and, of course, provides a fair trial for the accused—it's in nobody's interest to have unfair trials because we want democracy; we want it for women, and we want it for everyone else—I think there is a lot of room for mistakes in understanding by judges.

Hon. Rob Nicholson: Wouldn't you agree that it's all the more reason then to codify these different provisions rather than, as you say, to let the courts just interpret them anyway they want to? By codifying it here, we are giving the courts direct instructions or description of what is and what isn't illegal.

Ms. Hilla Kerner: Probably Liz Sheehy can respond to that too, but I think that's the wrong codification.

If the legislator is interested in setting a lot of examples of what incapability means, that will be helpful, but to raise the threshold is dangerous.

Hon. Rob Nicholson: My own thought was it codified the threshold but it wasn't.... Ms. Mathen, you made the point, and Ms. Sheehy as well, that there are benefits to codifying the different decisions, rather than just letting them sit out there, and certainly it must be of some assistance then as well to lawyers practising in this area. They're not just relying on their interpretation of the common law decision in this area, but it's transcribed into legislation.

Wouldn't you agree with that? It's not just a question of codifying what has already taken place, but it adds some certainty, I would guess, to anyone practising in this law, when it is transcribed into legislation.

Prof. Carissima Mathen: It does. It adds certainty. It adds notice. It ensures consistency between the Criminal Code and the common law. I would just point out that, of course, statute is superior to common law, and whereas common law can be revisited on a much lower threshold, statute is accorded a higher regard. For those reasons I think it's really important for Parliament to decide, from time to time, which elements of the common law it agrees with.

You can also make the converse argument, but certainly if it agrees, then I think it is very laudable for Parliament to engage in reflecting those principles in the statute.

Hon. Rob Nicholson: Ms. Sheehy.

Ms. Elizabeth Sheehy: I agree with codification, if the codification represents the decision. My point is this. It doesn't clarify this confusion. Calling this a codification of J.A. adds confusion. It is not a codification of J.A. A codification of J.A. would refer to the specific principle that you cannot consent in advance to sex that will occur while unconscious.

The second thing I want to note is that yes, it's true. The provision, as Professor Mathen points out, is open-ended, but one interpretation of that provision might be that it refers to other forms of incapacity, such as disability, as opposed to states that fall short of unconsciousness. I worry that we will be giving some sort of signal to judges that the key is unconsciousness, and there may be other forms of mental illness, for example, or mental disability that can amount to these other forms of incapacity.

Hon. Rob Nicholson: Do you have any comment on that, Ms. Dale, with respect to the codification of the different judicial decisions in this, and whether this bill captures those decisions?

Ms. Laurelly Dale: I don't have anything to add. My comments are limited to clause 25.

● (1610)

Hon. Rob Nicholson: That's fair enough.

Those are my comments, Mr. Chair. Thank you very much.

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

Mr. Fraser.

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

Thank you all very much for your presence today and for your interesting presentations.

Ms. Mathen, you touched on this a little, and we already talked about the codification of J.A. Can you talk about how the provisions in the bill assist findings of consent not being present in cases where the victim is just short of unconsciousness, for example? Can you touch on that a little?

Prof. Carissima Mathen: Certainly. Of course, the law as stated has always said that incapacity in itself impairs one's ability to consent in law. The current expansion would, in a sense, separate that to a specific mention of unconsciousness, and then the complainant is incapable of consenting for any reason other than the one referred to, i.e., unconsciousness.

It is simply a direction, I think, to judges and to triers of fact that a number of states can impair a person's ability to consent. It is true that there is still work to do with respect to the line at which someone slips into a state of intoxication, for example. Those are very difficult questions that in some sense will be limited to specific factual circumstances, but certainly I think there is value in at least separating the various ways in which someone could be incapable of consenting.

Mr. Colin Fraser: Thank you.

On Monday we heard testimony regarding the mistaken belief in consent from a couple of witnesses who said that the changes here and the attempt to codify Ewanchuk would effectively eliminate any mistaken belief in consent as a defence, both in law and in fact. As I understand it, the codification of Ewanchuk is meant to reflect the law, which is that you cannot have a mistaken belief in consent as it pertains at law, but that it would still exist as a matter of fact.

I'm wondering if you can explain your thoughts on whether or not it would effectively eliminate any mistaken belief in consent defence.

Prof. Carissima Mathen: I don't believe it would. I don't believe that would be consistent with the charter, to simply remove the ability to argue mistake of fact about whether there was consent.

It's important to note that mistaken belief in consent is something that is only considered in the criminal trial when the crown has proven that there in fact was no consent. That's when the issue of mistake becomes important. So it is a question of fact, but it is appropriate for Parliament to inject some values into what are the circumstances under which we will excuse someone from making that mistake of fact.

The Supreme Court has said that beliefs about consent cannot rest on mistakes of law. They made that clear in Ewanchuk. My argument is that Parliament has also done that in the limitations in section 273.1. That is why, with respect to that specific point, I am a little concerned that the language in the current clause 20, proposed subparagraph 273.2(a)(iii), which I pointed out, does make it seem as though what is being referred to is simply a factual context. I would suggest some reference of words to indicate that what is being referred to here is the legal understanding of consent.

Mr. Colin Fraser: Thank you very much. That's helpful.

Ms. Dale, you mentioned in your presentation, regarding the new hearing process for records in the possession of the defendant, that it could result in a three- to five-day hearing being necessary 60 days in advance of the trial. First of all, where do you get those numbers, of a three- to five-day hearing?

Second, isn't the 60-day notice period in the bill about the production of documents, or a request for production of documents, not the seven-day notice period that the defendant would have to make in order to adduce evidence of documents or records that are in their possession?

Ms. Laurelly Dale: I'll address the first part of your question. It's a very good question. With respect to the estimate of the three- to five-day period, of course that is an estimate. Sexual assault trials, case by case, can be half a day, or one day at most, in terms of trial time, and therefore would only perhaps require a one- or two-hour hearing for this purpose. The three- to five-day estimate would be an averaging of sexual assault cases.

If we look at the Ghomeshi case, in that case there were over 5,000 messages, emails that were utilized by his counsel to establish collusion, diminish credibility, and align with some of the consent defences that were used in that case. For 5,000 messages, it would require a much lengthier hearing than the three to five days.

As well, considered in that factor, if the complainant is going to be added now as a party to the proceedings, and they're permitted to make submissions at these hearings, scheduling of additional time has to be taken for them and their counsel to make submissions at that hearing as well.

● (1615)

Mr. Colin Fraser: The complainant would only be added for the purpose of making submissions at that hearing. You're not suggesting that it would be for the entire proceedings.

Ms. Laurelly Dale: By my understanding of the draft, the complainant is permitted to be in attendance at the hearing and to make submissions at the hearing.

Mr. Colin Fraser: Right.

What about the 60-day notice period? That's for production, isn't it, not the seven-day notice that is required for the hearing that we're talking about? Is that your understanding?

Ms. Laurelly Dale: My understanding is that it had to be 60 days prior to trial. However, that was my interpretation of the legislation.

Mr. Colin Fraser: Thank you. That's probably all my time.

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

Mr. Angus.

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you, Mr. Chair.

Thank you for this excellent presentation.

I'll start with Ms. Sheehy. If we're talking about codifying consent so that we can clarify the rules for these very disturbing cases that have to be tried, do we still not have the problem that judges decide to interpret what consent means all the time?

Right now in Quebec, we have a case of a judge who, over the sexual assault of a teenage girl in a cab, was suggesting that there are different levels of consent, that just because the guy took a 17-year-old girl and started kissing her without her consent, that required a lesser level of consent than if he did other physical acts against her. They're still acts of violence. How do we codify this if we still have judges who will ignore the basic rights of a victim?

Ms. Elizabeth Sheehy: Well, this bill doesn't purport to deal with judicial education or judicial accountability. Of course I share your concern that we have persistent problems in terms of judges fumbling the ball on the legal rules regarding consent and other issues in a sexual assault trial. I guess I still favour further legislative clarification and codification when possible.

On the issue of forms of incapacity that do not reach unconsciousness, I think it would be really good for our legislation to specify some criteria for capacity to consent, and I take some of these from Supreme Court jurisprudence in other cases. The complainant has to be capable of understanding the sexual nature of the act and the risks involved. The complainant has to be capable of understanding that she can choose to decline, and she has to be capable of communicating her voluntary agreement. I think putting those kinds of details in legislation is really helpful for judges, because I think the law of sexual assault is already exceedingly complex. The more clarification and guidance we can provide judges, the better.

Mr. Charlie Angus: I thank you for that.

I know that we don't have a law telling judges how to behave, and that's something judges have to have some interpretation or right to. But it seems to me that there's a larger societal problem dealing with victims of sexual assault. That is something that has to be dealt with in public, in the media. I know we're always told we shouldn't be trying judges in the media, but it's these notorious cases that draw attention to the fundamental problems.

Your suggestions for codifying, I think, is very helpful, because I am concerned about strictly a provision of being unconscious means no consent, particularly with issues of rape drugs and where young people may be incapacitated but not completely incapacitated.

Ms. Elizabeth Sheehy: Not unconscious.

Mr. Charlie Angus: Not unconscious. We're into the real weeds about sexual violence here, but we have to be able to start to clarify what defines consent. Would you make those suggestions coded into the legislation?

● (1620)

Ms. Elizabeth Sheehy: I would. I think it's a great starting point to begin to map out or to give judges some guidance that we're not only looking at unconsciousness, but someone can be incapable if they do not meet three basic criteria. These criteria were already set out in a Supreme Court decision on this issue. I think they are very basic principles. If a woman is incapable of really talking, and there may be evidence that she couldn't speak or she didn't understand what was going on, you then have really clear evidence that she's not capable of giving a legally valid consent.

Those three guiding points are not specific. I'm not talking about how much drugs she has to have consumed or how much alcohol the person has to have consumed. I don't think we can really do that in legislation, at least not at this point, but I think we can set guiding principles that are legal principles as to what conditions are necessary before a person has the legal capacity to consent.

Mr. Charlie Angus: Ms. Kerner, through your work, you have really painted a picture that sexual assault victims come in all classes and all races. But the issue of marginalized women, indigenous women, poor women, who have very few resources to have their rights protected, who may be in a situation where they engage in risky behaviour, or who have no power.... At the moment when they decide no, it still means no, and yet they have very few resources to be able to have their stories taken credibly in many situations because they are considered marginalized due to their past history. How do we start to address that power imbalance faced by marginalized women?

Ms. Hilla Kerner: I would say four things. First, I think there needs to be support services, independent transition houses, and rape crisis centres funded by the state, while independently operated by women, so on every reserve and in every rural place women can immediately get safety, support, and advocacy.

On the other hand, we have to have transparency in the system. The fact that we have seen the tip of the iceberg in terms of the judgment to the media does not tell us what's really happening. There is no accessibility of judgments. At the provincial court, in general, it's very hard to have access to the judgments. We want all judgments from all levels of courts to be available to the public for scrutiny.

It's the same with crown decisions and the same with police decisions. I hope that the legislator will come up with instructions that mean that all police forces everywhere, once in a while, once a year, need to report how many sexual assaults and how many violence against women complaints they have received, how long the investigation took, and what the result was of each case.

It's the same for the crown. How many recommendations did they receive? How many charges did they drop or were stayed, and how many were pursued to see court?

I got permission from a woman I work with. She's my age and when she was 11 she was raped for a few years by her adult cousin. In 2007 she went to the police. Charges were laid only in 2011, after four years. The pretrial was in 2013. The trial started in 2015 and it's not over yet. The defence lawyer here was arguing against delay. Delay is everything that the victims are experiencing. The defence counsels are leading this process of delay. Not only do women have no justice, but there is not transparency in all the places that the state is failing them.

There was a really brilliant document written in 1993, called “99 Federal Steps to End Violence Against Women”, by Lee Lakeman. It was adopted by women's groups across the country. I encourage you —and I can send it to the chair—to look at the recommendation for immediate application to advance the situation.

Mr. Charlie Angus: Thank you.

The Chair: I'm sorry, Mr. Angus, but your time is up.

Mr. Charlie Angus: I'm just getting started.

The Chair: You're at seven minutes, 32 seconds.

Ms. Khalid.

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

Thank you, witnesses, for your very interesting testimony.

Ms. Kerner, you were speaking about somebody who was sexually assaulted and her experience in the justice system with respect to delays. I found it to be very interesting and contrary to what Ms. Dale was saying from the opposite end of that spectrum with respect to the accused.

I would Ms. Sheehy and Ms. Mathen to also comment. Do you think that Bill C-51 would create further delays in the justice system with respect to hearings to the point that it's unconstitutional?

● (1625)

Ms. Elizabeth Sheehy: I think that will depend on what kinds of resources are put into the criminal justice system. We're already at a crisis point in terms of delay. I think there's just no question that sexual assault is not like any other crime. I'm quoting former Madam Justice L'Heureux-Dubé. That was her refrain in the Seaboyer case, “Sexual assault is not like any other crime.”

I think more resources are required to do a good job of prosecuting sexual assault. I think the answer is entirely in the hands of government at federal and provincial levels as to whether these provisions will necessarily add more delay.

Ms. Iqra Khalid: On its face, they may or may not. It's not a given that they will.

Ms. Elizabeth Sheehy: I think they are going to add some time, but the question of whether it amounts to more delay depends on what kinds of resources we put into these provisions.

Ms. Iqra Khalid: Ms. Mathen, perhaps you want to comment.

Prof. Carissima Mathen: I think the question for Parliament is not whether this will add more delay, but whether this is the right step to take to advance our objectives and to further justice. To the extent that more resources are required, it's incumbent on all the actors in the criminal justice system to make that happen.

Ms. Iqra Khalid: Thank you.

Ms. Kerner, earlier in your testimony you mentioned that you're opposed to the addition of the “no consent if unconscious” provision. You indicated the reason for that was that it would be misused by the defence. Can you elaborate on that a bit, please?

Ms. Hilla Kerner: First, I want to acknowledge you, Ms. Khalid. I know you did participate in the “Me too” campaign. I think it's a direct message of solidarity to women victims of sexual assault, and so I appreciate that.

I think my friend Elizabeth Sheehy explained at length about the problem with the codification...only one extreme element of incapability. I did agree earlier that codification is a very good idea. Applying Supreme Court judgments to the letter of the law is a very good idea, but if we are going to do that, we need to do it consistently and comprehensively.

Ms. Iqra Khalid: Thank you.

Ms. Sheehy, I'm going to come back to you. Ms. Dale had outlined reasons as to how the accused would be put in a more unfair situation should Bill C-51 become law, with respect to presumption of innocence, interjecting the complainant into the hearing and the evidentiary reasons for that, and the delays to trial as well. Can you comment? What is your opinion? Do you think there is validity to those concerns? What is the flip side of that coin?

I know it's a very delicate balance between an accused and a complainant, especially in areas of sexual assault. As you said, it's a very different type of crime. Are Ms. Dale's concerns valid? Also, do you think that Bill C-51 tries to level the playing field for victims of sexual assault?

Ms. Elizabeth Sheehy: I certainly agree that the bill takes a step towards trying to level the playing field. I think we often forget how much is on the line for complainants in rape trials. When an accused is acquitted, the complainant may be called a liar publicly, to her family, to her community, and to her job. She may also be exposed to further jeopardy, which may mean mischief charges or perjury charges. She may be subject to defamation proceedings, with enormous personal and economic costs. I think we forget that this is not an ordinary witness. This is a witness with her whole life on the line. I don't think it's unfair to an accused to be deprived of the element of surprise when she too, in that context, is in jeopardy with respect to her privacy, but also the further implications of that proceeding.

Ms. Iqra Khalid: Those are all the questions I have.

The Chair: Thank you very much.

Since we have votes today, I don't want to go on at length with the panel because we have to get to the next panel. Ladies, I want to thank all of you. Your testimony was compelling. You really helped the committee. I really want to thank each and every one of you.

For those of you who provided detailed submissions, they have to be translated, but then they will be distributed. If we have any further questions, we'll contact you by email to ask those questions. Thank you again.

I'd ask the next panel to come forward. We'll briefly suspend while we change panels.

● (1630)

(Pause)

● (1635)

The Chair: We will now reconvene.

This is the second session of witnesses that we have today. Welcome to the Standing Committee on Justice and Human Rights.

We are joined by Ms. Amanda Dale, executive director of the Barbra Schlifer Commemorative Clinic and Ms. Deepa Mattoo, director of legal services, who is in Toronto and is with us by video conference. Welcome to both of you.

We have the Canadian Centre for Gender and Sexual Diversity. Mr. Jeremy Dias, the executive director, is here with us. Welcome, Mr. Dias.

From the Women's Legal Education and Action Fund, we have by video conference, Ms. Lise Gotell, chair, and Ms. Karen Segal, staff lawyer. Welcome, Ms. Gotell and Ms. Segal.

We are going to start with the Barbra Schlifer Commemorative Clinic, so I'll turn to Ms. Dale and Ms. Mattoo to start.

Ms. Amanda Dale (Executive Director, Barbra Schlifer Commemorative Clinic): Wonderful. Thank you.

Deepa and I are going to divide up our comments, so bear with us.

Honourable chair and committee members, we're very honoured to be able to speak with you today about the proposed legislation dealing with sexual assault law, specifically clause 10 and clauses 19 to 25 of Bill C-51.

The clinic's submission will focus on three broad areas.

First, it will focus on the need for the implementation of trauma-informed training for all actors in the justice system who interact with sexual assault complainants.

Second, based on our experience of delivering such a program in Ontario, we recommend that sexual assault complainants be provided with government-funded legal representation. This will especially be true for the new sexual history applications that are contemplated in the legislation, but also from the time of first disclosure. Federal funding for non-compellable community support from the federal government means better support for provincial legal aid programs and community-based centres.

Finally, the clinic asserts that there must be some form of accountability for the new mechanisms proposed that is based on the expertise of the community advocates who work with the women who we are hoping will come forward.

As a brief background to the clinic, for those of you who don't know, the Barbra Schlifer Commemorative Clinic was named for a promising young lawyer who lost her life to sexual violence the night of her call to the bar in 1980. It's the only clinic of its kind in Canada. We are independent of the provincial legal aid systems.

Since 1985 the clinic has provided legal representation, counselling, and language interpretation to over 60,000 women who have experienced all forms of violence. Currently we assist more than 4,000 women a year, and we work in over 200 languages. We provide a variety of innovative counselling services and public legal education as well as legal representation. We are also engaged in law reform.

The clinic consults broadly with all levels of government on policy or legislative initiatives, and we are a public voice on the experiences of women engaging with the law when they have been sexually assaulted. We are also part of landmark cases regarding sexual assault law.

We are in broad support of the changes to sexual assault law that are proposed in this bill. Specifically, we believe the expanded rape shield provisions provide for judicial screening of communications between the accused and the complainant, and this is consistent with the truth-seeking function of the court. However, while these changes will further clarify the law, they do not change the attitude of the justice system actors.

Unfortunately, the clinic's experience over the last 30 years tells us that the proposed legislation needs broader support in place in community to operationalize these changes to make a difference in the lives of women so that those who we would like to bring into the fold of reporting to the law will actually feel the trust to be able to do so.

Deepa.

● (1640)

Ms. Deepa Mattoo (Director, Legal Services, Barbra Schlifer Commemorative Clinic): The first point, as Amanda said, is the trauma-informed law and education. We hear constantly from sexual assault complainants who interact with the justice system that they are re-traumatized throughout the process. When speaking with the police, they are not taken seriously, or police questioning insinuates or blatantly blames the victims. If their cases make it to trial, they do not have their own counsel. They are met with a hostile cross-examination by the defence counsel, and in some recent horrific examples, they are stereotyped and misunderstood by the judges.

The clinic submits that Bill C-51 should establish trauma-informed education around sexual assault at all levels of the justice system, trauma-informed education that instructs actors in the justice system to recognize and be sensitive to the impacts of violence and the symptoms of trauma. This is required for them to understand common manifestations of trauma and the emotional response of survivors to people in positions of power, authority figures, and others, moreover to recognize their own expectations with respect to the functioning of the legal clients, and how to problem solve when a client cannot engage with the system as they wish or expect. This is even more important in the wake of the fact that Canadian law has already recognized this education is crucial to the justice system.

The second point is access to counsel and the need for funding and resources. It is worth noting that sexual assault is still widely under-reported across Canada. The 2004 general social survey on victimization concluded that only 8% of sexual assaults were reported to the police. Some of the factors listed in our previous submission of course contribute to this.

Another experience we hear about from sexual assault complainants is that once they have come forward and disclosed their story to the police, they are left alone to navigate the complexities of the legal system on their own. They're not updated regularly on their case. They're not provided with information on their case, or if information is provided, it's too little. There is limited opportunity for them to participate meaningfully in the process, and when they do, they are not provided with any direction or advice.

The clinic submits that government-funded legal representation should be provided to the complainants throughout the justice system process, and not only, as suggested, for the rape shield proceedings. The clinic is the only community agency site for independent legal advice for sexual assault survivors. It's a pilot project from the Ministry of the Attorney General in Ontario. The clinic has seen a 40% increase in the overall support costs since the beginning of the project last year. We have in total served over 200 clients through this project in the last 15 months, with the possibility of only one full-time equivalent position.

Ms. Amanda Dale: We mentioned accountability mechanisms at the beginning. We believe that in order to realize the potential of Bill C-51, the government must put in place some regularized provisions to ensure that the amendments have their intended effect. The clinic recommends that the government establish a community consultation process with front-line agencies and survivors to monitor the rollout. The clinic suggests looking to the Philadelphia model which was used in policing for an example of this kind of engagement. The original model took place only in police departments. However, as there are many other actors beyond the judiciary and the police who will be part of the process of this being successful, we believe it should be rolled out more broadly.

In addition to sustainable funding for counsel, the clinic also proposes to look at the program Deepa mentioned, independent legal advice for sexual assault complainants, which the clinic currently runs. Additionally, we have an example in the family courts of a family court support worker. This is a program that we run also with the support of the provincial Ministry of the Attorney General. It's a non-lawyer advocate who assists a woman in navigating the system.

Our experience in the last five years has demonstrated that the court accompaniment and participation of advocates for women through the justice system increases their knowledge of the justice system, enhances their participation and decision-making through the process, assists them in realistic goal-setting, and moreover, changes their overall experience of the justice system as well as that of the other justice players who experience the expertise of a non-legal representative in the court system.

● (1645)

Ms. Deepa Mattoo: In conclusion, we want to say that the clinic truly believes that the community experts who work with sexual assault survivors and the survivors themselves should be at the centre of all the proposed amendments. We recommend that front-line agencies such as the Barbra Schlifer Commemorative Clinic, and the survivors themselves should have an ongoing feedback mechanism which is not only formalized but also predictable, to monitor the implementation of the changes proposed.

Thank you.

Ms. Amanda Dale: Thank you very much for including us in your deliberations. I expect we'll be answering some questions when you're ready.

The Chair: Thank you very much for your testimony.

We're going to move to Mr. Dias.

Mr. Dias, the floor is yours.

Mr. Jeremy Dias (Executive Director, Canadian Centre for Gender and Sexual Diversity): Thank you.

I'd like to begin by mentioning that I'm using my iPhone because our organization is totally paperless, so I'm sorry if that is new to you.

I'd also like to acknowledge that we are on the unceded territories of the Algonquin peoples.

[*Translation*]

I'm perfectly bilingual. So I will answer questions in French with great pleasure, but I will make my presentation only in English.

[*English*]

I work at the Canadian Centre for Gender and Sexual Diversity. We're the national LGBTQ advocacy education organization. We work across the country running workshops and doing presentations in all of the LGBTQ fora in all of your communities for all of your students.

We will be submitting the “pink agenda” after this testimony to the rest of the committee. It's from there that we extract our criticism and critique of the changes that have been made. We just want to highlight some of that, based on clause 10 and clauses 19 through 25, as Ms. Dale mentioned.

While we are in broad support of the changes and excited by the expansion of the rape shield laws, there are some concerns that the next witnesses are going to be talking about, so I'm going to leave that up to them. I do want to focus on some of the things that we would like to mention.

At our end, we are very concerned by the lack of research around intimate partner violence relationships within Canada in an LGBTQ context. What this means is that, while we're excited by all these changes, these changes don't reflect the experiences of lesbian, gay, bisexual, trans, queer, and two-spirit people in our country. We're excited, but we don't actually have an informed space to derive any sort of critique on these changes, so we really just want to emphasize those things.

This has made our understanding of this review of this piece of legislation complicated because the experiences of lesbian, gay, bisexual, trans, queer, and two-spirit people are all unique and totally different. What we know from anecdotal evidence is that there are high rates of intimate partner violence in LGBTQ relationships and when you think about it, that actually makes sense. You struggle with your relationships with your parents. You probably struggle with your relationships at school. You may not see yourself reflected in mainstream society and you sometimes bring that anger and violence to relationships.

In the handful of public academic discussions that we have had, mostly at Laurentian University, here at the University of Ottawa, and some at Ryerson University, we've had some really interesting debates where LGBTQ people, and specifically gay and lesbian identified folk, are very reluctant to report crimes of violence to the police because of the long-standing difficult relationship that we've had with police and police services. The first point of access, to which we're often directed, is an access point that we're not necessarily finding to be the most accessible.

These ongoing difficulties with police services across the country are then becoming more challenging through the expansion and deeper understanding of racism and intersectional violence in our community, by which I mean we in the queer and trans community are finally talking about racism. What you may not know is that the LGBTQ community is incredibly racist, disrespectful toward women, and cissexist, which is the modern way of saying transphobic. As we start to break down these pieces, we're finding that new community actors are coming forward and identifying a new challenge with police services and criminal justice services, as well as intimate partner violence victims services, that we didn't even know about. At an organizational level, it is really exciting to finally see those conversations come to light, but they are actually identifying major gaps in services.

Of course, this brings me to my second point, that we don't have any services that support LGBTQ victims of intimate partner violence. In our country, except for our organization's intimate partner violence victim prevention program, there is nothing else. We know this because we brought all of the LGBTQ service providers together in June and we asked everyone what they would do if a victim of intimate partner violence came to them, as an executive director, service provider, or volunteer at their service. The answer in many cases was “I don't know, maybe send them to police or send them to a shelter”, to which we asked, “Will these shelters welcome a lesbian person? Will these shelters welcome a trans person?”

We're not saying shelters are not welcoming these folk. In fact, when working with the national shelters network, we're really excited that these shelters are becoming very progressive and very aware of these issues. However, there is no funding to train these shelters and resources on these new and emerging needs in our community.

● (1650)

That brings us to my third point, which is reporting. As I mentioned earlier, we in our community struggle with our relationships with criminal justice service providers, specifically the major first point of contact, which is the police service. If there are no LGBTQ service providers who provide support counselling for intimate partner violence services, how can you even then be guided or supported when you go to police? Again, we have very little research to go on, so this is anecdotal, but what we're hearing from our partners internationally is that, in many cases, people are not reporting. This is also compounded by the existing issues of not reporting that victims of intimate partner violence already face: financial, emotional, and so on.

On top of that, if someone does decide to report something—as we actually had a case here in Ottawa, finally—those victims have then gone back to service providers such as us and said, “Hey, can you walk us through the process? Can you come to court with me? Can you sit outside the police centre so I have someone to talk to after?” As we looked around Ottawa, we actually had no resources to do that. Even our centre, while we got volunteers and staff to step up, had a very difficult time providing those services effectively and properly. We either need to train existing service providers and enhance them, or we need to create new service providers to address those needs.

Then, to make it all more exciting, we're finding that the justice system is very unfamiliar with us: we're talking police; we're talking crowns; we're talking judges. It ranges from all kinds of behaviour between complainants being completely misgendered and disrespected, right up to having a crown attorney say they weren't going take something to court because it was two men and they can fight out their own problems. We're really disturbed by these types of comments that are not even made behind closed doors. They're made in emails; they're super public. They're on our website; you should read them. We're really concerned by them.

Frankly, I'd like to echo Ms. Dale's comment that we need more training, which is funny because I was at this committee two years ago and we talked about training and about funding that, and we're not seeing any movement on that. Mandatory training for the justice system as a whole, not just judges, is super critical, mandatory training that has a national standard.

You're thinking you're the federal government and you can't really impose stuff on the provinces or territories, but you can work in collaboration. We can bring people together and create those national partnerships, because that leadership is required somewhere. It's not coming from us, because we don't have any money for it.

Going back to a little piece that we'd like to discuss, the experiences for sexual minorities, for gay, lesbian, bisexual, pansexual, or asexual folk are very different from the experiences for trans folk. What we're noticing within gay, lesbian, and bisexual relationships is that police services are just not taking them seriously and they're expecting that because both partners are of the same sex, they'll resolve the conflict on their own.

When it comes to trans victims, trans feminine victims are reporting that they're being outed as men, so once again the onus is on them to resolve their own conflict, and trans masculine folk are often being dismissed or misunderstood within those relationships.

The new and emerging issue, which I think many of you may be somewhat familiar with, is that we've had the first intersex Canadian come out. Nine months ago, as many of you know, at the Canadian Centre for Gender and Sexual Diversity, Mel Thompson came out as Canada's first openly intersex individual. Traditionally, most Canadians have at the age of five or six decided to be a boy or a girl, and while identified as intersex at birth, grow up for the rest of their lives in the traditional gender binary. Mel Thompson, the first Canadian to do so, has broken that rule, and now we're actually seeing more Canadians come out and demand that hospitals do not perform surgery on infants and do not give young children the choice of either being a man or a woman if identified as intersex at birth, but actually a third choice, to grow up as intersex and not have their bodies mutilated. That is actually becoming the norm through the European Union, through the United Nations Free and Equal campaign, and of course, in the Latin American alliance led by Chile. It's totally normal internationally and still very new here.

If you want to learn more, on November 1, our tool kit will be available online, including our requests to change the criminal justice code on these issues. You'll get an email about it anyway.

In speaking to this, I'm really excited by these changes. We totally support the expansion of the rape shield clause, and with the exceptions that our colleagues are going to talk about shortly, we're excited but we do hope that the committee and the members here will think about prevention. What we truly need is a national strategy to address intimate partner violence, and especially the rising rates of violence that we're seeing against women and female-identified folk. This national strategy has to work in partnership with municipal agencies, provinces, territories, as well as civil society; and it has to have both a prevention focus as well as a victim-informed strategy.

● (1655)

Frankly, what this comes down to is greater funding, and greater funding for research, not just for LGBTQ organizations but for all of us. Many of us are working the best way we can, but it's very difficult. We'd like to see some leadership on these issues as opposed to ongoing band-aid solutions.

Thank you.

The Chair: Thank you very much.

We're going to go to Women's LEAF, to whoever's starting.

Ms. Karen Segal (Staff Lawyer, Women's Legal Education and Action Fund): My name's Karen Segal. I'm counsel at LEAF, the Women's Legal Education and Action Fund. LEAF is an equality rights organization that, since 1985, has been involved in advancing women's substantive equality rights. We do that particularly through legal advocacy and litigation. In particular, we have played a significant role in law reform initiatives relevant to sexual assault, and have participated in nearly all significant changes in this area.

Broadly speaking, LEAF is supportive of the changes proposed in Bill C-51. However, we have serious concerns about the additions of proposed paragraphs 153.1(3)(a.1) and 273.1(2)(a.1). I'll first review our concerns about those provisions, and then briefly identify the reforms that we support.

Our fundamental concern with Bill C-51 is the proposed codification of unconsciousness as a bright line defending when someone is not capable of providing consent to sexual contact. The provision adds nothing new to the law of sexual assault, which has long held that unconscious women cannot consent to sexual contact, and risks opening the law of incapacity to being defined by unconsciousness as opposed to by an individual's ability to provide informed and voluntary consent.

As I said, courts have had no difficulty dealing with the long-standing rule that unconscious people cannot consent, and we're not finding that courts find that unconscious women have been capable of providing consent. Where courts have real difficulty is in dealing with complainants who are conscious but whose ability to give meaningful consent is severely impaired by alcohol or drugs.

The law on incapacity requires women to be capable of providing informed consent, which has been defined to mean understanding the sexual nature of the act, and of realizing that he or she may choose to decline participation. However, in practice, courts have struggled with giving meaning to this threshold. Judges have routinely required external indication of unconsciousness or sleep in order to conclude that the complainant was not capable of consenting. We've also seen judges rely on a complainant's ability to perform basic tasks, such as remembering the password to his or her cellphone, as evidence of the capability of providing informed consent to sexual contact. We are not seeing courts engage in a nuanced analysis of the complainant's ability to provide informed consent.

Further, courts have a tendency, because of this focus on unconsciousness, to conflate capacity to consent with consent itself. A glaring example of this is the Nova Scotia case R. v. Al-Rawi, which is currently under appeal, in which the accused taxi driver was acquitted despite the fact that the complainant was found unconscious in the back of the accused's taxi cab in a remote area of town, partially naked, with the accused crouched between her legs, holding the complainant's soaked underwear in his hands. The judge found that he could not conclusively say that the complainant was unconscious at the time the sexual assault began, and therefore, he had reasonable doubt as to her capacity to consent, and whether or not she in fact consented. In other words, she may have been conscious; therefore, she may have been capable; therefore, she may have consented. LEAF is very concerned about this trend in the case law, as it emphatically fails to protect women who are sexually assaulted while conscious but otherwise intoxicated and incapable of providing consent.

Our view is that the courts' excessive focus on unconsciousness as the defining point at which someone becomes unable to consent improperly distorts the analysis, and it focuses judges on consciousness versus unconsciousness as opposed to whether the complainant was able to and in fact did give voluntary, ongoing consent to sexual contact. Our fear is that these changes perpetuate this problem.

First, on the codification of unconsciousness, we believe defence counsel will rely on that to argue that unconsciousness is now the legal standard at which a woman becomes unable to provide consent. Given that codifying unconsciousness adds nothing new to the law, we fear that this amendment will be interpreted as clarifying the existing uncertainty in the law of incapacity that I've just identified. At the very least we anticipate these arguments will be made, which means the crown will have to re-litigate capacity to consent, at the expense of the lives of individual complainants whose lives are affected by these arguments and by these trials.

● (1700)

Second, even if unconsciousness is not officially interpreted as the legal bright line at which a person becomes incapable of consenting, we fear that this provision will perpetuate the excessive focus on consciousness as the point of incapacity, as opposed to encouraging judges to engage in a nuanced assessment of capacity versus incapacity, informed by the principles of understanding the nature of the act, understanding the risks associated with the act, and understanding the right to decline participation.

We recognize that the paragraph (b) provisions of these two subsections keep open the possibility that incapacity will be found for reasons other than unconsciousness, but this doesn't allay our concern. The new provisions will still direct judicial attention to unconsciousness as at least a bright line at which a person becomes incapable of consenting, and they do nothing to assist judges or decision-makers in assessing incapacity short of unconsciousness.

We propose that, rather than codifying and potentially restricting the definition of incapacity to consent, Parliament use this opportunity to address the problem that actually exists in the case law and to clarify in what circumstances a person is able to provide consent. We suggest codifying a standard that clearly articulates that a person cannot consent unless he or she is capable of understanding the sexual nature of the act and risks associated with the act, capable of realizing that he or she may choose to decline participation, and capable of communicating voluntary consent to the act. This analysis will go much farther to protect women from sexual assault than will an amendment that focuses on unconsciousness as a legal test for incapacity.

That being said, we do support many of the changes that are being made. For more detail on that, we direct you to our submissions which flesh out our arguments on that point. I'll note specifically that we support limiting the admissibility of records in which the complainant has a reasonable interest of privacy, regardless of who possesses those records. The purpose of the third party records provisions is to advance women's equality and right to privacy in the course of a sexual assault trial and to provide greater fairness to the complainant, which in turn encourages the reporting of sexual offences. We submit to you that those goals apply with equal urgency to any records in which the complainant has an expectation of privacy.

We also support codifying the law, which we would say already exists, that sexual communications are sexual history evidence. Sexual communication is just as susceptible to discriminatory logic, myths, and stereotypes as is sexual behaviour. An example is the fact of someone sending a sexual text message. We fear that it will be argued that it means that woman is the kind of person who would consent to sex, which is exactly the kind of logic that the rape shield laws were created to prevent. So, we support Parliament's movement to bolster the rape shield provisions and protect women from discriminatory myths and stereotypes.

We also agree with the provision providing complainants with right to standing in these hearings. Our experience with third party records hearings is that complainants with legal representation have a much more empowered experience, and it increases fairness to the complainant to have representation. We agree that complainants facing disclosure of their sexual history should be entitled to the same protection.

To summarize, we broadly support the changes. We encourage you to remove the codification of unconsciousness as a standard at which someone becomes unable to consent, and to properly clarify what is required for someone to have capacity to consent.

For a more detailed analysis of these provisions, we direct you to our submissions.

Thank you.

● (1705)

The Chair: Thank you very much. All of your testimony was very helpful.

We will now move to questions from the committee.

We'll start with Mr. Nicholson.

Hon. Rob Nicholson: Thank you.

Thank you very much for your testimony today.

Ms. Mattoo, you indicated that you believe counsel should be an important component of the assistance that a complainant, someone who has been victimized, should have. Would you agree that this is a step in the right direction, that the counsel for the hearing of the complainant is the first step and that it should continue throughout the process? Is that basically what you're saying?

Ms. Deepa Mattoo: Absolutely. In the submission from the clinic, we are saying that it is a step in the right direction, but there is a challenge with the fact that they're saying that it will only be available at certain stages and not throughout the process. Our experience from independent legal advice for sexual assault survivors tells us that it's actually really important for survivors and the victims to come forward and get that advice right from that initial point and through the whole process.

Hon. Rob Nicholson: Thank you very much for that.

Ms. Dale, I bet you are looking for progress that we are making. I'm sure you're supportive of the private member's bill that will require judicial training—

Ms. Amanda Dale: Yes, I have been in support of it.

Hon. Rob Nicholson: —in this area. That's one step in the right direction.

At one point in time, you said that your organization provides non-legal advocates to help navigate the system for the victims. Would it be better to have a legal advocate? I mean, trying to stick—

Ms. Amanda Dale: We have both.

Hon. Rob Nicholson: You have both.

Ms. Amanda Dale: We have both.

To clarify what I was trying to say, we're always in a resource crunch. This is always the argument against more and more lawyers entering the system. We are very much in support of proper legal counsel with a proper role in the law, but there are additional things that happen in cases of gender-based violence that women require which are outside of the purview of a lawyer's expertise. Lawyers are not always the best people to glue women back to the systems that they need to support them in their social life. What we have in Ontario is a combination.

You may know that the legal aid system in Ontario has a minimal amount of support for family law. Often women who are experiencing violence have multiple family law issues. In our clinic, which is not legal aid supported, we provide representation in family law.

Additionally, we have three workers whose job is to navigate that system with her, so that she understands the system and she gets the social supports she needs, like housing, income support, access to child care, access to children's aid, or whatever it is she needs in that context. Additionally, these workers know the family law system well enough that they can be the ones that literally run down the hall and make sure duty counsel is on tap or make sure that the legal aid certificate is being applied for when she's eligible for it.

It's that glue in the system which we believe would help in the case of sexual assault. Again, since we're talking about a different scenario, where she doesn't have legal standing, in addition to legal counsel, what we're looking for is independent legal advice, in addition to which she will have some kind of specialized support in the court system that is not victim services because victim services has a limited role and they cannot discuss anything that has to do with the dispensation of the case, as you probably know.

In order to have proper support that's in her corner, we're suggesting an additional element beyond strictly legal.

Hon. Rob Nicholson: Thank you very much for that clarification.

To everyone here, we've heard quite a bit about the codification of the unconscious provisions. We've heard both for and against.

Ms. Segal, I'd like to ask you a question, if you don't mind.

I'm not in the business of defending the government's legislation particularly.

Voices: Oh, oh!

Hon. Rob Nicholson: No, it's true. I'm here to try and analyze what they have and.... They do have the complainant is unconscious as one of the requirements, but there's also this other section, “the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1)”.

Don't you think that helps in terms of expanding it, so that it's not just limited to a person who is unconscious?

● (1710)

Ms. Karen Segal: I'm going to direct questions to Lise Gotell.

Hon. Rob Nicholson: Okay.

Dr. Lise Gotell (Chair, Women's Legal Education and Action Fund): We do recognize that the provision does open up avenues for the analysis of incapacity in a more nuanced way than unconsciousness. However, we are afraid that the codification of unconsciousness will reinforce what we're seeing as being a trend in the case law, where there's a drift towards seeing unconsciousness as the threshold of incapacity.

Hon. Rob Nicholson: That's fair enough.

We haven't received a copy of your testimony, but Ms. Segal, I think you did say that you do set out in the material you're submitting to the committee some of the possibilities that could be included in an amendment or a particular section for that. Is that correct?

Ms. Karen Segal: Exactly. It reflects what I addressed in my submissions here today.

Hon. Rob Nicholson: Mr. Dias, I have one question for you.

You didn't particularly address the legislation. Can I take it that you're in line with the comments of the other witnesses here today with respect to the actual drafting of the bill?

Mr. Jeremy Dias: Yes, absolutely. We're just giving a warning that once we're able to get some more research, we'll be asking for changes to be made.

Then, of course, we want to emphasize that we do support LEAF's note that the “unconscious” piece might be a problem and might require some clarification. In our experience, and especially with LGBTQ cases, we have noted that judges and crown attorneys find these loopholes to add some sort of simplicity to their process, and often we're very disappointed when victim testimony does not carry the weight that it should.

Hon. Rob Nicholson: Thank you, Mr. Chair.

The Chair: Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thanks very much, Mr. Chair.

Jeremy, thank you very much for joining us. We really appreciate your work.

Because you raised it in your last point, I want to state that the international lesbian and gay association's Canadian representatives and our LGBTQ2 secretariat have been working with Dr. Morgan Holmes, who is one of the lead experts in the country on intersex matters. As a federal government, we are working on a response to issues that face the intersex community, so we really appreciate your bringing it up here today.

From your expertise with front-line workers and through anecdotal evidence, what are some of the issues that face intimate partners and the violence that happens with them, other than challenges related to police? Once you go through the difficulty of coming out and you actually find somebody but then realize that they're beating you or there's violence, isn't it true that there's deep shame and you don't know who to talk to, even in your own friend circle, let alone professionals?

Mr. Jeremy Dias: Yes. I mean, there are two pieces to it.

One is that there are specific challenges that LGBTQ people face from abusive partners, right? A partner who is abusive might threaten to force you out of the closet. They might tell family members who you're still closeted to and force you out. Or if you're trans identified and you're using their benefits to access health care, health services, or hormone therapy, a threat of that financial cut-off is a very specific and degrading experience that LGBTQ people face.

On the flip side of things, what we've noticed in LGBTQ communities, especially in rural and remote spaces—Grande Prairie, Lethbridge, Sault Ste. Marie, Sudbury—is that LGBTQ folk are reluctant to go to the criminal justice system because they recognize that the violence their partners are bringing to relationships is not necessarily violence because they're—quote, unquote—a "bad person", but is violence that they've inherited from trauma, from past experiences, and they're bringing it into the relationship. People are trying to find non-criminal justice solutions to address these challenges, solutions that of course don't exist within the LGBTQ community because there is no funding for such services. That's one of the challenges.

At a conference that we hosted in Sudbury, one of the keynote speakers noted that if we were to lock up all the criminals in intimate partner violent relationships, we'd have no one left to date in towns like Sudbury, Trois-Rivières, or Fredericton, because the dating pool is so small, right? StatsCan says that we're 3% to 4% of the population. Most federal departments acknowledge that we're 13% to 14% of the national population, so you're talking about minority communities, and we face very specific and unique challenges. This is a reality that people are talking about on the ground.

● (1715)

Mr. Randy Boissonnault: I have an additional three questions. How can additional training for police, lawyers, and judges help in the area of intersectionality, particularly for LGBTQ needs? Which organizations other than yours would deliver it? Also, how much money are we talking about?

Mr. Jeremy Dias: Those are great questions.

How would this help? Unfortunately, in our country you can go from kindergarten to a Ph.D. without learning anything about LGBTQ culture, communities, or history, or even about inclusion and how to create respectful spaces. Frankly, this will make our justice system more accessible to the 13% of our population who are dramatically underserved in this cause, and we would carefully acknowledge, based on anecdotal evidence, that many LGBTQ people, within one relationship or another, will face intimate partner violence. We're very concerned about that.

Other than our agency, we house the national network of LGBTQ service providers, so while we would love a ton of money, we actually wouldn't keep it. We would rather train our LGBTQ service provider network and all of the national service providers and enhance those existing agencies, so that services are delivered by queer and trans folks. Similar to how this government and the previous one really empowered indigenous communities to take ownership of their resources and services, we would want to empower LGBTQ organizations across the country.

We're proud to say that the LGBTQ service providers network that is housed at the Centre for Gender and Sexual Diversity does create a total blanket across our nation. If only we had the funding to empower those agencies.... We're not talking about a lot of money. I fundamentally believe that a small investment of a million dollars or maybe slightly more would hire enough staff people in those agencies and would train them, and we would move forward on really enhancing the capacity of these agencies. As an organization, we are not advocating to build LGBTQ shelters in every city across the country for partners escaping domestic violence. We just want the ability to enhance existing service providers to create a good point of first contact and then train those service agencies that are already working in intimate partner violence.

Look at what Ms. Dale is doing and what LEAF is doing. We don't need to replicate that. We just need to work with those services to make sure that LGBTQ, intersex, and trans are a part of their language and a part of the work that we're all doing together to make the world a better place. For that, we need to fund them.

Mr. Randy Boissonnault: Thank you. I agree that we've seen this across the country in terms of the underfunding or the lack of funding or, in many cases, no funding from the federal government for important LGBTQ2 organizations.

I want to ask W-LEAF a question, but I first want to ask you a clarification question. I was listening to your testimony carefully. Wouldn't it be more accurate to state that racism is present in the LGBTQ community, as opposed to a blanket statement that the LGBTQ community is racist?

Mr. Jeremy Dias: That's a very interesting perspective. Our intersectional committee would carefully disagree and would hold to account my statement that everyone has the capacity for racism, discrimination, and sexism.

When we look at the International Day of Pink campaign that the Prime Minister, the current Leader of the Opposition, and Jagmeet Singh have all endorsed, and actually very passionately, one of the critical messages from the Centre for Gender and Sexual Diversity is one of acknowledging that all of us have the capacity to hurt people, all of us have been hurt, and all of us have seen hurt happen.

Honestly, all of us struggle with the challenge around racism, sexism, homophobia, and transphobia every day. It's not necessarily a destination of not being homophobic or not being racist, but rather an ongoing effort that we all make in our daily lives to make the world a better place.

Mr. Randy Boissonnault: Thank you.

Mr. Chair, I have a quick question for W-LEAF.

The Chair: You're over your time, unfortunately. Maybe Mr. Angus will ask that question.

Mr. Angus.

Mr. Charlie Angus: Thank you, Chair.

Ms. Segal, I want to start by continuing this conversation about the codification and consent, because I think it is really crucial that we get this right. I am concerned about how we start to frame this and if there is a way within law to do this.

If we're talking about the moment of unconsciousness, of incapacity, we're talking about a number of issues: power and powerlessness, risk, incapacity, and what actually clarifies real, clear consent, especially for a woman who is not in a situation of power or security when the act happens. Is there a specific codification language that you think we need to put in which would at least help to address some of these issues?

● (1720)

Dr. Lise Gotell: Well, there's no doubt that this is a very difficult issue. We are not talking about incapacity being something that touches unconsciousness. Incapacity actually can be a state that's removed from unconsciousness.

What we suggest is that—we haven't suggested legal or proposed language here—this amendment remove the unconsciousness provision and instead define incapacity in the following way. Incapacity means that someone is incapable of understanding the sexual nature of the act and the risks associated with the act, incapable of realizing that he or she may choose to decline participation, and incapable of communicating their voluntary consent. There are those three elements.

This is a very large problem. We are submitting our detailed written brief, but estimates are in the range of 50,000 sexual assaults happening each year in circumstances where complainants are intoxicated. This is a very significant problem.

Mr. Charlie Angus: I certainly agree.

Ms. Dale, my wife worked with sexual assault victims in the 1980s. My oldest is working with them now. When I hear my daughters speak, they blow my mind about the pervasiveness of what they call rape culture. They say that in Ottawa there are “rapey bars”, and young women are told, “Don't go there: that's where you get raped.” I mean, I hung out with a lot of dumb doofuses when I was growing up, but I never heard of a rapey bar.

How do we start to address this? What my daughters tell me is that when one of their friends is assaulted—and these are young women with some levels of power and of education—their inability to even go forward with the complaint...because sometimes the people who are perpetrating these have power too. How do we start to address these issues? Incapacity becomes a central focus when young women have to bring their own drinks—with a top on their drinks—to a party. This is a much more pervasive problem. How do we start to deal with this crisis?

Ms. Amanda Dale: I like to think that we did start dealing with it.

We need to understand that in the global context, violence against women, and sexual violence in particular, has been named by the UN as a global pandemic. They don't throw those words around lightly. From a public health perspective, we've had Canada stand up and say that violence is a public health issue. If we were to treat this as a pandemic, we would be investing in it differently.

I don't want you to hear me say today that everything is about money, but it is true that without proper social investment we can't move the marker very far. We wind up with a revolving door of victims because we're recycling them into an environment that reoffends.

Doing this work has been my career for more than 30 years. I believe we're in a moment where we have the opportunity to make a difference. I believe there's enough of a groundswell of public support in beginning to understand this issue at a deeper level. We're not still in the headlines that we were in maybe 15 years ago when we had a cycle of just victim blaming. We're getting a bit deeper now. I believe there's public support for proper implementation of a proper program that requires all of us to sit down at an expert table and actually hammer out some education pieces.

Everybody says “prevention, not just intervention”, but prevention takes place every time we intervene. How we intervene, whether the experience of the justice system is a positive one or not, is a message sent out to everyone about prevention, because every time someone gets away with it, every time we have a crime that is treated with what is very near to impunity in a country such as Canada, that is a message to everybody about how we value these issues.

You are getting at it here, but it's not all that you need to do.

● (1725)

Mr. Charlie Angus: No, and I appreciate that. The fact that we're having a discussion about consent says that we are moving the bar.

In terms of the pandemic and the lack of resources, I'd like to switch to the issue of indigenous communities, where we're having massive suicide death rates. There is always talk that there's a connection between sexual violence and youth suicides—

Ms. Amanda Dale: Absolutely.

Mr. Charlie Angus: —particularly for the young girls. We were in one particular situation where I called the police officers who were on the ground and asked if this was prevalent. They said they had no resources. We called the children's ombuds office and asked them what they knew, and they said they had had no resources. The mental health workers are flown in and flown out. This is the front line of indigenous sexual violence, and then those children are put into the foster care system, and the foster care system is the conduit of sexual violence against young indigenous girls.

My question is—I know you have an area of expertise—who is there to start addressing the issues of potential sexual violence against indigenous children who are put into a system that's supposed to protect them but fails them? Because that is the beginning of the Highway of Tears.

Ms. Amanda Dale: Yes, I totally agree, and I did work in the far north in setting up a shelter in Nunavut. I have some direct experience with both the levels of violence and the impossibility, as my colleague said, of just incarcerating everyone who offends, because it's so endemic that you would literally be incarcerating the whole community.

Clearly, the responses need to be more broadly based. I would say that your resident expert is NWAC. NWAC works well with the indigenous northern women's organizations, all of which have very well worked out plans for how to stem the tide of violence against them.

The leadership within the indigenous women's community is some of the strongest in this country. They are some of the most articulate about how to deal with these issues, including the native friendship centres, which have just changed their name to "indigenous friendship centres". You have great leadership in places such as Ontario, which is tackling the issues of gender-based violence as well.

Certainly, I would start with NWAC. They've done amazing work on this. They were the cry in the dark around murdered and missing indigenous women when no one was listening.

The Chair: Thank you very much.

Ms. Damoff.

Ms. Pam Damoff (Oakville North—Burlington, Lib.): Thank you, Chair.

Thank you to those witnesses I've seen at status of women. We actually studied violence against young women and girls as well as the private member's bill on judicial training. Sadly, much of the testimony we've had today hasn't been to do with Bill C-51; it's actually been on the same issues we heard about.

One of the challenges, of course, is that we have federal and provincial judiciary courts, so where is the money coming from? Is it the provincial or the federal government? I hear what you're saying. One of the most compelling witnesses we had represented crown attorneys, who said that when survivors of gender-based violence come forward, they think the crown attorney is representing them and not the state, so they feel they have a representative in court, but then when they get there, they're let down when they find that that's not their representative.

When you were talking about the need for someone to be with them, I completely agree with you. I don't think that's something covered in this bill, though.

Do you think the right to legal representation during the rape shield provisions, that part of it, is a good thing?

Ms. Amanda Dale: You're looking at me, so do you want me to answer?

Ms. Pam Damoff: I actually want all of you to answer.

I recognize that it doesn't go nearly as far as all of us would like it to, which would be to have someone take the survivors right through from going to the police to the whole court process. When I looked at this bill, I was thrilled that we were at least taking some steps forward. There's been some concern about access to representation. Making it available doesn't mean that everyone will be able to access it.

Maybe all three of you could comment briefly on that provision. Is this a good thing? How would you see the federal government improving what's there, and do you think even having that there will encourage more survivors to come forward?

● (1730)

Ms. Amanda Dale: I think it's a step in the right direction for sure, and I think it's important to have representation during the rape shield provisions. We've seen how things go very wrong when those are not in place. I think it's absolutely the right step.

We mentioned further steps because we would like to incentivize provincial legal aid programs. LEAF can probably comment on this, because they were very active in these provisions and in lobbying the provincial legal aid systems to even regard this as an important place for representation.

The Chair: I'm sorry, but I need to interrupt, Ms. Dale.

The bells are ringing. May I ask for unanimous consent to continue until we complete this round of questions?

Some hon. members: Agreed.

The Chair: Thank you, everyone.

Please continue.

Ms. Amanda Dale: Okay.

We went further because in our experience in Ontario with providing independent legal advice, originally the province wanted to provide it when a trial date was set. We encouraged them to back that up, because the cases go wrong right from the get-go. Women do not understand, as you pointed out, that the state is not representing them. Simultaneously, they don't understand the implications of any of their conduct or that any of it will be held against them or that even collecting a rape kit and submitting it commits them to a path that they may not have consciously committed to.

Ms. Pam Damoff: Do you have any suggestions for changes to the bill?

Ms. Amanda Dale: No. Maybe those would be at the implementation level.

Ms. Pam Damoff: Okay.

Ms. Amanda Dale: I'm here to encourage you in the bill and to say have us back so that we can help bolster the ways in which you can incentivize the provincial programs. That may be through additional funding or it may be through matching. I always like to have a carrot, to draw the provinces towards this by having matching funding that allows them to actually apply for funding that gives them a little boost if it's in a program area that you've determined.

I think there are ways to work with that provincial-federal gap quite creatively. That's what I would like you to consider as you go forward.

Ms. Pam Damoff: That is something we called for in our report at status of women as well—for the feds to work with the provinces.

Ms. Amanda Dale: I'd like to hear from my colleagues, because I'm sure they've thought about this from their stance.

Dr. Lise Gotell: I think it's a real issue. There is existing research. Complainants have had standing in section 278 hearings on the production and disclosure of confidential records. That's existed since that provision came into effect in 1997. The problem is the patchwork of approaches across the country as to whether or not complainants are provided with publicly funded legal representation. In some provinces, legal representation in section 278 hearings is provided through legal aid. Crown attorneys take this very seriously, because this is a state-authorized search and seizure. It's very important that complainants have representation.

We would like to see the federal government work in collaboration with the provinces to ensure publicly funded legal representation for complainants in section 278 record hearings and in the new provisions on the admissibility of sexual history evidence and the admissibility of confidential records in the hands of the accused. It's really critical that we ensure public funding for that legal representation.

I'll echo something that Amanda was saying, that in addition to concerns about providing publicly funded counsel to complainants when they have standing, complainants also require more general legal advice about even the very basic question of making a police report and about the progress of a trial. I know that the federal government now has a number of pilot projects in collaboration with the provinces across the country whereby complainants are being provided with three hours of independent legal representation. We need to make that more extensive. That should be something that exists across the country.

The Chair: Thank you very much.

Mr. Dias, do you have anything brief to add?

Mr. Jeremy Dias: I just want to echo what Ms. Dale said about the provinces and the territories working together. This issue was brought up to our youth advisory council from across Canada. They're excited to have representation when they go to court if something bad happens, but the youth council actually asked us some questions. Why aren't we teaching young people from the very beginning about what to do if they are a victim of crime? What happens when they are victimized by crime? How does the criminal justice system work?

I think the federal ministry of justice needs to work with not just their counterparts provincially but also other ministries provincially, including education and health, to say, listen, we have some carrots: match these carrots, put it into your curriculum, and let's give students the resources and tools even before they're victims of crime.

That type of proactive education is really critical. I can't even tell you how many victims of crime walk in and out of my office door. First off, they have been victimized. They're not in an emotional or physical state to be able to handle the information we're throwing at them. We do victim education training in our forums. Because 50% of women will experience violence, sexual or physical, before the age of 30, and because that number is even higher in LGBTQ communities, we do training for LGBTQ folks who are attending our forums so that they understand what the criminal justice system looks like, what will happen when you're a victim of crime, how to document that experience of victimization, and how to know what to disclose or not disclose to friends, family, or other stakeholders. It's about navigating confidentiality, because of course your body and your identity become evidence.

It just can't always be last-minute. We have to be proactive about these things. It would be great to imagine that we live in a world without crime, but I think the federal ministry of justice has an opportunity to show leadership, and then of course to work with civil society like us. We can sit down and craft a national strategy, which we still don't have, and implement it.

Thank you for the last word.

● (1735)

The Chair: Thank you very much.

I want to thank this panel for helping us go forward with our study of Bill C-51. I wish you all a great rest of the day.

We are recessed until after the votes, when we'll resume with our third panel.

● (1735)

(Pause)

● (1920)

The Chair: It is my pleasure to call this meeting of the Standing Committee on Justice and Human Rights back to order for our third panel of the day dealing with Bill C-51.

It is a pleasure to welcome from the University of British Columbia both Ms. Janine Benedet, who is a professor of law, and Ms. Emma Cunliffe, who is an associate professor.

Welcome, Ms. Benedet and Ms. Cunliffe. It's a pleasure to have you both here with us. Thank you for coming from so far away.

We will start with Ms. Benedet.

Professor Janine Benedet (Professor of Law, Peter A. Allard School of Law, University of British Columbia, As an Individual): Thank you very much.

As the chair indicated, I am a law professor at UBC. My research and my teaching focus on legal responses to sexual violence against women, including sexual assault, sexual harassment, prostitution, and pornography.

I'm here today testifying in general support of the provisions of Bill C-51 as they relate to amendments to the Criminal Code in the area of sexual assault while recognizing that the barriers women face in the area of sexual assault are much deeper and more systemic than what this suite of amendments touches.

In the few minutes I have for opening remarks, I'm going to focus in particular on the proposed amendments that relate to the definition of consent, and the defence of mistaken belief in consent, and then just conclude with a couple of words in support of the proposed changes to the definition of sexual activity for the purpose of section 276 of the Criminal Code.

I'll start with proposed paragraph 273.1(2)(a.1). I would just recognize that I think we're 17 years overdue for renumbering of the Criminal Code, and these amendments remind me of that.

This is the proposed change to the Criminal Code that would add as an item on the list of factors in which no consent is obtained the fact that the complainant is unconscious.

This is the one proposed change that raises concerns for me. I understand it as an attempt to codify the Supreme Court of Canada's decision in J.A. I think that's an important decision and worth reflecting in the Criminal Code, but I am worried that the proposed amendment reduces that decision to being about whether you can consent in advance to sexual activity when you are unconscious, a term that in and of itself is perhaps contested and not entirely settled in its meaning.

The decision in J.A. actually goes further than that. What it says is that you cannot give advance consent to sexual activity that takes place when you are incapable of consenting, and that's a broader term than just unconsciousness.

Now, I recognize that you might say that incapacity is still there, but I actually think it would be better, rather than inserting paragraph 273.1(2)(a.1) into that list, to simply amend paragraph 273.1(2)(b) to say no consent is obtained for the purposes of sections 271, 272, and 273, where the complainant at the time the sexual activity takes place is incapable of consenting.

That actually gets at the crux of J.A., the point that there can be no advance consent to sexual activity that takes place when an individual is incapable. What matters is their capacity at the time of the sexual touching. That would codify J.A., and it would also benefit perhaps a broader range of sexual assault complainants than what's being contemplated by the existing amendment.

In particular, with regard to individuals with dementia, we've seen some interest in the concept of advanced directives vis-à-vis the idea that there could be advance consent by someone in the early stages of Alzheimer's disease to continue to have sexual contact with a spouse even when they no longer recognize them. That's not someone who's unconscious, but it is someone who's very vulnerable and clearly incapable of consenting to sexual activity.

It would also benefit women with intellectual disabilities more generally by making it easier to think about incapacity in a situational way. Where we are now is that judges are very reluctant to find complainants with intellectual disabilities incapable of consenting, because they believe doing so disqualifies them from all sexual activity for all time. Again, focusing the incapacity inquiry on the time that the sexual activity takes place benefits not only those women who are unconscious or otherwise incapacitated from domestic violence or from drugs and alcohol but also women with intellectual disabilities.

It seems to me there might be a clearer and better way to reflect the very important decision of the Supreme Court of Canada in J.A.

● (1925)

The bill also proposes some changes to the definition of mistaken belief in consent, and in particular some clarification that the accused cannot rely on any of the factors that would vitiate consent to found a mistaken belief. That again is codification of the case law, a useful clarification that makes it clear that there is a difference between a mistake of law, which does not exonerate—if you believe that consent is something other than what the law requires, you can't rely on the defence—and the defence of mistake of fact, which is much narrower and requires an honest belief, in the circumstances known to you at the time—not the result of recklessness, not the result of wilful blindness, and not the result of intoxication—that the complainant was consenting and, of course, that you took reasonable steps to ascertain her consent.

Having said that, I think it is worth pointing out that in contemporary sexual assault trials it is rare to even get to this defence. We are still in a situation in which the Criminal Code does not define non-consent, and that's actually what the crown has to prove. Most often, cases fail because the credibility of the complainant's claim as to her state of mind—that she did not want the sexual touching to take place—is undermined, and it is most often undermined by long lists of missed opportunities or what the complainant ought to have done or should have done and didn't do.

That remains a significant barrier for sexual assault complainants, which isn't addressed by Bill C-51. This means that we rarely get to the question of the accused's belief in consent, but I think that, when we do get there, these amendments would certainly be a valuable addition to the Criminal Code.

The last point I want to mention relates to the amendments that touch on the issue of sexual history evidence. In particular, I want to express my strong support for expanding or clarifying the definition of sexual activity to include communications, photographs, and other kinds of evidence that may not relate to actual physical sexual contact between the complainant and the accused or third parties.

That's particularly important because the case law in that area is currently divided, with some judges treating that kind of evidence as falling under section 276, and others thinking that it falls wholly outside, and is therefore simply inadmissible. That would actually be an important and useful clarification, as is the following proviso, which is that, if the evidence is being adduced to support one of the twin myths, it is simply not admissible and we don't go on to a balancing exercise. Those are both areas in which I see courts struggling to apply these provisions as consistent with their original intent, and they remain important clarifications and additions to the sexual history provisions in that area.

That's what I would like to draw to the committee's attention at the outset. I welcome your questions.

● (1930)

The Chair: Thank you very much.

Ms. Cunliffe, the floor is yours.

Dr. Emma Cunliffe (Associate Professor, Peter A. Allard School of Law, University of British Columbia, As an Individual): Thank you for inviting me to speak to this honourable committee today and particularly for returning at the end of a long day to hear us speak.

It may provide a little context for my remarks if I begin by explaining that my academic research focuses on factual reasoning and the evidentiary rules in criminal trials, so I have a particular interest in factual reasoning in sexual assault cases. For that reason, I'll focus on the procedural dimensions of the proposed changes in Bill C-51, in particular the proposed changes to sections 276 and 278.

The three specific features of the bill that I will address are the clarification in respect of sexual activity that Professor Benedet touched on; the proposal to give sexual assault complainants standing in respect of procedural applications that bear upon their charter rights under section 278; and the imposition of procedural safeguards before an accused person may introduce records in which the complainant has a privacy interest under section 278.

While preparing for today, I reviewed the submission prepared by the Women's Legal Education and Action Fund and that prepared by the Criminal Lawyers' Association. I endorse the submission made by LEAF and the recommendations made within that submission, including in respect of the well-intended, but as Professor Benedet has explained, mis-drafted codification of principles regarding capacity to consent, intoxication, and unconsciousness. I would agree with Professor Benedet in that respect. I won't expand further on these matters at this time, but would be pleased to speak further to them in question time if the honourable members of this committee wish me to do so.

I'll now turn to those amendments that relate more to evidence and procedure. In order to clarify the purpose and the likely operation of these amendments, I'd like to begin by providing you with a brief review of the constitutional principles that have been laid out by the Supreme Court of Canada in respect to sexual assault trials.

The right of an accused person to make full answer in defence is fundamental to Canadian constitutionalism and the rule of law. Like all rights and freedoms, this right has limits. Some of these limits are inherent to the nature of the trial process. For example, defence counsel must have a good faith basis for questions asked on cross-examination. Other limits arise from the relationship between the right to make full answer in defence and other constitutional guarantees, such as the right to equality, privacy, dignity, and security of the person.

In the 1999 Supreme Court decision in R. v. Mills, Chief Justice McLachlin and Justice Iacobucci held on behalf of the majority that a quality consent inform the contextual circumstances in which the rights of full answer in defence and privacy will come into play. A direct quote from the judgment is “the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process.”

In these reasons, the court drew an explicit link between a complainant's charter rights and the truth-seeking function that is the ultimate purpose of a criminal trial. Similarly, the Supreme Court has emphasized that the sexual assault trial should not be permitted to become an ordeal for the complainant. For example, in R. v. Osolin, Justice Cory held on behalf on the majority of the court that a complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system.

The challenge that is therefore presented to both Parliament and the courts is how to fully respect the importance of both the accused person's rights and those of the complainant in a sexual assault trial. A proper delineation of the boundaries of both sets of rights is an integral step towards meeting this challenge. The submission prepared by the Criminal Lawyers' Association states that sexual assault complainants should be protected against disrespect, unfair treatment, myth-based interrogation, and poorly founded, overly intrusive production orders. I agree.

However, the Criminal Lawyers' Association does not acknowledge that sexual assault complainants hold constitutional rights that are potentially impacted by the manner in which sexual assault trials are conducted. It also fails to consider the Supreme Court of Canada's explicit recognition that these rights help to define the proper scope of an accused's rights within the sexual assault trial and vice versa.

Existing statutory rules, including section 276 regarding sexual history evidence, and section 278 regarding third party records, strike a constitutional balance using three principles that have received constitutional endorsement from the Supreme Court of Canada.

The first of these principles is that some forms of reasoning, often referred to as the twin myths, have been characterized by the Supreme Court as simply impermissible. Section 276.1 in its present form, and as it will remain in Bill C-51, absolutely prohibits the admission of sexual history evidence to support that kind of reasoning.

● (1935)

Second, all evidence is subject to a basic requirement of relevance. This principle is reflected in existing paragraph 276(2)(b), which will remain unchanged, and in subsection 278.3(3) which is also unchanged by Bill C-51. I endorse LEAF's recommendation that Bill C-51 be amended to adopt the judicial definition of “likely relevant” provided by the Ontario Court of Appeal in Regina v. Batte. More information on this point is provided at pages 12 to 13 of LEAF's submission.

Third, in order to be admissible, an accused person's evidence must have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This principle is set out, for example, in paragraph 276(2)(c) of the present code. While the numbering will change slightly as a result of Bill C-51, the principle will not. A similar weighing exercise is required in respect of the disclosure of third party records.

Let's turn, then, to Bill C-51. The first of the things it will do with respect to this balancing between the complainant's rights and the accused's rights is to clarify the definition of sexual activity as extending to communications. In circumstances in which an accused person wishes to introduce evidence of sexual communications by the complainant, the trial judge will consider the same three principles as already exist and are already constitutional. Is the evidence introduced solely to perpetuate prohibited myths and stereotypes? If so, it's inadmissible. Is the evidence relevant to the material questions of whether the complainant subjectively consented to the sexual activity that took place at the time of the occurrence of the activity and whether the accused person believed that the complainant was consenting? Does the evidence have significant probative value that's not substantially outweighed by the danger of prejudice to the administration of justice?

In considering these questions, a judge would address the accused person's charter rights and those of the complainant, as well as the extent to which the evidence would advance the truth-seeking function of the trial and other important social purposes. It bears noting that in 1992 when section 276 was first drafted, social media was basically non-existent. The text messages and emails, including picture messages which are widely used today essentially didn't exist in their present form. The cultural embrace of digital technologies for personal communication has opened new doors to the operations of myths and stereotypes that courts and Parliament have tried valiantly to exclude from the justice system. The proposed amendment to section 276 represents a sensible and incremental response to these social changes, and a clarification in a divided body of case law. It will not result in the exclusion of valuable evidence, but it will ensure that judges are attentive to the risks of impermissible reasoning.

I'll now turn briefly to proposed subsections 278.94(2) and (3), which provide complainants the right to legal representation at admissibility hearings regarding her sexual history or records. In an article that I published in the *Supreme Court Law Review* in 2016, I documented some of the difficulties presently experienced by complainants who seek to assert their charter rights without standing or legal representation. Complainants' charter rights are pivotal to these admissibility hearings. Indeed, these are the very reason why the hearings are being held. Giving them standing and ensuring proper funding to ensure that they have legal representation is the single most effective way to ensure that sexual assault complainants are accorded the equal benefit and protection of the law at this important trial stage.

Finally, I would like to touch on the extension of section 278 records to records that are in the possession of the accused. The Department of Justice backgrounder to Bill C-51 states that proposed subsection 278.92(1) is intended to apply to the—quote—"complainant's private records" that are in the accused person's possession. The language actually used in subsection 278.92(1) as proposed is that a record includes, relevantly, "any form of record that contains personal information for which there is a reasonable expectation of privacy". The Criminal Lawyers' Association raises the concern that the obligation is overbroad, and provides examples, at page 4 of its submission, of circumstances in which the plain language of the provision as drafted would appear to apply to records that do not engage the concern about a complainant's records.

● (1940)

Based on the Department of Justice backgrounder, I believe the intention is to engage the section 278 process when the accused has possession of records in which the complainant or witness has a privacy interest, but not otherwise. For this reason, I would recommend that this honourable committee consider an amendment to proposed subsection 278.92(1) to read "except in accordance with this section, no record in which a complainant or a witness that is in the possession or control of the accused", etc.

To clarify that, the salient link to engaging the process is the link between the record and the complainant's privacy interests. This would sidestep the concern about overbreadth that the Criminal Lawyers' Association has raised, while securing the goal the Department of Justice has laid out.

Thank you for your attention.

The Chair: Thank you very much.

We will now move to questions. We're going to start with Mr. Cooper.

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

Thank you to the witnesses.

Professor Benedet, first of all, I want to clarify what you are proposing with respect to proposed subsection 153.1(3), the language that refers to a complainant being unconscious. Were you simply suggesting removing that?

Prof. Janine Benedet: I'm suggesting that if the intent of Parliament is to codify the Supreme Court of Canada's decision in Regina v. J.A., it would be better to remove the reference to unconsciousness and to amend the current paragraph (b) to read that no consent is obtained where the complainant is incapable of consenting to the activity at the time the sexual activity takes place. That covers situations in which the complainant is unconscious, but also situations in which there's an argument that advance consent has been given and the complainant is not unconscious but is incapacitated for some other reason, consumption of drugs or alcohol, or some kind of progressive intellectual disability, that they may have had consent at one time and no longer have consent.

I think it covers the reasoning in Regina v. J.A., which wasn't limited to unconsciousness. J.A. makes clear that the relevant time for assessing whether consent is present is at the time the sexual activity takes place. If you are incapable of consent, which includes unconsciousness but is lower than that, then there is no consent to sexual activity and you can't simply say consent was given at some earlier time. You need to be in a position to withdraw it.

● (1945)

Mr. Michael Cooper: If the language stayed as is, you would be concerned, as I think other witnesses expressed concern, that unconsciousness might be a red line, or an argument would be made to that.

Prof. Janine Benedet: That's right. If you look at the jurisprudence, the case law around incapacity right now, it's not a very clear threshold. It's a difficult one to meet.

I think courts often struggle with whether there is a difference between the capacity to say yes and the capacity to know that you don't want to be touched. I think the former is a much higher level of functioning. We're already struggling with those kinds of decisions, courts holding the complainant who gets voluntarily intoxicated to a higher standard than someone who is involuntarily intoxicated.

I worry that the insertion of a separate provision dealing with unconsciousness—it's always been the common law that someone who's unconscious is not capable of consent—muddies the waters and makes the application of what will remain, the incapacity provision, even more fraught than it already is. I don't think it accurately captures the full breadth of the decision in J.A.

Mr. Michael Cooper: Thank you for that clarification.

There is one other area on which I wish to seek clarification. You made reference to the defence of mistaken belief. It was suggested yesterday by one of the witnesses—I believe it was Ms. Lee—that based upon the current wording in Bill C-51, that defence would effectively be eliminated both in terms of mistaken belief on the basis of fact and the law. I believe that the issue comes with subparagraph 273.2(3)(a)(iii), “any circumstance in which no consent is obtained including those referred to”, etc.

Do you agree with her analysis, that unless that wording is changed, there would be the risk of at least creating a lot of confusion about whether that defence in the context of mistaken belief would be an available defence?

Prof. Janine Benedet: I have to say that I don't agree with that concern.

I think that the new subparagraph 273.2(a)(iii) that's being proposed is simply a codification of existing law. The Supreme Court of Canada has already made clear that where the accused's belief in consent is founded on a mistake about what consent actually means.... You believe that women sometimes say no and they really mean yes. You believe that passivity or a failure to resist is equivalent to consent. All of those are the kinds of factors that are listed in subsections 265(3) or 273.1(2).

Believing that you have consent in those circumstances—if those are the circumstances known to you at the time—is a mistake of law and not a mistake of fact. You're operating on an incorrect legal definition of consent.

The defensive mistake of fact, which the Supreme Court of Canada has made clear, is meant to be an unusual defence. The phrase that was used by the court is that people do not often commit rape “per incuriam”—by mistake. We should be able in most circumstances to tell the difference between sexual assault and consensual sex.

It's meant to be a narrow defence. It's meant to apply only in circumstances where there's a reasonable doubt on the question of whether the accused honestly believed that the complainant had given her voluntary agreement to engage in the sexual activity, that she had done through her words or her conduct some kind of voluntary yes to engage in sexual activity. That's a mistake of fact. That mistake of fact, of course, needs to be accompanied by evidence that the accused took reasonable steps to ascertain the presence of consent.

The scope of the defence remains the same with this amendment. It's as it always was. I think this is just an attempt to clarify that a mistake founded on a mistaken legal definition of consent doesn't exonerate. I think that's the existing law; it's just not reflected in the code.

Mr. Michael Cooper: Thank you.

The Chair: Mr. McKinnon.

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

I would like to carry on with talking about consent. In earlier panels, some of our witnesses indicated that they would like to see incorporated into the law language such as this: consent means that the individual is capable of understanding the sexual nature of the activity and the associated risk, capable of realizing that they can choose to decline, and capable of communicating consent. Would you support that suggestion?

● (1950)

Prof. Janine Benedet: If I understand the question correctly, that's actually a fuller definition of what it means to be incapable of consenting. It's a definition of incapacity that we're talking about here. Am I understanding that?

Mr. Ron McKinnon: My understanding of the earlier testimony was that they wanted to see that specific language in the code in terms of that is what consent means.

Prof. Janine Benedet: Right.

Mr. Ron McKinnon: Would you support that?

Prof. Janine Benedet: I guess I see it as a definition of incapacity. We currently have a definition that says consent is “the voluntary agreement of the complainant to engage in the sexual activity in question”. The question the code leaves unanswered is in what circumstances that voluntary agreement could appear to be present but in fact is not. I shouldn't say that it leaves it unanswered. Some circumstances are enumerated, for example, where the accused induces the complainant to participate by abusing a position of trust.

I would see those as actually definitions of what incapacity to consent means. In general, I would support giving more thought to the question of what incapacity actually is. Another way to look at it is to say that really what we're doing there is giving some substance to the notion of involuntary consent, right? I suppose you could think about it that way as well.

Mr. Ron McKinnon: I'm now intrigued by the notion of involuntary consent. Can you have involuntary consent?

Prof. Janine Benedet: For a very long time, the law considered consent in terms of a failure to resist, so a submission could be equated with a consent. Our definition in the Criminal Code says that not only does there need to be consent, that the complainant has to want in her own mind the sexual touching to take place, but any agreement that's given has to be a voluntary one. For example, we have had cases where that agreement was extorted by a threat to expose nude pictures to family and friends, and the court has said, "Well, you said 'yes'", but that's not a voluntary yes; it's a yes that was extorted through some kind of pressure.

I've done quite a lot of work with my colleague Isabel Grant on the sexual abuse of persons with intellectual disabilities. We see cases in which there's a kind of conditioned compliance, and in which complainants will say "yes", and they will get in the van and they will take off their pants, but they may not have the ability to really understand what they're being asked to do. Often those cases are dealt with under the concept of incapacity to consent, and we don't have a very clear legal standard for when that exists.

Any clarification we can give will be beneficial. It doesn't have to be an exhaustive list, but there has to be the idea that consent has to be informed, that you have to have the ability to understand that you can refuse—because some individuals with intellectual disabilities do not know they can say no to sexual activity—and that it has to be your actual agreement. Those are all things that can be read into the code as it's currently written, but sometimes are not fully realized in the cases we see.

Mr. Ron McKinnon: As I understand it, you seem to be saying to me that this sort of determination and those sorts of criteria are already there, so they don't need to be codified.

Prof. Janine Benedet: Maybe those are two different things. They're already there, but unfortunately courts don't always see that they're already there.

Mr. Ron McKinnon: Let's imagine we codify them as consent requiring that these three conditions be met. Then we could say something like, "For greater certainty, this includes but is not limited to unconsciousness", and so on. Would that be a beneficial kind of amendment? Would that be more trouble than it's worth? Is that something the law could support and the legal system could deal with?

Prof. Janine Benedet: I'm not sure if it's a separate, free-standing provision or just more circumstances in the current list we see in 273.1(2) regarding where no consent is obtained. You could do that by simply defining incapacity a bit more broadly and including some of those other factors in the same list. Yes, I think that would be beneficial.

● (1955)

Mr. Ron McKinnon: I'm going to move on.

There is provision for counsel for the complainant in the process of admissibility hearings. It has been suggested that this is a slippery slope, that we don't do this for any other kind of complainant, and that it might become overly cumbersome for the process of trial itself in terms of scheduling, because now you have an extra party to schedule, extra lawyers, and extra expense.

Professor Cunliffe, could you weigh in on this?

Dr. Emma Cunliffe: A couple of things need to be said. The first is that if we are to make constitutional guarantees, as we have, then we also need to provide some means by which those constitutional guarantees can be met. The simplest and most straightforward way to do that is to allow complainants to have their constitutional rights protected by virtue of legal representation. The idea of separating a constitutional guarantee from standing to enforce that constitutional guarantee worries me quite considerably, for reasons I articulated in the general article I mentioned.

In respect of scheduling and whether this makes things even more cumbersome and raises concerns about, for example, Jordan's principle with respect to the right to a trial within a fair period, there is no question that courts are currently wrestling with the Jordan paradigm. There are a number of things that can be done in respect of that in terms of providing better resourcing, appointing more judges, ensuring that crown counsel are properly resourced, and at the provincial level ensuring that legal aid is properly funded. I would suggest that to deprive the complainants of their charter rights, including their right to legal representation, as a fix to the problems of Jordan would be a very poor fix indeed.

Mr. Ron McKinnon: May I ask another quick question?

The Chair: Sure, be very quick.

Mr. Ron McKinnon: In terms of depriving the complainants of their legal rights, they're not on trial in this case, hopefully. That's part of the goal here, that they're not on trial. It's the accused whose legal rights I think that would engage, not the complainant.

Dr. Emma Cunliffe: This is where the charter jurisprudence is complex relative to other forms of criminal law. You're quite right to say that it's the accused who faces a deprivation of their liberty as a result of the trial.

What the court has said repeatedly in many cases is that the accused's right to full answer in defence and the other charter rights that are associated with their particular position of vulnerability are partly delineated and delimited by the charter rights of the complainant in a sexual assault trial, specifically because of the equality concerns that arise, the history of the operation of myths and stereotypes, and the concerns about the accuracy of truth seeking in a system that has developed over time, unfortunately, through the perpetuation of myths and stereotypes. It's a recognition that these cases are different, which has been a very clear and consistent thread in the Supreme Court of Canada's jurisprudence.

I think it is crucial to emphasize and indeed to hold both Parliament and courts to account to the proposition that the Supreme Court of Canada has been clear on this. Yes, the accused have fair trial rights and they absolutely need to be respected. But part of respecting those is about thinking very carefully about the charter rights of complainants and about how those two things can be maximized ideally, or when they come into conflict, how that conflict can be resolved in the best possible fashion, thinking about other social objectives such as truth seeking and such as the public interest in the prosecution of crime.

Mr. Ron McKinnon: Thank you.

The Chair: Thank you very much.

Go ahead, Mr. Blaikie.

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): Thank you very much.

Thank you both for being here tonight and for your remarks.

One of the aspects of Bill C-51 is to introduce a new procedure to govern the use of trial records relating to the complainant that are already in the hands of the defence. We touched on that a little bit already.

On Monday the committee heard from the Criminal Lawyers' Association, who were saying there's some clarification needed in the bill around the type of use of the records that would trigger this new mechanism. Professor Cunliffe, you were speaking to this before, so I'm wondering if you could elaborate a little on that theme.

● (2000)

Dr. Emma Cunliffe: Thank you for inviting me to do so.

I agree with the Criminal Lawyers' Association that there is space for clarification. If we return to the case that's the genesis for this change, the case of Shearing, the facts in that case were that the complainant's diary had been stolen by the accused person, and the court held that the means by which the accused person came into possession of it were not relevant to the admissibility of the diary at trial. That's being addressed by a provision such as this.

If we think about the possibility, as exists in some case law, of an accused person improperly obtaining access, for example, to Facebook profiles or confidential email records, there's a significant public policy interest in ensuring that there are procedural safeguards before those kinds of materials can be aired in court.

The value of this provision, if it's targeted only to those records in which the complainant has a privacy interest, is that it allows the trial judge to run those records through that same decision-making process and those principles I elaborated. So does it just rely on and perpetuate myths and stereotypes? Is it relevant to a material issue at trial? Would the probative value substantially outweigh the prejudicial effect of introducing this information?

The trouble that I see and which I think the Criminal Lawyers' Association's submission points to is that the way in which the provisions have been drafted, that link between the complainant's privacy interests and the recording question is not apparent on the face of it. I think it's very clear in the intention but not on the face of it.

That's the reason for my recommendation. Where the existing text for proposed new subsection 278.92(1) reads, “Except in accordance with this section, no record relating to a complainant or a witness that is in the possession or control of the accused”, that's where the problem arises, the breadth of that language of “relating to”. It would be clearer and would more perfectly capture the intention to say, “Except in accordance with this section, no record in which a complainant or witness has a privacy interest and that is in the possession or control of the accused”. That link between the privacy interest of the complainant and the accused's possession becomes much clearer on that rewording.

Mr. Daniel Blaikie: Thank you very much for that very specific recommendation.

I have a more general question. While Bill C-51 would create a better legal regime around issues of sexual assault, I wonder what the concerns are in terms of women being able to make use of that improved legal regime in a context where legal aid isn't sufficiently available. What are your thoughts on what government ought to be doing in order to make sure that we don't just improve the law on the books and then find we have situations in which women aren't able to make use of those laws?

Prof. Janine Benedet: I could probably say a couple of things in relation to that. You're quite right that simply some kind of notional right to counsel, if it's not funded, is illusory for most women.

I think it's also important to recognize that the level of documentation for complainants does not fall equally across society. Even if you look at the patterns with regard to sexual offences, the absolutely highest rates are for teenage girls aged 13 to 15. That's from Stats Canada statistics.

You have young victims, often young women or girls, certainly where records applications are being brought, who have lived very heavily documented lives, who have child welfare records, school records, medical or therapeutic records, possibly records from some kind of rape crisis centre, etc. Many of those records the young women had no part in creating and have never even seen, but they carry a lot of judgments about who these women are. These are also young people who live their whole lives online and who have all kinds of material in that sphere.

I think it is important to recognize that this doesn't fall equally. In terms of what else we could be doing, certainly funding the opportunities for counsel, as is being proposed here, is very important.

I think that in terms of our most vulnerable witnesses in sexual assault trials, Canada is way behind other jurisdictions. I was very pleased to welcome a delegation from Scotland a couple of years ago that was coming to learn from other jurisdictions about the approach to accommodating vulnerable witnesses in court and in sexual assault trials in particular. It became quite apparent that we had much more to learn from them than they did from us. Certainly the reports that they've been putting out are proposing quite dramatic changes to the way we take evidence from vulnerable witnesses.

I think that there's a lot to be learned from what is happening elsewhere and that none of those things have to detract from the right of every accused to a fair trial. They're just a recognition that often it's very vulnerable women and girls who are coming before the courts in these cases.

● (2005)

The Chair: Thank you very much.

Mr. Fraser.

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

Thank you, both, very much for your excellent presentations and recommendations. It's helpful for the committee to have actual, tangible recommendations that we can think about.

Professor Benedet, you talked about codifying J.A. and also codifying Ewanchuk. Do you think that currently the bill properly codifies Ewanchuk? You talked about the honest but mistaken belief in consent and the fact that it eliminates that defence as per law but obviously leaves it in there for an honest but mistaken belief as far as it deals with the facts. I appreciate that and I recognize that it's a narrow defence, but do you believe that the proper balance is struck and it actually codifies Ewanchuk appropriately?

Prof. Janine Benedet: On the issue of mistaken belief in consent, yes, I think the proposed revisions are entirely accurate and a fair codification of what the Supreme Court of Canada said in that case.

The piece that's missing is that the court in Ewanchuk also defined for the purposes of the *actus reus* and not the mental element that's at issue in mistaken belief in consent, that idea that non-consent means that the complainant in her own mind did not want the sexual touching to take place. That's what the crown has to prove beyond a reasonable doubt and that's where most sexual assault prosecutions of adults, in relation to adult complainants, fail because there are concerns about the credibility of the complainant and that assertion about her state of mind at the time.

It's interesting to me that while the code defines consent, it doesn't define non-consent. We've never codified that statement in Ewanchuk that non-consent for the purposes of sections 271, 272, 273 means that the complainant in her own mind did not want the sexual touching to take place. It's there in the case law; judges are applying that standard. Some of the issues simply relate to the way that we allow complainants to be cross-examined on what I think are lingering myths and stereotypes about what non-consent actually looks like. I just noted that that actually isn't reflected in the Criminal Code. Interestingly, it's the one part of Ewanchuk and arguably the most commonly applied, and it's not reflected.

Mr. Colin Fraser: I'll just stay on the honest but mistaken belief in consent part, though, just for a minute, so we understand how that would work in practice.

As I understand it, the crown would obviously have to present their evidence with regard to there being an absence of consent. That's part of the case they would have to make, and it would be up to the defence to call evidence and raise the defence of honest but mistaken belief in a factual circumstance.

Is that how that would work in a trial? Can you help me understand exactly what kind of evidence the defence could call to raise that factual circumstance?

Prof. Janine Benedet: You're right. Even though it's negating the mental element, we treat it like a defence. The crown would put in their case. The defence, in order to have that defence left with the jury, would have to give an air of reality to the defence, which means they would have to point to some evidence on the record that's capable of raising a reasonable doubt on the issue of the accused's belief. That evidence could come from the crown's own case if the complainant's evidence on cross-examination indicates that there was some misunderstanding or some potential for misunderstanding. I suppose it would be enough simply based on the crown's own evidence, so it's not necessary that the accused testify in order to raise the defence. Practically, as a tactical matter, it often takes the form of the accused testifying and giving a different version of events.

The reason the defence is so rare is that, generally speaking, when the accused does testify, the accused testifies to a version of events that are wholly different and involve enthusiastic and voluntary consent. Generally speaking, courts say that if the complainant's version is, “I absolutely did not consent, and that was clear to anybody and there was no mistaking it,” and the accused's version of events is, “She was a willing and enthusiastic participant and has only made this up after the fact,” there's really not much room for a third version of events, some kind of middle ground.

That mere fact, regardless of what we're putting into the Criminal Code, means that the defence is not one that should be arising very often. It would have to be an unusual set of facts where there is some version of the evidence in which we could imagine that the complainant did not want the sexual touching to take place, but the accused believed that he had a “yes” from the complainant. That's true regardless of these amendments or anything else.

The threshold is not huge at the initial stage. It's the air of reality threshold. Is there evidence which, if believed, is capable of raising a reasonable doubt? Of course, there's the question of the accused's belief in the circumstances known to him at the time. Did he believe he had a “yes” by words or by conduct, and is there some evidence that the accused took reasonable steps in those circumstances to ascertain the presence of consent? That's an important part of the defence as well that's been part of the law since the 1992 reforms.

● (2010)

Mr. Colin Fraser: Thank you. I don't know if I have more time.

The Chair: You have time for one more question.

Mr. Colin Fraser: If I can turn back to the codification of J.A., I take what you're saying, that it's, to your mind, unsatisfactory with regard to just having that the complainant is unconscious, but there is the (b) part of that as well, though, that the complainant is incapable of consenting to the activity for any other reason. That kind of puts in two parts to replace the paragraph (b) that's already there. Do you not feel that the (b) part, adding the words "for any other reason", would mitigate what you're saying, that it would include where people are just short of unconsciousness or incapable for other reasons, and it wouldn't put a time period on it of how far back you'd have to go? It would kind of answer that question. Either you're unconscious or you're incapable for any other reason.

Don't you think that answers the question?

Prof. Janine Benedet: I think it's better than just leaving it as incapable of consenting, because then I think it's open to confusion: "Wait a minute, isn't that just redundant, (a) and (b)?"

I take the point that the addition of the words "for any reason other than unconsciousness" is an attempt to say it's a broader category. I guess my question is why we are separating out unconsciousness as some kind of standard that's worthy of particular mention. If the idea is that we want to reflect something that was unclear about the law, and the court needed to clarify in J.A. at a time when we had paragraph (b), talking about incapacity to consent, what was unclear about the law at the time that J.A. was decided was not that unconsciousness is a form of incapacity; it was that the relevant time for determining consent is at the time the sexual activity takes place, and you can't give it in advance. That's what's not reflected in these amendments. To me, that would be a better addition, because it would actually speak to the legal issue that was debated in J.A.

Mr. Colin Fraser: Okay, thanks very much.

The Chair: Thank you very much.

Colleagues, does anybody else have a short question?

If not, ladies, I want to thank you so much for coming before us. You offered really clear and compelling testimony, and it was very helpful. Thank you again for setting out in writing the actual amendments you propose.

Have a wonderful evening, everyone.

The meeting is adjourned.

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