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Chair

Mr. Anthony Housefather

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● (1545)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good afternoon, everyone.

Welcome to this meeting of the justice and human rights committee as we continue our study on counselling and other mental health supports for jurors.

I've chatted with our witnesses who are here, but we have two witnesses who are joining us from afar.

We have Mr. Mark Mossey, who is the executive legal officer, office of the senior judge, judges' chambers, from the Nunavut Court of Justice.

We have fellow west islander, Mr. Paul Dore. Mr. Dore, who is the juries commissioner from the court services of the State of Victoria, is joining us from Melbourne, Australia.

Thank you so much, both of you, for joining us from so far away.

In the room, we have from the American Society of Trial Consultants, Ms. Sandra Donaldson, who is the vice-president. Welcome, Ms. Donaldson.

We have from the Canadian Council of Criminal Defence Lawyers, Mr. Will Trudell, who is the chair. Welcome, Mr. Trudell.

As an individual, we have Professor Brian Bornstein, who is a professor of psychology and a courtesy professor of law at the University of Nebraska-Lincoln.

Welcome, Mr. Bornstein.

As I've explained to the witnesses in the room, because of video conference issues, just in case anything technical happens I'd like to have the testimony of both of our witnesses on video conference first.

Mr. Mossey, you have somewhere around eight minutes but if you go up to 10 minutes, I'll give you the latitude.

Mr. Mark Mossey (Executive Legal Officer, Office of the Senior Judge, Judges' Chambers, Nunavut Court of Justice): Thank you, Mr. Chair. I don't think I'll be that long.

I would like to thank the committee again for my invitation today.

By way of introduction, my name is Mark Mossey. I am employed as the executive legal officer to Chief Justice Neil Sharkey of the Nunavut Court of Justice. I have lived, raised a family, and worked in Iqaluit since 2010. Prior to joining the Nunavut Court of Justice in 2015, I was a poverty lawyer with Maliiganik Tukisiiniakvik Legal Services, the legal aid clinic here on Baffin Island. During my time in Nunavut, I have also served as president of both the Law Society of Nunavut and the Nunavut branch of the Canadian Bar Association.

As articulated in my written brief previously submitted to the committee, I felt it necessary to draw on the experiences of fellow justice stakeholders in order to paint an accurate and compelling picture for the committee of some of the stresses placed on jurors as a result of the unique challenges Nunavut poses as a jurisdiction. While jurors in Nunavut are tasked with the same complex and emotionally taxing burden as southern jurors—I should note my reference to “southern” in this context is to Canadian jurisdictions below the 60th parallel—Nunavummiut perform jury duty in much different conditions.

It was interesting, though not surprising, that the responses I received from justice stakeholders to my request for input on this subject were consistent in their themes. The responses told a universal tale of suboptimal conditions for jurors to deliberate; financial and child care burdens being placed on jurors; and an emotional toll being taken on by jurors in small, isolated communities, where entire populations sometimes only total into the hundreds. They are asked to sit in judgment of fellow community members who are often friends, acquaintances, or even relatives.

Jury fatigue and the fallout communities are forced to deal with alone, after a jury convicts a community member and the court party immediately leaves to head home to Iqaluit, were also identified as stress situations for Nunavut’s jurors. As to not simply repeat what was submitted in my brief, I think it is imperative to draw attention to how Nunavut’s unique challenges, from geography to climate, isolation to poverty, have an exponential impact on stresses already built into the jury system in Nunavut. I am sure that any assistance to jurors that may result from this committee’s work will be greatly appreciated by both jurors and justice stakeholders alike.

I thank the committee again for the opportunity to appear before you today. I'll be happy to answer any questions that I may be able to assist with.

Thank you, Mr. Chair.

The Chair: Thank you very much.

Mr. Dore.

Mr. Paul Dore (Juries Commissioner, Court Services Victoria): Good afternoon, and thank you for the invitation to contribute to this committee's work.

[*Translation*]

I grew up on the West Island of Montreal at a time when anglophones weren't required to be fluent in both of Canada's official languages. I moved to Melbourne shortly after the Montreal Canadiens won the Stanley Cup. So I would like to apologize to all the francophones in the room for the interpreters here today.

[*English*]

I am sure this committee agrees juries bring the values, standards, and expectations of our community into the courtroom, and they contribute in a significant way to the administration of justice. The Juries Act establishes the juries commissioner role and as many deputies as are required to administer the act.

The Juries Commissioner's Office ensures a sufficient number of Victorian citizens, broadly representative of the community, are available to serve as jurors in supreme court and county court trials.

There are 14 jury districts across Victoria. Melbourne is the largest by far, with 13 other regional locations of varying size and capacity. While civil jury trials are still available to parties, most jury trials are in the criminal jurisdiction, and most are heard before a judge of the county court of Victoria.

The Juries Act deals with compensation for injury during jury service and states, "If a person suffers personal injury arising out of or in the course of jury service, compensation is to be paid...." Our duty of care under this section of the act extends to anyone attending for jury service, whether empanelled on a jury or not.

In any given year in Victoria approximately 170,000 people are randomly selected from the Victorian electoral roll and receive a notice of selection for jury service. This notice includes a questionnaire whereby we assess citizens' eligibility as prospective jurors. We provide citizens with an opportunity to apply to be excused for good reason.

From there, approximately 70,000 people are summoned for jury service. At this stage, citizens are again given an opportunity to apply to be excused.

A few months from first receiving their notice of selection, approximately 20,000 people attend courts across the state as summoned. In groups called jury pools, they sit through an orientation, and we reinforce information previously given regarding our expectation of their availability, reminding them of their opportunity to apply to be excused.

Then in groups of 25 to 40 people called jury panels, they go into courtrooms for the empanelment process. This occurs approximately 600 times a year, as we have about that many jury trials, of which fewer than 100 would be civil trials with juries of six people. On that math, about 6,600 Victorian citizens a year serve as jurors.

Most people find the jury service rewarding and most leave with a sense of achievement. Others find the experience not so rewarding, and we tell them this is understandable.

As this committee appreciates, jury service represents a significant disruption to a person's life. Jurors are away from their work and home environment, sometimes for weeks or even months. They listen to and digest evidence often detailing the most horrific of human behaviour. They discuss these details with 11 strangers in foreign surroundings, and we ask them to reach a verdict, the impact of which will resonate with the accused, the victim or victims, witnesses, and many other members of our community for years to come, or forever.

This is something most people will never experience and for some who do, we understand it may take some time and support to process that experience.

Victoria has had a juror support since 2004. For the first many years of this program, the default approach was telephone counselling, but face-to-face sessions were offered as deemed necessary by the counsellors.

Our service provider was a two-person operation, but very professional, competent, and always available. The only issue? They were Melbourne-based, which limited the opportunity for in-person counselling for regional jurors.

In late 2015, we negotiated an agreement with the provider of Court Services Victoria's juror support program, whereby the same type of service offered to employees became available to citizens participating in jury service.

This current provider leverages a network of counselling services across the state, offering counselling and coaching support from qualified and registered psychologists and social workers.

● (1550)

There is a telephone number operating 24-7 that jurors call to book an appointment. If a juror indicates an immediate need for support, or the call centre attendee suspects there's a need for immediate attention, a telephone counselling session is arranged as soon as possible, but under normal circumstances, jurors use this phone number to a book a counselling session, which can be arranged to take place in person, via telephone, or through a video conference connection, according to the juror's preference.

Our approach is as follows. There are no restrictions as to why a juror could access the juror support program. It could be to seek support after hearing evidence in a trial, to work through personality clashes with other jurors, or just to talk about their experience without breaching jury confidentiality.

The program can be accessed by anybody who attends for jury service, whether selected on a trial or not. Legislative duty of care aside, our experience is that the arraignment process has the potential to harm one person as much as a two-week trial may affect another.

The counsellor has the discretion to schedule as many sessions as he or she deems necessary for individuals, but we have an arrangement whereby a senior clinical manager will call me should an individual need more than four sessions.

From January 2016 to December 2017 the uptake is as follows. In 2016 we had 17 jurors access the program. Of those, 14 were from Melbourne, and three were from regional Victoria. Nine of those chose a face-to-face session, and eight of them chose to go through the telephone. In 2017 we had eight people access the program, six from Melbourne and two from regional Victoria. Five of them chose to access it face-to-face and three by telephone.

The average number of hours per juror is just over two hours. For the issues that were presented—and these are broad categories—in 2016, four people presented with trauma, 10 with personal stress, and three with anxiety. In 2017, four presented with trauma, three with personal stress, and one with anxiety.

All issues presented related to or were triggered by the court cases. That is, all 25 people who accessed the juror support program over the last two years had been empanelled on a jury.

I want to thank the committee and you, Chairman, for this opportunity to present to this committee. I look forward to answering any questions you may have.

● (1555)

The Chair: Thank you very much, Mr. Dore. Thank you very much for getting up so early in the morning to do this.

Ms. Donaldson, the floor is yours.

Ms. Sandra Donaldson (Vice-President, American Society of Trial Consultants): Thank you very much.

I would like to say thanks to the committee for inviting the American Society of Trial Consultants to speak to you. I understand that trial consultants are rarely used in Canada, and perhaps after speaking today that might change a little.

Many brilliant and skilled professionals have spoken to this committee. They have presented many ideas, many solutions, and much data. I am not here to go back over all of that. What I would like to do is talk to you about how we can make a difference during the jury selection process, in particular in identifying and eliminating potential jurors who end up being in the situation of experiencing high stress, so it's more of a preventative measure.

Let me give you a little background about who I am. I have a Ph. D. in psychology from the University of North Carolina in the United States. I have been a practising trial consultant for 32 years, all of which, up until December, were within a law firm, Womble Bond Dickinson, in North Carolina.

While there, I created a trial consulting business and not only helped the lawyers in that firm, which is a very large law firm on the east coast and now worldwide, but I also had other clients. It's the kind of business where if you do good work, it gets you more work with the next person down the street, which gets you more work.

I have participated in many trials. Just for one client who is faced with 30 years of mass tort litigation, I stopped counting at 150 trials.

I am bringing to you a lot of personal experience of being in the courtroom at trials. I probably have participated in more trials than most of the attorneys I have worked with over the years.

Let me also tell you a little bit about the American Society of Trial Consultants. ASTC was formed in 1982 when a group of 24 professionals met in Phoenix, Arizona to share their experiences in a new profession, jury consulting. The group grew over the years, meeting yearly to share their growing wisdom. Today ASTC has about 300 members. We are called jury consultants, trial consultants, and litigation consultants. Most frequently we are referred to as jury pickers.

Although we would like to think of ourselves as selecting or picking juries, the reality is that the process is one of deselection, both sides aiming to remove those jurors who are unsuitable for rendering an impartial verdict for their client and hoping that when finished they have a group of open-minded, unbiased jurors to decide the outcome.

The main mission of the American Society of Trial Consultants is as follows. Our legal system is based on the principle that each party putting forward the best case, making the most of facts, law, and presentation skill allows the truth to win out far more often than not. In that kind of a system, the goals of the ASTC lie at the very heart of the law's ability to deliver justice. We help litigators become better at persuading jurors and other fact-finders, and that makes the system work in a way that is more meaningful, more reliable, and ultimately more fair.

Not all trial consultants in the United States are members. It is an unregulated profession with no credentialling. Those who are members of ASTC are expected to uphold certain ethical standards and practice guidelines.

ASTC established the only set of ethical principles and practice guidelines that exist in this unregulated profession. It developed a statement of shared values that are intended to inform the professional judgment of the working trial consultant striving for the highest professional ideals.

Among our principles, members of ASTC are expected to conduct themselves at all times with professional integrity, personal dignity, and respect for the legal system. They are expected to uphold professional standards of conduct and to clarify their professional roles and obligations. They comply with the law and encourage the development of law and social policy that serves the interests of their clients and of the public generally. We maintain the integrity of the jury pool. In other words, we do no harm.

● (1600)

The right to a trial by jury should not mean it's at the expense of jurors' emotional well-being, but a sacrifice they make out of a sense of civic duty, which to this day I find absolutely amazing. To give you an example, I participated in a civil trial in Minnesota that was expected to last four months. The judge was insensitive to hardships and bias. There was a 100-plus item juror questionnaire and lengthy voir dire by counsel for both of the parties.

We had a lot of information about these jurors. For example, we knew one juror worked two jobs so his son could go to college. Serving would mean the elimination of one of the jobs. Another would not be paid for jury duty. These jurors were not removed for cause by the judge, and peremptory challenges were focused on eliminating very biased jurors, such as a research clinician who had received a grant from the government to study the very product that was at issue in the trial. The concern was that a person of this nature would be the expert in the jury room, and the decision would be based on information other than what was presented.

On the hardship individuals, we just expected that in a four-month trial, eventually they would just drop off. They just would not be able to withstand it. Surprisingly, they all stayed for the four months. In the case of the juror with the son in college, the son withdrew from college that semester so he would not be a financial burden on the family. As for the juror who was not paid, the jury itself took up a collection and paid his house payment one month. That is a sacrifice beyond what any juror should be asked to do, but they did it. Minnesota is one of the few states that has a very strong civic duty, and they will do anything to fulfill that civic duty.

While some people watch YouTube videos on how to get out of jury duty, others make the commitment to serve. Minnesota has an exceptionally strong sense of doing one's civic duty. Of interest is that it was the judge who actually had a mental health breakdown after the trial.

Most people experience some stress when placed in new situations such as jury duty. Jurors are people plucked from the various life situations. Although they have seen court proceedings on a variety of television programs, reality is never like Hollywood. The show *Bull*, currently on television, is nothing like what goes on in a real courtroom, nor is it a good example of what we do as professionals.

For some, there is no frame of reference to help understand and control the situation, and we know that stress is reduced if an individual feels they have some control. Although most jury duty is a low-stress experience, certain types of jury service can produce higher levels of stress. Those involving particularly horrific crimes with gory crime scenes are sometimes very difficult to overcome, but even civil trials that last for a long period of time are difficult. I had two trials where jury selection took four months, and then the subsequent trial was almost a year. I had another case where jury selection lasted 15 months. We went through over 1,400 jurors to empanel the jury, and the trial then lasted for a year and a half. This is a huge time sacrifice that people make. In all of those situations, though, there was no juror who complained of extreme stress or reacted with PTSD.

Most symptoms of stress related to jury duty go away in a day or so, as the life of a juror normalizes. Even in those exceptional situations mentioned above, not everyone suffers to the degree that PTSD is experienced.

Paula Hannaford-Agor cites that 70% of all jurors report some stress, but it's only 10% who report high levels of stress. A lot of what the committee is focusing on is that 10%—the people who have the high levels of stress. How do we uncover that 10%?

In the U.S., Canada, Australia, and England, there is the right to a jury trial, yet only the U.S. allows voir dire beyond judicial inquiry —the questioning of prospective jurors in a trial to determine their suitability for rendering a fair and impartial verdict. Jurors are presumed to be fair and impartial.

● (1605)

In most countries, they just pluck 12 people from the community, or whatever their number is, and they are left to decide the outcome of the case.

Voir dire in the United States is the process of probing a juror's state of mind that might provide grounds for excusal. Jurors can be excused from serving because the trial will be a financial burden, for child or adult care duties, because they hold essential public jobs like firefighters or policemen, and for bias that could be a prejudice against one of the parties. Jurors with experiences too close to home, for example they have a family member the same age as the victim, observed someone, or they themselves have been sexually abused, assaulted in the past, are at the mercy of sufficient questioning, and the court's mercy, to be excused.

The ASTC has a special practice section called jury selection. In it, it says that:

> In preparation for jury selection, trial consultants may perform a variety of functions including, but not limited to: (a) conducting pretrial research (quantitative or qualitative research) with Respondents who meet the criteria for jury service in the trial jurisdiction; (b) preparing profiles of juror characteristics believed to be positive or negative for the client; (c) preparing voir dire questions to be submitted to the Court or to be used by counsel in conducting voir dire; (d) preparing a juror questionnaire to be submitted to the Court; and (e) making recommendations for improving voir dire conditions.

We're actively involved in trying to create a situation in which it will be a fair trial and the jurors who serve are suitable to serve for whatever reason.

One of the things we find is that judges have a lot of control in the United States over the jury selection process. Federal court is a little more controlled with generally judicial questioning. Attorneys are allowed to submit questions in writing. The judge will sometimes ask the questions and sometimes won't. State court is a little better in that there is attorney voir dire. The time can be controlled in some cases. It can can go on for weeks, questioning jurors before the panel is passed to the other side.

People in general are poor predictors of their feelings or behaviour. You may think that you can set a bias aside or be able to view graphic evidence, but when that bloody photo of a child's badly abused body, who is the same age as one of your own children, is shown, a connection can be made with feelings in that juror that they're unable to control.

How do we help jurors realize that they're going to have difficulty serving in a particular case? We structure the situation to identify and uncover those jurors who are going to have difficulty. It's through proposed questioning. If you're not able to ask a certain number of questions, jurors are not going to just come out and say, I observed this, or it was a part of a situation in my past, so I don't think I can be fair, because everyone thinks they can be a fair juror. Everyone thinks that they can set the information aside.

You have to help the juror uncover their own potential biases with questions we can ask. For instance, do they have any medical, physical, or psychological conditions that might interfere with their ability to serve? That might be something you ask in judge's chambers. Also, they've not seen the evidence, so it would be difficult for them to predict how they would react. How do they typically react watching horror or particularly violent, bloody TV or movies scenes? Do they keep watching, or do they close their eyes and turn their head the other way? Have they ever watched something horrific and had it affect them for some period of time? Some people have a difficult time viewing cases involving abused children or bloody crime scenes or autopsies. Others are able to separate themselves and have a more clinical experience. Which of these best describes you?

These are questions that, depending on the jurors' answers, they wouldn't have thought to just come out and say themselves. Once this is said, and with further exploration, there are jurors who might experience the kind of harm you're talking about and get them off the jury.

As a conclusion, I would like to recommend some suggestions that Canada might employ, such as improving and allowing more voir dire in the judicial setting to help identify and uncover those jurors who could be harmed. Include attorney voir dire and written juror questionnaires so that they can uncover these things privately, rather than stating them publicly in front of everyone in front of everyone.

● (1610)

Given advance notice of the trauma that's involved in a case, we've done things such as cover the face of a juror or we have explained something in a model format as opposed to with the actual crime scene evidence. A consultant who I know, in a mass shooting case, would use paint gun examples as a way of demonstrating a mass shooting but without involving the actual people. It was more the strategy that was involved.

I would like to make these recommendations. I know they put a burden on the system, but they are things that can be preventative measures.

Thank you.

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

Mr. Trudell.

Mr. William Trudell (Chair, Canadian Council of Criminal Defence Lawyers): Thank you very much, Chair and members of the committee. It's an honour to be here once again on behalf of the Canadian Council of Criminal Defence Lawyers.

On behalf of the council and as a defence counsel, I think I can say that we are very pleased that the committee is studying the issue of jurors and how to help jurors. I think we would all agree that it's probably one of the most precious aspects of a democracy to be judged by your peers.

I think, however, that the work you're doing may uncover some suggestions, as we've just heard, as to how we can do things a little bit better. What I would say to you is this—and I'll keep my comments brief in the beginning—I think we don't do a good job in the front end, and I don't think we do a good job in the back end in relation to jurors.

You're not going to be surprised to hear that I get calls from persons who say, “Oh, my God. I've been summoned for jury duty. How do I get out of it?” Then, of course, it's almost universal that, if you talk to a juror who has served, they will say it's the most incredible experience of their life, but we have mystery going in.

I think one of the things we should consider is enlightening the jury array when they are gathered by telling them what their role is, not waiting for it to happen in court. Remove some of the mystery. If a case is going to be a horrific criminal allegation, I think the jurors can be prepared for that by persons who meet with the array before they are called into a courtroom so that they can understand that there's a prisoner's box there, and you might see an accused person come in, and they might even be in handcuffs in a particular case. It takes away the mystery. Just that jury box, why does that person have to sit there? Judges may not have an opportunity to explain it.

I'm really happy to hear Sandra talk about the depersonalization of information that jurors have to give. You're standing there, and a juror is called up, and they say their husband is ill, or they don't think they can afford child care. That should all be done in a questionnaire. I can tell you that in one of the most sensational cases that we've experienced in this country, there was a questionnaire with a brief description of the case. I'm talking about Bernardo. When a person came up, the defence, the crown, and the judge had the questionnaire, and the defence, the crown, and the judge could all agree that this juror should be excused without the juror having to explain some of the personal trauma they might experience.

I think that, at the other end of the case, judges are doing this more often. They're going in and talking to jurors, thanking them for their work, and explaining how important their role is. I also think that we haven't provided, except on a part-time basis, if I can use that phrase, as a result of the pressure that Mr. Farrant brought in Ontario, and Ontario responded....

In my respectful submission, we need to provide therapeutic assistance after the case is over, after the sentencing. After everything is done, I think the jurors need to have some therapeutic sessions. They should be provided, and they should be paid for.

One of the problems that we might pay attention to—and some of the doctors, psychologists, and psychiatrists may help us with this—is that you may not understand what effect that trial had on you for years, because we don't know how we're absorbing it.

I think one of the important vehicles in this country is something called Let's Talk Day that we just experienced. Everyone is encouraged, through Bell Canada's program, to talk, but at the end of a jury trial, we sort of put a lid on the jurors and say they can't talk.

● (1615)

I would think that one of the things you may reconsider is section 649 of the Criminal Code. There should be an escape provision exception for persons to talk about their deliberations for therapeutic reasons, and the exception is for the former juror—not the psychologist, not the provider of therapy, but the juror.

I think that would be a simple amendment, carefully drafted by clause-by-clause experts. It would allow jurors to “let's talk” about what they experienced in that room. I think that becomes a very important aspect, and it's almost the only thing that the federal government can do. The provinces are really responsible for how the jury system works, but I think we need to do better up front because jurors come into the courtroom wondering who we are. They have their own view of who we are, and we have our view of who they are; we have certain information. Some jurors have already made up their minds in some respects.

Let me give you an example. In a murder case I had quite some time ago, the judge said to the panel, “This case could take two or three months.” Then a juror was called.

I watched the juror walk up, and he was obviously uncomfortable. When he got into the witness box to be challenged for cause because it was a unique case, I said, “I apologize, sir, but when your name was called and you came up, you seemed to wince or be uncomfortable. I apologize, but was I right? His honour said that this case would take a long time.” And he said, “Well yes, actually, I don't think I can put up with you people for that long.” We chose him.

It is the most humbling experience to be involved in a jury trial and one of the most precious experiences for jurors, but we need to take the mystery out of it and protect and enhance this essential aspect of our democracy.

Thank you.

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

Mr. Bornstein.

Dr. Brian Bornstein (Professor of Psychology, Courtesy Professor of Law, University of Nebraska-Lincoln, As an Individual): Members of the committee, thank you for the opportunity to speak with you today on this important issue. I agree with Mr. Trudell that it speaks very well of the House of Commons that it is examining this topic.

I am a professor of psychology and law at the University of Nebraska-Lincoln, where I've been on the faculty since 2000. My major research focus is jury decision-making, and I have been investigating and writing about juror stress and well-being for over a dozen years.

I have divided my remarks into three sections: symptoms and prevalence of juror mental health issues, causes, and interventions and benefits. My generalizations today are drawn from a body of research that has largely been conducted in the U.S. Canadian jurors' experience might differ due to the many differences between countries in jury selection, trial procedures, and the kinds of cases that result in jury trials, but I expect that many aspects of the experience would be similar regardless of nationality.

The symptoms of juror stress are much easier to describe than the prevalence. Stress, anxiety, depression, perseverative thoughts, and impaired sleeping and eating are the most common negative symptoms that have been found in the literature. In the vast majority of jurors, these symptoms fall short of the threshold for a clinical diagnosis, but in rare cases, they can be severe enough to satisfy the criteria for an anxiety, depressive, or post-traumatic stress disorder. Jurors' reactions necessarily vary across individuals. Some people are naturally more sensitive or resilient than others. For example, several studies have found that women jurors report more, and more severe, stress symptoms than men jurors.

The exact prevalence of juror stress is hard to pin down because of the enormous variability in the kinds of trials and in how researchers measure stress and well-being. However, a rough ballpark figure is that one-quarter to one-half of jurors experience some type of negative reaction to some aspect of their jury service. That figure is probably an underestimate, given the general tendency of most people to want to appear in a positive light. Because trials vary so widely, it makes more sense to talk about factors that are more or less likely to cause stress than about the overall prevalence. Certain features of trials pose a greater threat to jurors' well-being than others.

Causes of juror stress range from the common and mundane to the rare and excruciating. Research that I conducted several years ago, along with a number of other studies, has identified seven different categories of stressors. In descending order of frequency, they are as follows:

First is disruption to daily life, such as having to manage jury service along with one's work and personal life—such as the example Ms. Donaldson gave of the man who had to work two jobs while serving as a juror—as well as the low rate of juror pay in most jurisdictions.

Second is trial complexity, such as difficulty understanding expert testimony or jury instructions.

Third is reactions to evidence such as gruesome photos or testimony. We tend to think of this most often in terms of violent felony cases, but it also comes up in civil cases involving grievous injuries to plaintiffs. Conversely, evidence can be so tedious and boring that it is hard for jurors to sit through it.

Fourth is difficulty making decisions, or what I sometimes like to refer to as the burden of justice, such as fear of making the wrong decision or an awareness of what a particular verdict would mean for the parties involved.

Fifth is general jury duty factors, such as not understanding how the whole process works, who the various court personnel are, and what they do, and just generally feeling somewhat lost.

Sixth is juror interactions, such as heated disagreements during deliberation, especially if one takes a minority position, as well as negative interactions with courtroom personnel.

Seventh is external sources, such as fear of reprisal or media attention. Media attention, in particular, is increasing as the demand for online news grows and social media make it ever easier to disseminate information.

Some of these factors will almost always be present in jury trials, such as unfamiliarity with the process and disruption to one's daily life, whereas others will only occur in certain cases, such as complex evidence and media scrutiny. Also, some of these things are easier to address than others.

Means of reducing juror stress can be categorized as those that take place pretrial, during trial, or post-trial.

Pretrial techniques include juror orientation programs that warn them about—or even expose them to—potentially upsetting evidence, and private, individual voir dire. These processes have been found to reduce stress and increase juror satisfaction. Individual voir dire before a judge in chambers also increases the rate of disclosure of possible bias or conflict.

● (1620)

During trial, jurors could be allowed to ask questions, take notes, and discuss the case with one another prior to deliberation. Many jurisdictions have also experimented with simplifying their jury instructions. Studies show that these things tend to increase juror satisfaction without having an adverse impact on verdicts.

Post-trial techniques include debriefing sessions led by the judge or mental health personnel, such as the program described in Victoria. Jurors tend to appreciate the opportunity to vent afforded by a debriefing, and judges also find debriefing useful, but how much it alleviates any actual symptoms of stress is somewhat unclear.

The problem is that very little research has addressed the effectiveness of these various interventions. Considering the benefits of reducing jurors' stress, it is necessary also to consider the costs, especially in terms of time and money. For example, creating an orientation video is a one-time expense that requires relatively little time to create or show to jurors, but post-trial debriefing would be a significant time investment by judges and jurors, and a significant expense if led by a mental health professional.

Some of the benefits of reducing stress are obvious. The state has an interest in citizens' well-being and should not impose threats to their well-being—of long or even brief duration—by requiring them to perform a civic duty like serving as a juror.

There are less obvious benefits as well. Although the relationship between stress and decision-making is complex, and some research suggests that a moderate level of arousal can benefit cognitive performance, distraught jurors do not make good decisions. Stressed-out or anxious jurors are likely to be preoccupied and distracted from the task at hand, increasing the risk of inattention and poor comprehension, which can contribute to a miscarriage of justice.

There is also an efficiency argument to be made. Highly stressed jurors are more likely to have to be replaced, requiring the selection of alternate jurors. Negative experiences with jury duty perpetuate the myth that it is a duty best avoided, posing challenges for courts to obtain sufficiently large and diverse jury pools. Because after jury service, it is generally viewed positively and increases trust in government and other types of civic engagement, anything that deters citizens from serving on juries can have ripple effects.

Finally, although the focus of today's hearing is on juror stress, I wish to close by emphasizing that jurors are not the only ones whose well-being is at risk from what transpires in the courtroom. Attorneys, judges, and other court workers also make difficult decisions and are exposed to upsetting information. These personnel may face additional stressors that do not affect jurors, such as security concerns and burnout: their well-being should also be addressed.

Thank you.

● (1625)

The Chair: Thank you very much.

I want to thank all of our witnesses for their very cogent testimony.

Now we will 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.

I'll begin with Mr. Trudell. You touched upon section 649 of the Criminal Code, and you recommended that an exception be made whereby jurors—after a trial and upon seeking counselling—could discuss their deliberations and other aspects of the trial within the confines of section 649.

I was wondering if you have any thoughts about during trials. Would it be a concern, for example, from a criminal lawyer's standpoint, for a juror who is seeking counselling during a trial? For example, the program provided in the province of Alberta allows jurors to seek counselling during a trial, to discuss aspects of the trial. Would that potentially result in significant prejudice in terms of a juror's ability to deliberate and reach a fair decision based upon the evidence at the trial?

Mr. William Trudell: I do not think it is a good idea to allow a juror, during the course of a trial, to seek outside guidance in relation to the stresses they're having in performing their duty. That's one reason judges may have alternate jurors handy in a major case.

The magic of the jury system is that they are able to gather, almost as a family, protected, to make their deliberations. I didn't know that was done in Alberta, but I would like to look into that a little more. I think it's very dangerous to do that. If someone is having difficulty and needs therapeutic assistance as a juror during the middle of a trial, they're going to have difficulty performing their task, and they should be excused.

Mr. Michael Cooper: I'm now going to turn to Mr. Dore from Australia.

You talked a little bit about the juror support program in Victoria, and you cited some statistics. Seventeen jurors used the program in 2016 and eight jurors in 2017. That just seems like a really low number.

Is there any explanation for this? We've heard from a number of witnesses, including as Mr. Bornstein intimated here today, that at least half of jurors have some negative feelings or negative impact as a result of their jury service. Yet, in the face of what seems to be a fairly common problem—even if, as Ms. Donaldson indicated, it's 10%—you mentioned 17 jurors in 2016 and eight jurors in 2017.

That's staggeringly low, but it is interestingly consistent with evidence that was brought to the committee from Ontario, where I think there's somewhere in the neighbourhood of 7,000 jurors each year in the province of Ontario, and yet since they started their juror support program only 20 or so people per year have used the program.

I'm just very interested in that.

● (1630)

Mr. Paul Dore: I'm not too sure how to answer it in that I'm surprised as well by the low numbers. In fact, sometimes I wish that all 6,600 jurors accessed a juror support program after jury service.

I think the answer lies in something that both Mr. Trudell and Ms. Donaldson said. We do what Mr. Trudell was suggesting should be done on the front end.

I don't know if you remember the numbers, but we start with 170,000 people who are randomly selected, and only 20,000 people actually show up to a courtroom. We have accepted applications to be excused on a personal basis, a one-to-one basis, from many citizens for all those reasons—such as financial impact—that may lead to stress should they end up on a trial.

In Victoria, the employer is obliged to make up the pay that a person would reasonably expect to be paid had they not been on jury service, and that obligation has no end to it. If you're on a nine-month trial, your employer is obliged to make up your pay, but we will excuse people who work for small businesses or are self-employed, or where the financial burden might be there. If you care for children or other people in your family, we don't ask you to upset your life entirely.

So we have weeded out—for lack of a better word—a lot of people who might otherwise be stressed or feel an impact as a result of serving as jurors. We do a lot of that front-end work in our orientation. We are continually communicating with people along the way about what they can expect in a courtroom, not the details of the trial but who's in the courtroom, what they can expect, and how things run.

Once a panel of jurors—30 or so people—show up in a courtroom, and they're in the hands of a judge, and the selection process has to occur, and peremptory challenges are there, and people can apply to be excused, judges should be pretty confident that people are only going to be excused on the basis of the detail of that trial. At that point, if a person feels that they can't sit through a trial because the subject matter is too close to home or because they know something about the trial, they can apply to the judge to be excused from that trial.

Finally, as I think Ms. Donaldson suggested, they don't have to do it in open court. It is very unusual for a judge not to offer everybody the opportunity to write their answer down, and the judge will excuse a person without reading in open court what the reason is.

I think that's probably why the numbers are low. I think the numbers should be higher. Recently, we've been promoting the service more, so I'll let you know how it goes in the next couple of years.

The Chair: Mr. Trudell, you wanted to chime in, and then we'll move to the next questioner.

Mr. William Trudell: I just want to say that if we look at some of the major criminal cases in Canada, let's call them the horrific ones that we all probably are familiar with, you probably will find that not very many jurors wanted the help on a continuing basis. I think one of the reasons for that is judges go a long way to break up, for instance, the presentation of graphic evidence. They would be conscious of the breaks that the jurors need. We have very talented judges in this country who know how to deal with these kinds of cases.

If a judge knows this is coming and knows it could be pretty hard and he's already prepared for it, he directs a lot of effort to the jurors during the trial to protect them, to make sure they have breaks, etc. I think that's one of the reasons that there aren't that many people who need the access right away. Of course, it affects us all. A defence counsel... I'm pleased it was heard; it affects everybody. As a defence counsel, you see a murder take place. It may not resonate for quite some time. The same thing applies to jurors. We're doing a job. Jurors are looking at it, seeing it, listening to it.

I think the role that the judges take in carefully making sure that there's a balance contributes to the lack of need for the jurors after.

● (1635)

The Chair: Thank you very much for that.

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you, all, very much for your interesting words. I appreciate it very much.

Mr. Trudell, I just want to turn back to section 649 that you referenced. My understanding of that provision of the Criminal Code is to ensure that there is confidentiality about what discussions take place in the deliberations of a jury—there's good reason for that—and to ensure that full and frank conversations about how they arrive at a decision are kept in that jury room.

If an exception is made for therapeutic purposes, as you say, or whatever wording could be used so that a person could seek some help to talk about the discussions that took place in that room, is it your understanding that this information would obviously be confidential with a mental health professional or whoever? What would your opinion be about the compellability of that witness? Would it be privileged information and not admissible in court in any future proceedings or in any appeal, for example, on things that happen in the jury room?

Mr. William Trudell: We have to be careful about making sure that the case is over before the juror is allowed to have the therapeutic contact. It can't take place prior to sentencing. It should take place when the case is entirely over. Maybe it's after an appeal. I scribbled something on the plane, and I said, this provision does not apply to communications by a member of a jury for the purpose of therapeutic assistance as a result of their experience serving as a jury member. The provision continues to apply to any person receiving such information.

It's very clear that it's the juror's protection. Let's just say for the purposes of this discussion that there was a situation where some litigation took place after, and a therapeutic provider was on the witness stand and was asked to divulge. My respectful submission would be he would say “I can't”. He would say, “I'm bound by my Socratic oath”, and it's almost like solicitor/client privilege. The only difference is the juror cannot waive that; we'll call it “privilege” just for the purpose of this discussion.

I think if the Criminal Code was amended to be very specific in words that we all understand, I think it might accomplish what we're trying to do here. There will be problems probably down the line.

Mr. Colin Fraser: I'll turn to you in just a moment, Ms. Donaldson, for your thought on that.

We heard as well that it sometimes can be therapeutic for jurors who stay in touch with other jurors from the same case to discuss the matter afterwards. That could be therapeutic.

Do you see any value in that, or is that going down a road we don't want to go down?

Mr. William Trudell: If we weren't living in an age of social media, if we could control the dissemination of the information.... Let's say, “Who were you talking to?” ...“I was talking to the juror whom I served with on that murder.” ...“What did you talk about?” I just think it's very slippery. It's a problem because we ask jurors to come into the courtroom, take an oath, and then leave. We can't give them escape hatches because we have no control. As soon as I say something to you, you and I may be dealing in confidence, but it may go someplace else and where there's no control over it.

I don't think—

Mr. Colin Fraser: That would never happen in politics. We have no experience in that.

Mr. William Trudell: Not in this country, with great respect to my friends.

Mr. Colin Fraser: Ms. Donaldson, I want to give you a chance to say something on that.

Ms. Sandra Donaldson: In the United States, once a juror is done with a trial the judge says, “You are free to speak with anyone you wish to speak to about your experience”, so they do have the opportunity. I've conducted a lot of post-trial juror interviews and the jurors, particularly in longer trials or particularly in traumatic trials, become close friends and support units for each other. That support system helps alleviate the need for counselling because they do have someone they can reach out to who experienced the same thing.

There's a movement going around on court reform that is testing whether or not jurors should be allowed to talk about the trial during the course of the trial. Whenever they are in the jury room, they could start to talk about some of the evidence and what they are seeing, with the idea that if it is an interactive, ongoing process, they ultimately have to reach a decision. Of course, the opposite side of that is the concern that there's undue influence by one particular juror or their misunderstanding of the evidence that would affect the verdict.

● (1640)

Mr. Colin Fraser: Mr. Bornstein, we heard some evidence in previous testimony that, after a verdict is made in a criminal case, jurors feel like their job is done. They're shown the door, out they go, and they don't know what the resulting sentence might be. They don't know anything more about that case.

Do you think it would be helpful for the court to actually keep them informed about the rest of the matter after they walk out the door, as part of the debriefing process, or is it better to just let things go?

Dr. Brian Bornstein: I think that it would definitely be beneficial to give them more information, as opposed to less. The jurors I have talked to have very often had a lot of questions about things, like what the eventual sentence was going to be or why they didn't hear about this sort of evidence. When they've been allowed to talk to the judge in some sort of debriefing afterwards, they can often get those questions answered. They might not be able to do that, depending on whether it raises a legal issue and so forth.

In many cases, one of the things that does bother jurors is not knowing some of the things, like what you are talking about, so I think it would definitely be helpful.

What works against that to some extent is that after the trial is done some of the jurors are just done. For however long the trial has lasted, they've given over a significant part of their lives to dealing with this. They're behind on work. They've had to pay a babysitter for extra time. When I have tried to collect data on jurors after the trial, it's been a pretty even split. About half of them are very eager to talk about it and the other half say they have given their week over to this and they just want to get home and deal with all the other stuff they have to deal with.

Those are going to be competing factors.

The Chair: It's now Mr. Rankin's time.

I'm sure we'll get more questions from Mr. Trudell and then I'll come back.

Mr. Murray Rankin (Victoria, NDP): I appreciate that because it was just fascinating. I understand the frustration my friend feels.

I want to start with Mr. Mossey. Thank you for being with us.

Particularly given the realities of Nunavut and remote communities, often I'm guessing that jury trials would take place in Iqaluit and people might come from away. Are there any programs available? Are there unique cultural issues that you have identified in your practice that would help us understand what to do in remote places like Nunavut?

Mr. Mark Mossey: Thanks, Mr. Rankin. That's a good question.

I would say that the vast majority of our jury trials actually take place in the communities, not in Iqaluit.

I was just canvassing the office before I came in, and we can't remember the last time we had a full jury trial in Iqaluit, but looking at the schedule, we had two back-to-back in a month scheduled for Rankin Inlet.

I think Nunavut is very much an outlier when we're talking about juries, especially when I hear the evidence put forward by my fellow witnesses. In Victoria, Australia, there is a pool of 170,000 people. We have 810 eligible individuals in Pond Inlet to serve on a jury. If we do back-to-back juries in the community and we pool 250 people each time, we expel the entire adult population very quickly.

We're a travelling circuit court. I've put a lot of this in my written brief, so excuse me for any repetition. We have one permanent courthouse in Nunavut, and that's where I'm sitting right now. We travel to the other 24 communities weekly. We do 100-odd circuits per year.

When we go into the community to do a jury trial, we don't have a courthouse. We set up in a school gymnasium, a community hall, or a hamlet office. We put a jury to deliberate in what is not the most ideal of situations, and then, when the verdict is over, the court party gets on an airplane and comes back to Iqaluit.

I found Ms. Donaldson's testimony extremely interesting and fascinating, and it's something I have to follow up on, but to hear that only 10% of jurors experience this extreme stress is something that just doesn't really apply in the Nunavut context.

You'll find a quote in the paper I submitted indicating that in these communities there are sometimes only hundreds of people. There are not thousands or tens of thousands. It's inevitable that those 12 people sitting on the jury know the accused and know the complainant. They may be a second cousin to those people, so to think that they're not stressed or burdened by this on a very high level is a misnomer. Nunavut is an outlier here, much like in a lot of contexts for Nunavut.

I hope I've addressed your question, Mr. Rankin.

● (1645)

Mr. Murray Rankin: You have. Thank you very much.

Mr. Trudell, just to go back to the point you were exploring with Mr. Fraser, one idea I wonder about is if one were to, in a sense, find what you called an escape exception to section 649, so that people could talk to a therapist and not violate the jury confidentiality rules. Couldn't one reinforce that by professional discipline with respect to the therapist?

In other words, if you are able, with an amendment, to talk to a therapist after the trial is over and you're experiencing serious PTSD, like Mr. Farrant whom you referenced, then that therapist could be made subject to professional discipline rules if he or she were ever to disclose to anyone for any reason what they had heard at the time. It's sort of belt and suspenders. You suggested an amendment to the section of the Criminal Code, but one could reinforce that with professional discipline requirements.

Mr. William Trudell: Mr. Rankin, in my other life I spent a great deal of time representing professionals, and there is no question that I would suggest we don't need to amend it because professionals are regulated very strictly. Any doctor who breached the confidentiality of the patient relationship, let alone the Criminal Code, would certainly risk losing their licence.

One of the things we need to pay attention to, in fairness to jurors, is the role of the media. How many cases end when the front page of the media says what the jury didn't hear and all the evidence of the voir dire that a judge has decided is inadmissible is splashed in the newspapers? This is unfair to jurors. It goes back to the idea that they should be told in the beginning that there are going to be things that the judge rules on that they're not going to hear about.

A juror could feel cheated, quite frankly, if they walk out and haven't had a debriefing, and then they read about it in the newspaper. I think that the community has a collective responsibility to respect the jurors and not to make their jobs harder. It's one of the after-effects.

Mr. Murray Rankin: Thank you.

I really appreciated your testimony as well, Ms. Donaldson. I thought it was helpful that you gave us a list of specific recommendations.

The idea that more time would be allowed to have a voir dire to help identify problems that a judge would have, obviously without the jury being present, sounds like a really good idea.

I was concerned about the other idea that you had, however, about steps like a paint gun to limit the impact, using a paint gun rather than showing the horrible pictures that would cause trauma. Isn't it true that sometimes a district attorney in your system would want the visual impact in order to persuade those jurors of the horrible human cost of a particular murder or something? Does that always apply?

Ms. Sandra Donaldson: That's the rub. Prosecutors or plaintiffs in personal injury cases want to make the evidence as graphic and real as possible because their support is going to come from jurors who feel the pain and identify with the victim. The defence on the other side wants to make it into more of a clinical presentation, use the paint gun situations, remove that element of emotion. Humanly, that's not possible. It does help to reduce, but if the concern is doing harm to jurors—

● (1650)

Mr. Murray Rankin: But you're not going to tie the hands, in your solution, of a prosecution that wants to get maximum penal consequence from the pictures. This makes perfect sense.

Ms. Sandra Donaldson: Unless a judge helps to control because of the graphics. The parties have to talk to a judge, and generally they won't come to an agreement. They just have opposing strategies for trial.

The Chair: Thank you very much.

Mr. Ehsassi.

Mr. Ali Ehsassi (Willowdale, Lib.): Thank you to everyone for providing us with very helpful information.

Mr. Dore, you were explaining to us the uptake of services by former jurors in Victoria. As I think you heard, we have the same challenge in Ontario as well. The anecdotal evidence we are provided suggests that the numbers are very low as well.

When you were devising and implementing the jury support system, was any thought focused on the issue of stigma and how to work one's way around that so jurors feel more comfortable coming forward and seeking help if need be?

Mr. Paul Dore: We carefully crafted our communications in consultation with the counselling service. We started from a position that we start with in all areas of jury service. We say to citizens this is the last type of conscription available to the state. You didn't choose to be a juror. You were randomly selected from the electoral role. There are some opportunities for you to apply to be excused if you need to be excused. If you are eligible, and you're not disqualified from jury service, then you're obligated to at least show up with your summons.

We go through an orientation that sets out what they can expect. Then we say to them a reaction, call it stress or whatever—I'm not a psychologist—is a normal response to an abnormal situation. Then finally we say to them we won't know if you phone this 1-300 number. We are almost flippant about it. That's probably the wrong word. I don't know if people do. I get a bill from the counselling service that says this is how many hours we did. I don't know who phoned, from what trials. It's only for the purposes of this session that I got the stats. All I can tell you is it was 17 people. Some were from Melbourne and some were from regional Victoria. There are 13 regions. I don't know which of those 13 regions. I think the stigma can be minimized by that sense that it is absolutely confidential, and it is absolutely up to you whether you pick up the phone.

Mr. Ali Ehsassi: Thank you very much.

Mr. Bornstein, during your testimony, you highlighted the extent to which fatigue or evidence of anxiety could lead to jurors making mistakes. It impairs their judgment. That's very intuitive for us. We can accept that.

Could you perhaps delve into that in more detail and sensitize us as to how much of an impact these things can have on a juror's judgment?

Dr. Brian Bornstein: You raise a couple of interesting aspects of what's going on, fatigue being one, but also the stress level. In some of these cases, like Ms. Donaldson was describing, the trial goes on for months or years. Jurors become bored. The first thing you learn when you observe a jury trial is it's not at all like the jury trials on TV; in fact, they're really tedious, even ones that are sensationalized cases. The manner in which attorneys are required to phrase their questions and how the evidence is presented can drag on and on. It's not unusual to see jurors sleeping, at least in American trials. In longer trials, jurors are clearly not paying attention for long periods of time. If they're allowed to have their phones with them, they're on their phones, so many courts now require them to leave the phones in the jury room so they can't do that. Fatigue and boredom are going to work against the ability to process the information, pretty much in the way you'd expect.

The issue of jurors being upset by what is going on is a little trickier, because to some extent that increases their ability to pay attention. If they become more alert because they're shown some interesting pictures of the crime scene, or what have you, they might pay attention a little more. However, that can reach a point where their anxiety level becomes so pronounced that it makes it harder for them to pay attention, or they're paying attention to aspects of it that might not be legally appropriate, so it can become prejudicial in some of those cases as well. We would describe that as an inverted U-shaped function, to use technical language. Up to a point, maintaining interest and having some sort of arousal level can be beneficial, but then past a point it can be counterproductive.

● (1655)

Mr. Ali Ehsassi: My last question is to Mr. Trudell. Given that we are talking about lengthy trials, one of the recommendations we've heard is that if a particular trial is dealing with a horrific case, perhaps we should consider providing breaks along the way. What would your view of that be? Would that throw the administration of justice into disrepute, or is that something you would be in favour of?

Mr. William Trudell: We've moved to a real energized case management system in this country in criminal justice and in civil cases. I think the national steering committee did a paper on case management. A judge will assess the case—that's what we ask them to do—and decide whether it's appropriate to take breaks. I'm not sure what you mean by breaks, in terms of how long; I don't know what people have said. A judge can work that out with counsel and maybe consult with the jurors, decide that a case is going to take a long time, and therefore not sit on Fridays or something. I don't recommend a three-week break, but certainly shorter days, a four-day week.... If a case is going to take four or five months, a judge is not going to sit every day, hopefully, because it's just not going to work. The jurors are going to lose patience and it's not going to work.

It's a human system, and I really think judges with case management are managing. They know what's coming, that breaks are important, and that jurors want breaks. There's nothing the matter with saying to jurors, “We're going to sit until three o'clock today, or we might...what do you think?”

The foreman or somebody is going to say, “Let's go home,” or “No, we'll sit.”

It's a human thing. It's up to the management of a case. That's what judges are skilled in doing and are being trained to do more often.

Ms. Sandra Donaldson: I have a small comment on that.

Many trials I've been involved in have had naturally occurring breaks, like a four-day weekend for Thanksgiving or the holidays, or the Jewish holidays in September and October. There are many breaks in a trial. In New Orleans, they break for Mardi Gras, and their court is closed for a week. What's done in some of those situations is that mini-summations are allowed. When the jurors come back, each side is allowed to give a very mini-summation of the evidence that has occurred so far, just to kind of bring everyone back and up to speed with what's occurred.

Mr. Ali Ehsassi: Thank you.

The Chair: Now we're going to go to questions from people who haven't yet asked.

Mr. Nicholson.

● (1700)

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you to all the witnesses here. This is very important. This is the first time, to my knowledge, the Canadian Parliament has focused specifically on the needs and the concerns of jurors. Your testimony here today is very helpful.

First of all, Professor Bornstein, you indicated you have put together a lot of studies over the years. Are these online, something that we could access? Is there a way to get some of that material?

Dr. Brian Bornstein: The ones that are not readily available I would be happy to send.

Hon. Rob Nicholson: I wonder if we could make arrangements for that. I think that would be very helpful.

Dr. Brian Bornstein: Sure.

Hon. Rob Nicholson: I would certainly appreciate that.

I just pass on a comment to you, Mr. Dore, as well.

I've been in justice for quite some time over the years. One of the things that was very helpful in updating the legislation, the Criminal Code, in Canada was to have a look at what Australia did. You have a federal system, the same type of law system we have; and you have many of the challenges here. I found it very interesting to hear your testimony today. It sounds to me like you're ahead of us in many respects with respect to jurors, and the support for them. I want you to know that's very much appreciated, so thank you for that.

To you, Dr. Donaldson, you indicated there's a certain amount of stress. You pointed out one case where the jurors or somebody helped pay somebody's.... In Minnesota, don't they get any stipend at all for jury service?

Ms. Sandra Donaldson: There's stipend. I think at that time it was maybe $30 a day or $40 a day. The most we see in the United States is about $40 a day. Large companies usually pay their employees. Government workers usually are paid for jury service. It's people who work at smaller businesses. I think it's having under 10 employees, self-employed people. If I had my way, if I were queen of the world, jurors would be paid minimum wage for their services, for those who are not compensated by their employers.

Hon. Rob Nicholson: I think basically you eliminate sometimes maybe a whole class of people—

Ms. Sandra Donaldson: Yes.

Hon. Rob Nicholson: —who are not financially well off or on minimum wage, or less than minimum wage, or unemployed. Basically, you shut them out of the system of serving their state or their country.

Ms. Sandra Donaldson: If it's a trial of more than a few days or a week, those people do get shut out, but they can usually manage for a short trial. I have had numerous long trials in my career and those jurors are definitely shut out. In fact, we will sometimes call for a special pool of 500 jurors in order to sit a panel of eight, with three alternates; and we're lucky to sometimes seat a panel out of those who were summoned because only about 200 show up.

Hon. Rob Nicholson: Thank you very much.

The Chair: Mr. Fraser.

Mr. Colin Fraser: Mr. Dore, we have heard some testimony during our study so far about different examples where jurors were not necessarily comfortable in their courtroom setting or arriving at the courthouse or whatever during the trial. It's been suggested that it helps to de-stress, or as best as can be done to minimize a stressful situation. If, for example, different parking arrangements are made so that the jurors aren't arriving at the courthouse at the same time as family members of either the victim or the accused in a criminal trial, or if they have their own entrance to the courthouse....

I'm wondering if you could give some examples about what is being done in the state of Victoria to try to minimize stress in the courtroom situations for the jurors themselves.

Mr. Paul Dore: I can, as long as we remember there are 14 districts. For instance, I'm sitting in Melbourne, in a purpose-built building that was commissioned in 2002, and it is a perfect environment for jurors. As you suggest, they have a separate entrance. There's a lounge. They're given security cards as employees, so they can get in the building, clear security, get on a lift, go up to the floor they're required to go to, and enter the deliberation room they're required to go to. It's well set out.

At the other end of the spectrum, we have courthouses that were built at the turn of the last century, where we don't even have a jury pool room. The pool will gather under a tree and then be brought into the courtroom, so there are varying degrees.

We're currently in Shepparton, which is a couple of hours out of Melbourne. It's a regional court. The government has invested around $70 million to build a new multi-purpose courthouse that will have two trial courts, so there are two courtrooms that could cater for jury trials. I sit on that steering committee, and a lot of thought and effort has gone into building a purpose-built environment for jurors.

I'll just make a couple of comments, if I may, on what previous people have said. Our judges, certainly on longer trials, will build in breaks, and I just have to stress again that we have a front-end system whereby the personal hardship issues never get into a courtroom.

The third thing I'll say is—and it doesn't matter if you're the CEO of BHP or not—your employer is obliged to make up your pay to what you would have expected to be paid had you not been on jury service. Our system has really catered for those personal stresses, not necessarily the stress related to the horrific details of the trial, but in the sense that those other personal circumstances never get into a courtroom.

● (1705)

Mr. Colin Fraser: Thank you.

The Chair: Mr. Rankin.

Mr. Murray Rankin: This is a question for Professor Bornstein or Ms. Donaldson.

Are there examples in the United States where the media or academics have really had an example of a person suffering from PTSD that has been given lots of publicity? This is an issue we're studying in Canada. I just wondered if you have any other glaring examples of this issue arising in the United States, or any interest that's been given to an individual of this kind.

Ms. Sandra Donaldson: You see some examples of jurists themselves talking in social media, but I'm not aware of any media attention only.

Dr. Brian Bornstein: There's been some, and the most recent one I can think of is the trial of the Aurora, Colorado theatre shooter. You might remember the case a few years ago, of the man who went into the midnight screening of a movie with several assault weapons in Aurora, Colorado. I think his last name was Holmes.

There were a lot of media reports during his trial of jurors breaking down in tears while testimony was being presented of the pictures of people who were bleeding and had died. They were a necessary part of the trial, but were extremely hard for jurors to view. Many of them were interviewed after the trial ended and talked about just how difficult it was.

Ms. Sandra Donaldson: In the many personal injury trials I've been involved in, we have frequently seen a juror cry. Working for the defence, I'll sit there and say oh, we just lost that juror. They're going to vote for the plaintiffs. Lo and behold, they're able to separate that out. We find out afterwards that they voted in our favour.

The crying and the emotions you observe are just human emotions, and some jurors are able to separate that out.

Mr. Murray Rankin: I have to tell you, as a person who watches American movies and reads Michael Connelly novels, I have no idea how these jury consultants work, so it's fascinating. I can't imagine a four-month jury selection process.

When you do the initial vetting of jurors, do you look for signs of emotional instability? Do you have psychologists? Are you able to say, you know, we really better steer clear of them, because I can see trouble down the road with that particular juror's mental and emotional stability?

Ms. Sandra Donaldson: Yes, in two ways. If there's a written questionnaire and we start getting unusual responses, or outrageous responses with some venting or anger, we know that this is a person whose emotions can't be controlled, and we're going to look closely at that. Generally, we don't know until they've come into the courtroom, are seated, and start to be questioned that there's something not right about them.

● (1710)

Mr. Murray Rankin: Are these peremptory challenges or for cause when a person is emotionally...?

Ms. Sandra Donaldson: For cause.

Well, we try for cause, at a judge's discretion.

Mr. Murray Rankin: I hear you.

Ms. Sandra Donaldson: That's what you have peremptory challenges for.

Dr. Brian Bornstein: Can I speak to that just briefly? The problem is that many people can fake it.

Also, people who perhaps have emotional stability don't have it 24-7, depending on what's going on in their lives otherwise or what evidence might be presented at trial. They might not respond in an unstable manner, but if they had a fight with their spouse that morning, or who knows what, the emotional instability could manifest itself, which makes it much harder.

The Chair: Thank you very much.

Mr. Cooper.

Mr. Michael Cooper: I have a question for Dr. Donaldson or Mr. Bornstein.

We've looked at jury support programs provided in a number of provinces and in two states in Australia. Are you aware of any jury support program in any U.S. state, or perhaps provided by a court in the U.S., that is a model or that we perhaps should look to as we consider the range of services and the scope of what a proper jury support program should look like in Canada?

Dr. Brian Bornstein: It's a good question. None leap to mind. In my experience, it's done very much on an ad hoc basis by individual courts and individual judges. In some cases, there are a few jurisdictions that are experimenting with things like orientation videos or the rates of pay. Some states have raised the level of pay. They're addressing some stressors like that, but I can't think of one that has been more comprehensive in terms of addressing the issue.

Ms. Sandra Donaldson: Texas has a program. Texas has instilled legislation that has a program such as that. I have a couple of articles that I will forward to the committee on not only a summary of what state courts have concluded and are implementing as changes, but also, to answer your question, the states. I know that New Jersey doesn't have a formal program, but it's something that everyone in the court system is sensitive to. I will send you those articles.

The Chair: Mr. Dore, in the state of Victoria, what is the cost to the state of the juror support program, and is there any contribution from the national government?

Mr. Paul Dore: The answer to the second question is no, and the answer to the first is less than $10,000 a year. We are paying the cost of the hourly rate of a counsellor, which is around $170 an hour, and for some of the promotional collateral such as the pamphlets and those sorts of things. The issue is that it is a tap that may have to be turned on as the uptake is increased.

The Chair: I have a second question. You've heard us talk about our section 649 of the Criminal Code, which prohibits discussion of deliberations post trial.

As Ms. Donaldson mentioned, in the United States, there is no such restriction on the jurors. Nobody can compel them to speak, but they have every right to speak, to write books, and to talk about the deliberations. What is the system like in Australia? What are the rights of jurors? Is there an exception for mental health counselling, etc.?

Mr. Paul Dore: Yes, I wish you hadn't said "write books", because when I speak to jurors, students, or anybody else, the first thing I say to them is that if their understanding of the jury system in Victoria is based on American TV, they have to get that out of their head. I always say, yes, they can go and write a book, and CNN can interview them, but for us, section 78 of our act sets out a provision that sounds similar to what you have, which is that the deliberations are sacrosanct, that a juror can't discuss the deliberations.

Interestingly, it says, in subsection 78(5):

> Nothing [in those previous subsections] prevents a person who has been a juror from disclosing any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of that jury to a registered medical practitioner or a registered psychologist in the course of treatment in relation to issues arising out of the person's service....

It's very explicit.

● (1715)

The Chair: That's very helpful. I think we'll look at that very closely. Thank you very much.

Mr. Fonseca has a question.

Mr. Peter Fonseca (Mississauga East—Cooksville, Lib.): This is a follow-up to the Chair's question, Mr. Dore, in regard to cost. In terms of compensation costs for the State of Victoria, what would the compensation be for all those wages that you'd make up for all the jurors? That costs the treasury.

Mr. Paul Dore: Do you mean the actual paying of jurors to be at court?

Mr. Peter Fonseca: The stipend, yes.

Mr. Paul Dore: We pay a whopping $40 a day.

Mr. Peter Fonseca: No, they don't pay the full wage—

The Chair: No, the employers. He was saying that in Australia the employers have to pay the employees during their jury service at their standard wages, regardless of whether they're a CEO or not. That's what he had said.

Sorry, Mr. Dore. I'm just letting Mr. Fonseca know what you said.

Maybe Mr. Fonseca can now revise his question.

Mr. Peter Fonseca: All right. I don't know if he would have an estimate on that cost to the employers.

Mr. Paul Dore: I need to make one clarification. In Australia, there is a Fair Work Act. It states in section 111 that the employer has an obligation to make up the pay of a juror. That act says that this obligation ends after 10 days, but the next section of that act says if a state law is "more beneficial", then the state law will apply. In Victoria, because of the wording of our legislation around the obligation of the employer, it means that we override the Fair Work Act.

In Victoria, we pay $40 a day for the first six days and $80 a day thereafter, but the employer has to make up the pay. In other states, they'll pay more than $40 a day—I can't quote all the numbers—and then at day 11, they'll pay even more, knowing that the employer doesn't have an obligation to make up the pay.

As for the answer to your question around the cost to employers or to the economy, an economist would have to answer that question. I just can't answer it.

Mr. Peter Fonseca: Thank you.

The Chair: Is Victoria the only state that has the rule that says after 10 days the employer has to pay?

Mr. Paul Dore: Well, it's not so much that the 10-day rule says that the employer.... The legislation in Victoria, in subsection 52(2), says:

> Despite any inconsistent term in a contract of employment, an employee who has been summoned for jury service and who has attended court, whether or not he or she has actually served on a jury, is entitled to be reimbursed by his or her employer an amount equal to the difference between the amount of remuneration paid under section 51 and the amount that he or she could reasonably expect to have received from the employer as earnings for that period had he or she not been performing jury service.

It's silent on how long that period is, whereas the federal legislation says the obligation to the employer ends at 10 days, but then the federal legislation says that if you can get a better deal under state legislation, you can.

I can only say that in New South Wales, their stated obligation for the employer is not open to interpretation, to allow the 11th day to be the employer's obligation. I don't know if I've answered that succinctly, but each state has varying ways of compensating jurors.

The Chair: Thank you.

Mr. Fraser.

Mr. Colin Fraser: I'm very briefly following up on the Chair's question. I think you quoted from subsection 78(5), where there's an exception to allow a juror to discuss things with a medical practitioner, or whatever the terminology you used was. First of all, what act is that?

● (1720)

Mr. Paul Dore: It's the Juries Act 2000 (Vic), so it's a Victorian legislation.

Mr. Colin Fraser: Are you aware of any problems, criticism, or any litigation arising from that particular section?

Mr. Paul Dore: No.

Mr. Colin Fraser: All right. Thanks very much.

The Chair: Excellent.

I think Mr. Trudell wants to say something before we break.

Mr. William Trudell: Chair, can I raise one potential issue?

I was very interested to hear about the struggles in the north, in trying to select a jury, and of course, it paves the way for restorative justice, but there are sections of the Criminal Code that demand a jury trial, murder, for instance, and there are sections of the Criminal Code where the crown must consent to a re-election. When you are, perhaps, looking at legislative amendments, it may very well be that this might garner some attention. If I could re-elect to have a judge alone instead of a jury trial, I may want to do it, but the Criminal Code prevents that in certain cases.

The Chair: Thank you very much.

Thank you very much to our very distinguished panel of witnesses. I don't know that we've ever had a more internationally diverse group.

The meeting is adjourned.