HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 094 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Tuesday, May 1, 2018

Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

Tuesday, May 1, 2018

● (1535)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good afternoon, everyone. I call to order this meeting of the Standing Committee on Justice and Human Rights. I'd like to welcome everybody.

I'd like to welcome our first witnesses. As I've explained to you, there has been a notice of motion put before the committee; that will go first today. We're going to come to you as soon as that motion is over. We appreciate your patience.

I shall turn to Mr. Cooper, who is putting forward a motion.

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

The Minister of Justice has a responsibility to fill judicial vacancies in a timely manner. Notwithstanding that responsibility, this is simply not happening. Today there are approximately 60 judicial vacancies across Canada, 12 of them in the province of Alberta, where the situation in terms of backlog and delay is particularly acute.

A year and a half ago, the Alberta government by way of order in council established 10 new judicial posts to deal with the backlog in Alberta's courts. A year and a half later, the Minister of Justice has managed to appoint one new judge from the province of Alberta.

This would be problematic in normal times, but it is much more serious in light of the Jordan decision. As a result of the failure of the minister to fill these vacancies in a timely manner, what we have is a crisis that has worsened. There are serious costs, including more than 400 criminal cases having been thrown out.

Just a week and a half ago, a case involving notorious gang leader Nick Chan was thrown out of court because of delay. This is an individual who was charged with first-degree murder, who was facing a charge of conspiracy to commit murder and directing a criminal organization. He is the head of the notorious so-called Fresh Off the Boat gang, which is linked to more than a dozen murders. He has been called one of the most dangerous men in Calgary, and today he is walking the streets, in part because the minister has simply not gotten judicial vacancies in the province of Alberta and across Canada filled.

The fact is that Canadians deserve answers. They deserve to know, as these cases are being thrown out, why the minister has not filled these judicial vacancies in a timely manner.

Pursuant to the motion that I have put forward, I have asked that the minister appear before the committee to explain the delay. What's the holdup? Why has it been that in a year and a half, for example, in the province of Alberta, out of 10 new judicial spots that were established, only one has been filled? Clearly that is not a record of action. It is a record of inaction; it is a record of neglect.

In addition to these cases being thrown out and dangerous criminals walking the streets, public confidence in the administration of justice is being affected.

Further to this, I would like this committee to undertake a study about the shortage of judges and the impact it is having on the administration of justice and on public confidence in the administration of justice.

I think it's a straightforward motion; I think it's a common-sense motion. This is a problem that has gone on for now almost two years, and I think the time has come, in light of all these cases that have been thrown out, for the minister—not in a 35-second answer in question period—to come to the committee for an hour or an hour and a half so that substantive questions about a very serious issue can be asked of the minister, we can get some clear answers, and some light can be shed.

I think it would be worthwhile to undertake this study because clearly, when dangerous criminals are walking the streets, when more than 400 criminal cases have been thrown out, and when thousands more are at risk, confidence in the administration of justice is being undermined.

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

Mr. Fraser.

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

With respect to the motion that Mr. Cooper has put forward, I do not support the motion, for a couple of reasons.

First of all, I know the motion has been provided in the time required in order to have it before our committee properly, but there was no discussion with any committee members, that I'm aware of, as to the merits of the motion itself. This is unfortunate, and perhaps could have led to some agreements on the nature of the motion itself.

More substantively, there are two premises in the motion itself that I believe are unfounded. The first one is that the vacancies are not being dealt with. I would submit that they are being dealt with. In fact, in 2017, there was a record number of appointments made by the Minister of Justice. There were over 100 appointments made. To date, there are, I believe 168 appointments that have been made by the current Minister of Justice. A new merit-based system, I would suggest, is better than the old way that it was done. It leads to a more diverse bench, but is also a more meritorious appointments process.

In fact, in Alberta, as Mr. Cooper referenced in particular, my understanding is that the vacancies are all new positions that this government has put forward. Granted, not all of them have been filled yet, but the new process will allow the appointment of justices, who will fill those positions shortly.

With regard to the other part of the motion dealing with a substantive premise, there is no evidence that the cases that have been stayed as a result of Jordan are due to the judicial vacancies themselves. Given those two premises not being founded, I do not support the motion.

I do find it a bit interesting that a Conservative member is bringing forward this motion, when we know that for many years under the previous government, there was a chronic number of judicial vacancies. In fact, Mr. Cooper may know this from being a lawyer from Alberta, according to a friend of mine who practises law in Alberta, it suspended some of its mandatory rules in its court in the years 2012-13, under the Conservative government, because of judicial vacancies. Those rules were suspended, which of course was a problem for people seeking justice in that province.

With all of that said, I think we need to address the issue of delay in our courts. Obviously, the Jordan case is a reality that we must deal with, but I don't think this motion address that at all.

I also would suggest that Bill C-75, which is now before Parliament, does address some of the issues with delay, and I know our committee will be dealing with it soon.

For all of those reasons, I do not support the motion.

Thank you.

● (1540)

The Chair: Thank you.

Mr. Nicholson.

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

I think what my colleague here is asking for is very reasonable. Just to talk about the premise of what this is all about, we are now not having a merit-based system which is something new to this country. We've had a merit-based system of appointing judges in this country for decades. Indeed, under the previous administration, there were judicial advisory committees made up of representatives from the legal profession, from the provinces, from the federal government, from people who were coming together for no other reason than for the best interests of this country. I think everybody can be very proud of all the appointments that were made during those years.

There are challenges in the province of Alberta in terms of the increase in population, of course, over the years, related to the demand for judicial services. It's important to do that. There are new jobs created. I think if the honourable member has a look over the last two and a half years, he'll see there has been a consistent difference between Alberta and many other jurisdictions in Canada. If there are a couple of vacancies in Ontario, I understand that. There are people who resign or retire, or whatever. It has to be done on a continuing basis. To have that many at one time.... I would be interested to hear from the minister saying, “Okay, if there's a problem maybe people aren't applying.” If that's the problem, great, we get the message out there. Get your name in if there's a problem with that. I'm hoping that she would agree with me that in the years that I had a look at the judicial applications in the province of Alberta, I never saw a shortage of people, quite frankly, who were qualified to sit on the Queen's Bench in Alberta.

That being said, with the number of vacancies there are now, I understand where my colleague is coming from. And he's right. When you get very serious cases thrown out, it does hurt people's confidence in the criminal justice system. I'm sure you hear this yourself. What's going on that this individual is getting a chance to walk without having to face the consequences of the charges levelled against him or her? That being said, there are more things we can do. We can encourage people to get their applications in, that sort of thing. I'm absolutely convinced there is no shortage of people in the province of Alberta who have their names before whatever, for the composition of the new judicial advisory committee. I'm sure there must be enough.... If there's some sort of a problem with their getting together and making these decisions.... They come on the recommendation from those committees to the Minister of Justice. If she tells us she's only had three in the last year, that's an issue, or if people aren't applying.

I think that's what Mr. Cooper is looking for, just to have a discussion around this table. What better place to have it than right here at this committee.

The Chair: Thank you, Mr. Nicholson.

Mr. MacGregor.

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

I'll be lending my support to the motion. If I could offer one criticism, I think judicial vacancies are one part of the problem, and it could be expanded to broadly cover other things. I think one of the things that are important about the committee structure, as a body of the legislature, is that we're here to hold the government to account. That goes for my honourable friends on the government side.

One of the things that I've always appreciated about sitting on this committee during the last year was how respectful we are because of the weighty subject matter we deal with at justice committee. I've always felt that on this particular committee we've had some great camaraderie. I think Mr. Cooper has a point, that because of the charged atmosphere that exists during question period, it's really impossible to have a fulsome conversation on this matter. I feel that given the justice minister's previous appearances at this committee, I think we can hold ourselves to the same standard that I witnessed during 2017, and have a respectful conversation on this subject.

One criticism I could offer, it could be a much broader conversation, but I still think there's no harm in having the justice minister come here so we can do our jobs as parliamentarians and conduct ourselves as an investigative body and come up with some helpful solutions. I offer my comments, and I hope that my Liberal colleagues will take them in the spirit they're given.

Thank you.

● (1545)

The Chair: Thank you very much.

Is there anybody else who wants to intervene who hasn't intervened yet? No.

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

It's disappointing, but not surprising, that government members are not going to support this very simple motion.

● (1550)

Hon. Rob Nicholson: On a point of order, I think it was just Mr. Fraser who said he wouldn't. We don't know what everybody else—

Mr. Michael Cooper: Let us hope, but we'll see in a few minutes.

I'll speak to a couple of points that were made.

To Mr. MacGregor's point, I wholeheartedly agree with you that filling judicial vacancies is not the be-all and end-all, but it is the easiest thing. It is the most straightforward thing the minister can do, which is to get these vacancies filled in a timely manner. As for the Jordan decision, it doesn't mean that we won't continue to see cases that are thrown out due to delay, but we can help solve the problem, as a first meaningful step, by doing the obvious and simple thing, which is getting these vacancies filled.

Mr. Fraser made a couple of points. The first point he made was that the minister is, in fact, appointing judges. Well, obviously it's not fast enough—not fast enough when there are 60 judicial vacancies across Canada; not fast enough when it has taken the Minister of Justice a year and a half, and she has managed in that year and a half to fill only one of the new judicial posts in Alberta; and not good enough in the face of the Jordan decision, whereby the whole landscape has changed in terms of cases being thrown out due to delay. She has introduced a bill, Bill C-75, which in fact is probably going to make the situation even worse, but we can have that conversation another day.

In terms of the minister doing her job, to the first point that Mr. Fraser made, it in fact took the minister more than six months to appoint a single judge. For more than six months, she sat on her hands. Indeed, for a minister who is supposedly doing her job and filling these vacancies.... This is a minister who has presided on several occasions with a record number of vacancies, so it is not the case that the minister is dealing with it. To the degree that the minister is going to hide behind Bill C-75, I say it is too little, too late.

With respect to there being a lack of evidence that these vacancies are perpetuating the backlog, which in turn is perpetuating a crisis that is resulting in these cases being thrown out, with the greatest of respect to Mr. Fraser, for whom I do have a lot of respect, it is an absurdity. It is a matter of common sense that 10 or 12 judges in Alberta, for example, but also in other provinces, can hear a lot of cases. With respect to Mr. Fraser's point on that, I would suggest he tell that to former chief justice Wittmann of Alberta, who rather unusually, spoke out publicly expressing his deep frustration at the minister's inaction when it came to filling judicial vacancies.

With respect to his comments about the previous Conservative government, there was no Jordan decision under the previous Conservative government. We have now lived with Jordan for almost two years, and nothing has changed in terms of the manner in which the minister has been moving to expedite the appointment process. Clearly, once the Jordan decision was rendered, there should have been an emphasis on the part of the minister to expedite the process to see that these vacancies were filled in a timely manner. When you have 60 that are vacant across Canada today, and it's taken a year and a half and all the minister has managed to do is get one of the new judicial spots filled in Alberta, the only conclusion one can come to is that the minister is not taking seriously her responsibility of filling judicial vacancies in a timely manner.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Cooper.

We've had debate back and forth, so I'll now call for a vote on Mr. Cooper's motion.

(Motion negatived on division [See *Minutes of Proceedings*])

The Chair: I'm sure the committee will engage privately in discussions.

I don't want to take away any longer from our witnesses who are now here before us, so I would very much like to welcome, from the Probation Officers Association of Ontario, Mr. Chris Podolinsky, who is the President; and Ms. Christine Beintema, who is the Vice-President.

Welcome. Thank you so much for being before us. I will turn the floor over to you to talk about the bill we have before us, which is Bill C-375.

Mr. Chris Podolinsky (President, Probation Officers Association of Ontario): I can start by thanking the committee for inviting the Probation Officers Association to speak on Bill C-375.

The Probation Officers Association was established in 1952. We're a voluntary, non-profit organization, representing professional interests of the probation officers and probation and parole officers across the province of Ontario. POAO is not a union, but an association of like-minded professionals, who believe in the work they do and the role they play in the criminal justice community in Ontario. POAO is an autonomous representative of probation officers and probation and parole officers in Ontario and is committed to the preservation of the fundamental role of the probation officer within community corrections.

Our association encourages members to improve their knowledge and skills by engaging in continuous education through seminars, workshops, and courses, with mental health being a topic of interest for the past several years.

As mentioned, my name is Chris Podolinsky. I'm the current President of the Probation Officers Association of Ontario. I am based out of Windsor. I work in the Ministry of Children and Youth Services, dealing with youth between the ages of 12 and 17. I've written many pre-sentence reports over the years, but they are governed under the YCJA Act. To my left is Christine Beintema, working in Chatham probation and parole. She's written many pre-sentence reports over the years.

We're here to speak on Bill C-375, which proposes an amendment to subsection 721(3) of the Criminal Code, that any mental disorder from which the offender suffers as well as any mental health care programs available to them are to be included in pre-sentence reports. Bill C-375 concerns the preparation of pre-sentence reports that are prepared by probation and parole officers. The bill proposes that pre-sentence reports are to include information about any mental health disorder from which the offender suffers as well as any mental health care programs available to them.

In recent years, mental health has been identified as a significant concern. It's estimated that 10% of the general population suffers from a mental health disorder and the rates of mental health disorders experienced by those within community corrections and institutions are significantly higher, 26% for males, and estimated over 50% for females in the corrections system.

POAO continues to advocate many forums for increased mental health services for our offenders. POAO is pleased that improvements have been made in recent years to destigmatize mental illness. However, it recognizes that there are still many steps that need to be taken.

The bill requires in federal legislation that pre-sentence reports provide, unless the court orders otherwise, information on any mental health illness that offenders may suffer and any mental health care programs available to the offenders. Our association agrees that the issue of mental health is of significant concern to the criminal justice system and should be taken into consideration when making sentencing decisions.

In Ontario, the role of a probation and parole officer already includes a requirement to provide information related to an offender’s mental health in court reports. Feedback from our members, the members of POAO, with respect to the bill, concern the process of gathering the required mental health information, physical and mental limitations of the clients, and the lack of available resources in the community.

The association wishes to highlight that probation and parole officers in Ontario currently conduct skill-based interviews with offenders for the purpose of gathering information to prepare comprehensive pre-sentence reports. Investigative information is provided by the offender and collateral sources including but not limited to family, employment, counselling resources, community agencies, and health information, including mental health for inclusion in the pre-sentence report.

Through this investigative process, probation and parole officers comment on general patterns of behaviour; psychiatric, psychological, physical, and cognitive limitations; and disorders that may impact the offender’s pattern of criminal behaviour. In the event that the offender has a mental health diagnosis, probation and parole officers will investigate and confirm through contact with mental health professionals where possible. In instances where there is no confirmed mental health diagnosis, but reports of related mental health concerns from the client or collateral sources, probation and parole officers will comment on observed or reported behaviours.

● (1555)

Ms. Christine Beintema (Vice-President, Probation Officers Association of Ontario): Probation and parole officers recommend conditions in a pre-sentence report that best suit the needs of the offender, with consideration, of course, to victim safety and the safety of the general public.

One of the challenges faced by probation and parole officers is that community agencies often provide services on a voluntary basis. They are not equipped or prepared to provide services to offenders who are resistant or unwilling to attend for treatment. Although an offender may be directed to attend a particular service or agency, the agency is not compelled to provide services to an offender who is disinclined to seek treatment. In addition, offenders who are motivated to engage in mental health treatment or supports may lose motivation because of lengthy waiting lists at community agencies.

In many instances, offenders will advise that they have been diagnosed with various mental health issues but are unable to provide details or confirm that they've been formally diagnosed. During the process of gathering information, they can tell us many different things but not always be willing to give the information or be able to provide the correct information for us to follow up.

In such cases it's difficult to gather the appropriate information necessary to confirm and provide an accurate and thorough report. Bill C-375, if passed, should consider legislation that would assist in facilitating the sharing of information between Corrections and the health care systems. As gathering health care information can take a longer period of time, the court should also consider granting probation and parole officers additional time to investigate, for these reports, diagnoses that are reported but unconfirmed.

Currently, probation and parole officers experience difficulty when attempting to obtain information from medical professionals related to the mental health diagnosis or otherwise. Probation and parole officers must consider and are limited by the offender's right to privacy and must have the offender's consent to access health records. If this consent is received, obtaining health records can take an extended period of time, which affects the amount of time needed to adequately prepare a pre-sentence report for court.

If Bill C-375 passes, perhaps the new legislation would encourage changes to the health care system to require medical professionals—of course, where release of information is signed by the offender—to provide requested mental health information to probation and parole services in a timely manner, at no cost, and in a language that is suitable for the layperson.

That's one of the complications we run into: we're often sent a bill for information we're requesting, which we are not permitted to pay for. It often takes a long time. We understand they're busy, but we have timelines to follow. Oftentimes we'll have notes from a medical professional that are handwritten and be unable to read them but also to understand them, because we aren't medical professionals.

POAO members have suggested that if mental health concerns are being identified at court, as specified on a request for a preparation of a pre-sentence report, perhaps representatives at the court could facilitate offenders' signing of releases at that time, because at that point they're willing to provide permission for us to investigate and to reach out to their medical professionals. Sometimes, by the time they get to our office, they've said, “No, this is what we wanted. We wanted you to prepare a pre-sentence report, but now we're here and we're not really sure that's what we'd like to see happen”—which is their prerogative, but it would be nice if we could catch them at the court.

POAO members note that probation and parole officers are limited to providing information relative to the offender's willingness to co-operate and ability to make informed and appropriate decisions. We are restricted to being able to access only information and records to which the offender provides consent. That's something to keep in mind: even if the bill goes further and we are compelled to include that information, we can only include the information the offender is willing to provide.

POAO expresses the need for more comprehensive and organized information regarding the availability of mental health resources throughout the province and in individual areas. Ontario is a vast province, and resources vary in availability from region to region. The spirit of the bill, which is compassionate and noble, does not align with the reality of available services. Those involved in the justice system are often unable to access psychiatric services, as psychiatrists and mental health professionals are overburdened by the ever-increasing demands for services in the community.

One suggestion is to hire psychiatrists to work exclusively out of correctional institutions or probation and parole offices, which would allow clients direct access to services. At present, many offenders are compelled to seek services from their family doctors, who, while skilled, lack the knowledge and experience of a qualified psychiatrist.

● (1600)

Mr. Chris Podolinsky: The association appreciates the opportunity to share knowledge and experience with the committee and speak on behalf of probation and parole officers in Ontario.

POAO would like to thank Mr. Jowhari for bringing the bill forward and to paraphrase Mr. Jowhari, while the bill is a small change to legislation, it may have considerable impact on our work and on some portions of the justice system. The bill is a necessary first step toward addressing the lack of resources and gaps in the system for clients with mental health needs.

As an association, we're committed to ongoing communication and consultation regarding this bill as the committee sees fit, in an effort to support this change to the Criminal Code. We are committed to supporting our membership and colleagues as one component of the criminal justice system and to continuing to do the best work possible through professional development and advocacy.

I have a couple of points to add. The pre-sentence report is generally when it's ordered at court, at least in Ontario. We're provided four to six weeks to complete the report. If they're asking us to get the mental health information, a four- to six-week window may not be enough, based on the hospital or doctors getting the records required. This may extend that for a six-week period.

The report itself takes about 10 to 15 hours to complete, at least in Ontario. That includes all the interviewing, gathering the records, and then the actual writing of the report. Depending on the office—some offices are very busy; there's a shortage of probation officers in the province. They are overburdened and with multiple reports on top of the other duties they are currently assigned, it's a difficult process.

On the last point, and you touched on it, there are cases in the province where information about mental health records is being suppressed. There's a fee for that, and it adds to the burden of budgets for these costs.

We'll turn it over to any questions.

The Chair: Thank you very much for your testimony.

We will turn to Mr. Nicholson for the first question.

Hon. Rob Nicholson: Thank you very much for your testimony here. You've given us a whole new insight into this bill.

One of your last comments was that right now it takes about 14 to 15 hours to put together a report. Obviously this is going to increase the time available for that. How many hours do you think it will take if this bill is passed? You've already said it will go beyond the three or four weeks that you have to prepare these things.

Ms. Christine Beintema: Absolutely. Each report is different, so if we have a first-time offender in front of us with no mental health issues, you could probably prepare a pre-sentence report in 10 hours. The average is about 15 hours.

To clarify, we already include this information in our reports. This will legally compel us to do so, and so the reports we're writing right now, if there is a mental health issue that we need to investigate or gather information about, probably adds another four to five hours, depending on the complexity of the situation and the availability of information.

In Chatham, I work right beside the Canadian Mental Health Association so if we have the proper releases of information signed, it can go fairly smoothly, but it's all dependent on area and resources and accessibility of information.

Hon. Rob Nicholson: Now it's going to be mandatory in all cases.

Ms. Christine Beintema: Yes, exactly.

● (1605)

Hon. Rob Nicholson: One of the interesting things you said as well is a lot of these individuals don't want to get treatment because of the lengthy waiting lists to get treatment. This is certainly going to compound that. I appreciate your recommendation that we tell the provinces to provide more resources and all that, but we have to accept the situation as it is now, and this is definitely going to increase it, isn't it?

Ms. Christine Beintema: Yes.

Hon. Rob Nicholson: You say there is nothing compelling the health care professionals to share the information with you. I had a look at the bill, and I don't see anything in there that directly addresses that issue.

Ms. Christine Beintema: No. I know that's an ongoing concern for us. We can gather the released information, and the client could be willing to have us gather that information, but when you forward the information to the physician...there have been issues with having them send us a fee for service or for preparing that report: lack of time, or not feeling you are entitled to that information, and that's up to them to decide, but our focus is our clients. We want to make sure the proper information is relayed to court so that an appropriate sentence can be handed down and can benefit the client.

Hon. Rob Nicholson: You were somewhat supportive of this bill and the idea of it, but it seemed to me that it was contingent on the provinces and everybody else stepping up to the plate and providing more resources.

Let's just assume for the purposes of this discussion that the provinces aren't going to have huge investments or expand this area. Do you think this is going to work under the present system?

Ms. Christine Beintema: I think in Ontario, since we do it already, we will continue to do it. I think it may lead to more challenges, if we are compelled to do it legally, if we aren't able to follow through. With all the barriers in place, we—

Hon. Rob Nicholson: Do those challenges include court challenges as well?

Ms. Christine Beintema: Absolutely.

Mr. Chris Podolinsky: If I could just add to that, we can tell the courts what's available, but we can't do anything about timelines. We can't do anything about the client's willingness to participate. We can certainly say, “Here is the service in the community”, but again, the wait-list could be several months. The drug-free programs have 20 beds, with hundreds of people who need to get in them. It may not be feasible.

Again, if the client is not willing to follow through, and then it gets back to court, we'd be expected to disclose those steps at some future point. If the person was not following the order, we'd be responsible for relaying the reasons the order wasn't followed through.

Hon. Rob Nicholson: I appreciate your insight. Thank you very much for this.

Thank you, Mr. Chair.

The Chair: Mr. Boissonnault, you're up.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you very much.

I heard in your testimony, Christine, that this is codifying what's already done, yet it's going to put some challenges on the system. Is it true to say that what we're really talking about is codifying what is already being done, yet that's going to perhaps cause some resource issues in other parts of the system? We can separate the intent of the bill, which is to codify, and then the resources question we can tackle separately.

Ms. Christine Beintema: Absolutely. The resource problem is already an issue. I think where I would struggle, or where we would struggle, is if the legislation compelled us to do this, and we provided the information to the court. I would want to make sure that it's clear that there is not an expectation that because we're providing the information and providing whatever resources are available, say, in Chatham, it means that they're actually accessible to the client in a timely manner, or whatnot.

The first problem is getting the information into the report. The second problem is the follow-through, which the court is expecting from our giving the information that this is what's available to the client.

Mr. Randy Boissonnault: Sure.

I come at this from a non-legal perspective. I'm one of the lay people on the justice committee, if I can use that term. How is it helpful, and why is it helpful, as a probation officer, to have some insight into an offender's mental health or whether someone is facing any mental disorder?

Ms. Christine Beintema: First and foremost, when we move forward, the gathering of information for a pre-sentence report is sort of the beginning piece. The guts of our work is working with the offenders and looking at their level of motivation to make changes.

When you have a client with a mental health issue, it affects every other area of the person's life and the level of motivation to make changes. No matter what we have the client in front of us for, there could be barriers to services, to accessing services, to being able to engage with services. We want to make sure that we address the mental health piece first and foremost, because typically, that is attached to the criminal behaviour.

Mr. Randy Boissonnault: Let me look at things this way. We have a resource issue in the mental health field across the country. We know that. We know that the delivery of health services is a provincial responsibility, and here we are at the federal level looking at codifying a practice that already takes place.

Can you see an argument being made that we pass this law, it codifies an existing practice, and you're now able to say to people, “We actually need to know your mental health state, so you can't now opt out and simply not tell us because you don't think you'll get the service because the money isn't there”? That could then help us, as legislators, work with the provinces and push so that we actually expand the amount of services we provide to people who are facing mental illness.

Ms. Christine Beintema: I do. However, my concern would be saying to a client, especially one with mental health issues, “You are compelled to give me the information.” I don't think I can say that to an offender who is in front of me. It's the offender's right to share information with me, or not. I would do my best to gather that information, and part of our job is to work with and develop rapport with clients in order to have them share information with us that would help us supervise them appropriately, but yes, I would have concerns about telling clients that they are compelled to give me information like that.

● (1610)

Mr. Randy Boissonnault: Okay.

Thank you both very much.

The Chair: Mr. MacGregor.

Mr. Alistair MacGregor: Thank you, Chair.

Thanks to the witnesses for coming today. I appreciate hearing your insights on this, especially given the level of expertise and direct access to the justice system you experience.

You said in your opening remarks that, “Bill C-375, if passed, should consider legislation that would assist in facilitating the sharing of information between Corrections and the health care systems.” Can you just expand a little bit on that?

Ms. Christine Beintema: I don't have the knowledge to know exactly how that would work, but it would be nice to see some sort of connection between the two. Whether or not that would be at a provincial level, between my ministry and the Ministry of Health, or if there is come connection federally down to the provincial level, I don't have that level of knowledge. But it would be nice to have some sort of a memorandum of understanding or some sort of an agreement between the two so that when we are requesting information, the health care providers are aware that there's an understanding that they share that information, provided there are the right releases of information and agreement with the client.

Mr. Alistair MacGregor: The consent always has to be there with the client.

Ms. Christine Beintema: Absolutely.

Mr. Chris Podolinsky: I'd like to expand on that a little. I think there have to be mechanisms in place for more information sharing. For example, a lot of our clients have been picked up on the weekends and admitted into the psychiatric ward for observation. Often they're released the same day or the next day, and we're not always made aware of that. If they've been in the psychiatric ward four or five times, and we don't have enough information, that really changes the way we approach that client.

I think if the bill is passed, it would make our job easier. We'd be able to provide better service to the client if we had that information available, if there was some mechanism in place where if they're admitted to hospital for treatment, that we're at least given an alert or made aware so that we can do our jobs better.

Mr. Alistair MacGregor: I think both of you in your testimonies identified one of the big problems we have in justice reform in that it is a shared responsibility. We as federal legislators do have our jurisdiction over amending the Criminal Code, but the administration of justice falls to the provinces, so we have to find those ways to work together. As Mr. Boissonnault said, if we're just codifying something which is already standard practice for many of your members.... I'm just wondering if you have strong relationships with other provincial associations. I think one of the things we can do through amendments to the Criminal Code is try to ensure that we're not operating under a patchwork quilt across the country. Whether the offender is in P.E.I., Ontario, or British Columbia, they're getting some kind of a standard in a pre-sentence report.

Ms. Christine Beintema: That was actually one of the questions that came up when we were asked to come and present. We started to realize that we don't know what other provinces do. I believe we're the only provincial professional association. There used to be one in British Columbia, but it doesn't look like it's been active in years. We're really speaking just about what Ontario does. But that was one of the questions we had: what are other provinces doing? Maybe other provinces aren't putting mental health information in their reports. We are going off our provincial policy whereas other provinces may be different. It would be very helpful to have representatives from each province speak to what their policies are.

Mr. Alistair MacGregor: In the way Bill C-375 is written, by adding proposed paragraph 721(3)(a.1), it not only lists a mental disorder from which the offender suffers, but as well mental health care programs that are available to them. Is that something that you do already?

Ms. Christine Beintema: Absolutely.

Mr. Alistair MacGregor: You said in your testimony that there's already such a lack of available resources. Do we sometimes get the judge reading the pre-sentence report and saying that it's all well and good that he or she has this recommendation but there are no resources to help the offender?

Ms. Christine Beintema: Because I'm in a small community, we have contact directly with our judges, so we have those conversations often. There's a lack of resources in small communities, but I'm sure in larger centres, there's maybe not a lack of resources, but waiting lists and such so it's still difficult to access. The judges are made aware. Sometimes it's frustrating because we feel like we know exactly what this client needs after speaking to their psychiatrist and their mental health care worker, and here you go Justice so and so... but the reality is we know that the outcome is limited.

● (1615)

Mr. Alistair MacGregor: I think we're in agreement that this bill has a noble intention, but it definitely needs added resources in order to make it fully realize its potential.

Thank you.

The Chair: Mr. McKinnon.

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

I think this question has been canvassed various ways, but I'm not quite clear. The legislation says that you need to report on any medical disorder from which the offender suffers. It doesn't talk about the ones that the offender knows about, or the ones that he or she is willing to talk about. Is that a problem? Are you able to assess whether this person has any mental disorder other than the ones he talks about, or whether or not he does talk about it?

Ms. Christine Beintema: Obviously, our role isn't to assess any mental health issues. We're not qualified to do that. In the past, because we are educated and have knowledge about mental health issues in general, is we have noted certain characteristics or behaviours that the client displays, whether or not they have been reported by family members or by medical professionals, or are anything that we observe in our office. That we can note in the report. We obviously cannot make diagnoses. It's just the same as if a client says they're not using drugs but we witness them displaying symptoms of drug use: we can comment about those symptoms or behaviours they display, but we can't make diagnoses.

Mr. Ron McKinnon: What's the consequence if you miss something, and the information goes to the judge? How is the judge going to use that information? If there's some mental disorder that you're not aware of that is relevant—maybe I'm confused here—do you need to have access to a psychiatrist on an ongoing basis to do a psychological assessment for everybody? If there's information like this missing from the pre-sentencing report, what does that do to the scope of the judge's action?

Mr. Chris Podolinsky: I think in a lot of cases we would interview what we call collateral contacts: family members, people important in the person's life, and perhaps employers and service providers. For example, the client may say, I'm not diagnosed but I may have depression. So we can write that report, and say that the client reports feelings of depression, and suggest to the judge that this is an avenue we could explore after sentencing. As Christine said, we can't make the diagnosis. We can report when other people tell us they have concerns. That information can be included in the report and, again, followed up once they're sentenced, or it can be built into the conditions that this be followed up on.

Mr. Ron McKinnon: It seems to me that this change would require you to get some sort of psychological assessment done by someone who's trained to do that.

Would you agree with that?

Ms. Christine Beintema: Not completely. My understanding—and I could be wrong—is that the legislation would compel us to gather the information that the client is providing. If the client is saying they don't have any mental health issues, and we have no sources to confirm that there are mental health issues, there's no information for us to gather. We can't pull information out of nowhere.

If we're told by a source that he has been diagnosed, then we can investigate, and I think the legislation could help us to investigate that further, with some participation from other parties that we deal with. However, if a client isn't telling us.... It's frustrating sometimes when we interview clients who don't have anybody around them. They don't have any family supports, and there's nobody who knows them, because we're going based solely on clients' reporting, the information they're giving us.

Mr. Chris Podolinsky: I think if it's determined the way you mentioned it would be a big problem, a very significant problem, because based on the shortage.... In my community, for the youth I was working with, the psychiatrist had a roster of 300 patients, and they had to wait to get on that list. There are limitations on what's available for people who can make the diagnosis, and the reports are very expensive, $1,500 to $2,500 each. That would drain the budget, just based on the volume of clients. It would absolutely drain the budgets required to get the reports done.

Ms. Christine Beintema: Those reports are the responsibility of the courts to request. We don't request psychiatric or psychological reports. What we can do is work with the client to facilitate them accessing, whether or it be the Canadian Mental Health Association or some other community resource that can help with that, but that would be after sentencing. Upon sentencing, if the judge requires a psychiatric report, which is sometimes ordered, that happens outside of our role.

● (1620)

Mr. Ron McKinnon: If you think there's something going on that you can't find out about, you don't know about but you suspect, would you put that in the pre-sentencing report, and then perhaps the judge would come back and say an assessment is needed?

Ms. Christine Beintema: Yes. That could be a recommended condition. We include those at the end of our pre-sentence report. We may note any behaviours or concerns that we have, or maybe that family members, etc., have, and then we can request that in the body of the report.

Mr. Ron McKinnon: I believe you also said that basically this compels you legally to do what you do already. Essentially, it says to me that you're comfortable with this wording, really.

Ms. Christine Beintema: Yes.

Mr. Ron McKinnon: Those are my questions. Thank you.

The Chair: We'll go to some shorter questions that any member of the committee may have.

Mr. Cooper.

Mr. Michael Cooper: Thank you, Mr. Chair, and thank you to the witnesses. You mentioned, to pick up where Mr. McKinnon left off, that this is something you already do in Ontario. It might be helpful if you could explain precisely what the policy says in Ontario.

Ms. Christine Beintema: I reached out to our assistant deputy minister's office to request it, because for us to speak about policy.... The role of our association is to speak about how we do our job and how various legislation impacts upon the way we do our job. They had advised that they had spoken about the policy directly, so I don't have the wording of our policy specifically. The terms of our policy direct that we explore mental health issues with the client and include that subject in the body of the report.

Mr. Michael Cooper: Then, based upon what I heard from you, that would involve talking to the offender and engaging with them, as well as pulling out of their file any information that is documented as well as any observations that are made while the offender is incarcerated.

Would that more or less explain what would be done to satisfy this policy requirement?

Ms. Christine Beintema: Absolutely.

Mr. Michael Cooper: In that regard, this bill provides that in a pre-sentence report any mental disorder of the offender shall be reported. That is far broader than merely taking what is documented on file and putting it into a report, far broader than engaging with an offender, and far broader than recording observations that are made of the offender while incarcerated.

How would a probation officer be able to identify any mental disorder involving an offender without someone, such as a psychiatrist or other specialist, coming in and interviewing the offender? How would you get around it to satisfy what seems to me to be a much broader-in-scope requirement provided for in this bill?

Ms. Christine Beintema: My interpretation of it wasn't quite like that. We already look at several different avenues to identify it. The bill, as I read it, is not indicating that a client must be assessed and a diagnosis, if the condition exists, be made. What the bill is suggesting is that we as probation and parole officers write pre-sentence reports and must consider mental health issues and the availability of resources.

That's why I say that it's something we already do. I don't see the scope as being much larger. If the information is there and we have the means to gather that information, which is the big sticking point as far as I'm concerned, then it goes in the report.

Mr. Michael Cooper: If your interpretation of the bill was not the right interpretation and it did involve the need to have a psychologist or psychiatrist come in, would that change your view of the bill? Would it be feasible? Would it be practical? Would it be possible?

● (1625)

Ms. Christine Beintema: I don't think it would be feasible, practical, or possible to have a psychiatrist come in. I think it would be ideal, but no—

Mr. Michael Cooper: —the resources simply aren't there to do it.

Thank you.

The Chair: Mr. MacGregor.

Mr. Alistair MacGregor: I'll continue on the same line of questioning as Mr. Cooper.

The existing text of subsection 721(3) states that:

> Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:

Then we have the “age, maturity, character, behaviour, attitude and willingness to make amends”, and now we're adding mental health.

I think, and correct me if I'm wrong, the words “wherever possible” allow you some leeway whereby you try your best efforts.

Who ultimately makes the final call on the pre-sentence report? Is it the probation officer himself or herself?

Yes?

Okay, thank you.

Ms. Christine Beintema: That is the wording I was going back to try to find, because I think it was what led to my understanding. I don't think it's as broad; it's where we're able to, because we're dealing with a human being and can only gather as much information as they allow us to have access to.

The Chair: When you deal with, for example, “the offender’s age, maturity, character, behaviour, attitude and willingness to make amends”, you're not forced to go to any specific expert in the field to make that determination.

Ms. Christine Beintema: Exactly—whether or not they're 23, if they say they're 23, or....

The Chair: Right.

If we were to use, as opposed to the current wording of “any mental disorder from which the offender suffers”, perhaps “any aspect of the offender's mental condition that is relevant for sentencing purposes”, would that assist you in terms of limiting the scope of...?

Ms. Christine Beintema: That's a good question.

Mr. Chris Podolinsky: With “relevant”, it opens up the question of who determines what's relevant and what's not relevant.

The Chair: It's the person who's writing the report. It allows you to make a determination as to whether or not the information you have is actually relevant.

Ms. Christine Beintema: Yes.

The Chair: Okay. Interesting.

Thank you.

Mr. Fraser.

Mr. Colin Fraser: Oh, I was simply going to say what Mr. MacGregor said about “wherever possible”. I thought that was an important point to get their take on.

I think that's my comment.

The Chair: Perfect.

Does anyone else have any questions? No.

I want to thank this panel of witnesses. Thank you so much for coming before us today. We really appreciate your patience and your explanations.

I'll call a brief recess while our second panel of witnesses gets set up.

● _____ (Pause) _____

●

● (1630)

The Chair: Let's begin with our second panel of witnesses.

I am very pleased to welcome, from the Canadian Association of Elizabeth Fry Societies, Ms. Savannah Gentile, Director, Advocacy and Legal Issues; from the Canadian Council of Criminal Defence Lawyers, Mr. Dean Embry, Defence Counsel; and from the John Howard Society of Canada, Ms. Catherine Latimer, Executive Director.

Welcome to all.

Ms. Gentile, the floor is yours.

Ms. Savannah Gentile (Director, Advocacy and Legal Issues, Canadian Association of Elizabeth Fry Societies): Thank you.

I would like to begin by acknowledging that we have the honour and privilege today of meeting on the unceded traditional territory of the Algonquin nation.

Thank you for inviting our organization to speak today on Bill C-375. I'm the director of advocacy and legal issues with the Canadian Association of Elizabeth Fry Societies, and I regularly visit the prisons for women across Canada with our regional advocate teams.

CAEFS has extensive experience advancing the equality rights of women whose behaviour is or is thought to be criminalized, and a depth of knowledge concerning the interactions of such women with the legal system. CAEFS has a substantial interest in ensuring the criminal justice system operates fairly with respect to women, and that the perspective and experience of women, in particular indigenous women, are represented in its design and operation.

My remarks today are born out of my experience working closely with women at CAEFS and whom our 24 local EFrys serve. I'll do my best to do justice to the experiences of these women and to identify the issues they have raised with me.

The numbers of women in prison with mental disabilities continues to rise. Indeed, with the majority of the female prison population identified as experiencing mental health issues, it appears prisons are becoming the default option for mental health intervention. This pattern persists despite the common practice in many jurisdictions to include mental health information in pre-sentence reports. As such, it is CAEFS's position that formalizing this practice into law does not go far enough. It will not reverse or even make a dent in the current practice of incarcerating women with mental disabilities, and it will not lead to their compassionate care.

In fact, there is a risk of which there is growing evidence that women may be sentenced to prison terms because of the false perception that appropriate counselling services are available in prison. In CAEFS's experience, women sometimes receive federal sentences rather than provincial sentences because of the misconception that they will have more access to rehabilitative programming at the federal level.

This pattern is exacerbated by the gaps in mental health services in the community and the unwillingness on the part of some community-based services to accept criminalized women. We need to work on changing this.

The fact that prisons have become the accepted placements for women with mental disabilities is deeply problematic. CSC's response to women's mental health behaviour is overwhelmingly security driven and damaging. Incarcerated women who need quality mental health care end up receiving punishment in its place. It is CAEFS's position that this substitution is unacceptable in Canada.

When prison officials adopt counselling services like those seen in community-based programs, they often lack a gender, race, and class analysis of women's experiences and needs, and become part of the punitive regime. This is a mistake. A good example of this is the heavy reliance by CSC on cognitive behavioural therapy, a technique that is not meant to address past issues or provide supportive counselling.

For most women in prison, mental health problems and their occurrence, for that matter, are intractably linked to a lifetime of being subjected to poverty, systemic racism, and physical and/or sexual abuse. Within prison, women are frequently punished for responses to trauma, which are perceived by CSC as simply bad behaviour. In too many cases, CSC's approach to mental health can be deadly. For example, current CSC policy prescribes that prisoners at risk of self-injury or suicide be placed in a segregation cell on what they call mental health observation. It's segregation by another name.

CSC's position that segregation is a status and not a place, and that individuals on mental health observation are not in segregation, demonstrates its inability to recognize that confinement of this kind escalates women's distress and can lead—and has led—to further and more lethal forms of self-harm and suicide attempts. The jury at the Ashley Smith inquest made two concrete recommendations that had the potential to lead to significant changes in CSC's approach to self-injury back in 2009. Both were rejected by CSC.

In 2016, Terry Baker committed suicide while under mental health observation in a segregation cell at the Grand Valley Prison for women. Just days prior to her death, Ms. Baker had been bound to her bed for a prolonged period of time, which is another common practice used on women at risk of self-harming.

● (1635)

CSC has been on the same trajectory for decades, without any signs of real change, despite several reports, commissions, inquests, and recommendations to support change. This trajectory, which is security-driven, discriminatory, and harmful, is antithetical to the treatment of mental health issues. CSC's classification scheme confines indigenous women and women with mental health problems in maximum security and segregation because of their histories, not in spite of them.

Unemployment, lack of education, family instability, and homelessness prior to incarceration all lead to higher ratings on the custody rating scale, a tool that was developed over 25 years ago based on a sample of white male prisoners, which results in overly high classifications when used on women. This has been reported on for decades. Women's needs, especially those with mental disabilities, are translated to risks. Maximum security is a form of segregation that separates women with complex needs from the general population and therefore, from programming, meaningful work opportunities, family visits, and important mental health supports. In short, placement in maximum security greatly diminishes these women's chances of obtaining parole and successfully reintegrating into the general population and ultimately, into their communities.

The following are recommendations that, unlike the current bill, could amount to real and significant changes to the circumstances of women with mental disabilities.

First, we could support the UN special rapporteur on violence against women recommendation that preference be given “in every case, to alternatives to imprisonment for prisoners with disabling mental health by utilizing [section 29 of the CCRA] to transfer prisoners to mental health services, facilities, or psychiatric hospitals.” We've reported on this before. There are currently only two mental health beds designated for women.

In the meantime, while women with mental disabilities remain incarcerated, we should transfer the responsibility for the health care, including for mental health, of prisoners from public safety to the ministry of health, as has been done in British Columbia, Alberta, and Nova Scotia.

We should legislate an absolute ban on the use of solitary confinement; segregation, including maximum security in women's prisons; medical observation; mental observation; and all other related forms of isolation of incarcerated young women and women with mental health issues. This is something that has been supported by the special rapporteur on torture.

We should create a mechanism for the external judicial oversight of CSC and specifically, in relation to decisions regarding segregation placements, placement on mental health observation, and any other forms of isolation and the use of physical restraints, like Pinel restraints.

We should create a mechanism through which judges can revisit the sentences they impose if legalities, gross mismanagement, or unfairness in the administration of a sentence renders that sentence harsher than that imposed by the court. A reduction of the period of imprisonment may be granted to reflect that the punishment administered was more punitive than the one intended. That's a recommendation coming out of the 1996 Arbour report.

Overall, we hope that you recognize that the relatively low number of women in prison as compared to men is an opportunity to innovate, rather than to ignore. Women prisoners, as a group, are low risk, and the potential gains from progressive and substantive changes to the law for this group, and for their families and communities, could be immeasurable.

Thank you.

● (1640)

The Chair: Thank you very much.

While I appreciate all of the comments, this is really about Bill C-375 and this committee cannot go beyond Bill C-375 and can only make amendments to what is before us. I'd appreciate it if witnesses would stick to the scope of the current bill because anything otherwise is not what we're actually here to talk about. You may get some questions, but they will be about Bill C-375.

Ms. Savannah Gentile: I appreciate that, but I think it's still important to provide the context within which this bill is going to operate.

The Chair: I understand.

Mr. Embry, go ahead.

Mr. Dean Embry (Defence Counsel, Canadian Council of Criminal Defence Lawyers): Thank you, and good afternoon.

The Canadian Council of Criminal Defence Lawyers, or CCCDL, was formed in 1992. It was born out of a realization that there was no truly national voice for criminal defence lawyers. To fill this gap, the CCCDL was established as a council with board members from coast to coast and the north, so a national perspective could be generated and shared with legislators.

The CCCDL has been appearing before and consulting with the House and Senate committees since its inception. As I'm sure many of you are aware, the CCCDL is always grateful for the opportunity to participate and share its perspective. On behalf of the CCCDL and myself, I thank you for the opportunity to speak to you today.

As for myself, I'm a criminal defence lawyer with a practice in the GTA, and 90% of my practice is at the trial level, which unfortunately, from time to time includes sentencing when things go wrong for me and my client. Those sentencing proceedings often have pre-sentence reports. Further, a large percentage of my clients —probably the majority—suffer from major mental illness. I represent individuals with major mental disorders, with charges ranging from theft and simple assault to homicide.

In recent years I've had the opportunity to speak at law schools, conferences, and at legal aid training seminars about the intersection between criminal law and mental health. On those occasions, I've always tried to stress that absent considerations regarding an accused's fitness for trial or criminal responsibility, as affected by a mental disorder, an accused struggling with a mental disorder ought to be treated like all other accused.

While the fact that an accused may be suffering from a mental disorder is a fact about the accused, and it may indeed be an important fact, it should never be seen as a central fact. It is from that perspective, and from the perspective of the clients I represent, that I would submit that the proposed legislation, while it appears well-intentioned, is fatally flawed and ought not to be implemented.

Now, I say it is well-intentioned because it is my impression the proposed amendment seeks to draw out mitigating factors that are usually present when an accused suffers from mental illness. I assume it also seeks to enhance the rehabilitative function of sentencing by providing the sentencing judge with the information about mental health care programs that may assist the accused. Both of these are obviously laudable goals, and defence counsels welcome both of them.

That said, there are two major issues that are, in my view, insurmountable. The first is privacy issues and the second is serious practical concerns.

With regard to privacy, there can be no doubt that the information that is the subject of the amendment is private health care information, the disclosure of which is already strictly controlled by both federal and provincial legislation. The various legislative schemes are numerous and, frankly, beyond my area of expertise. That said, I submit that the guiding principle is that the personal health information ought not be disclosed except in exceptional circumstances or when it has been shown that such disclosure is absolutely necessary.

In contrast, this amendment would see the disclosure of clients' personal medical information as a matter of course. It would compel the parole officers, who we saw today, to inquire into and document an individual's mental health status anytime someone is found guilty of a criminal offence and a pre-sentence report is generated. I note that ordering a pre-sentence report is mandatory if a party requests one. Therefore, the crown of the court could, in effect, demand this information be disclosed, without having to provide any additional information or justification.

I also note that mandating this information goes beyond simply asking the accused, as I am sure we did hear today. While compiling a pre-sentence report, parole officers will seek input from collateral sources. That raises the spectre of parole officers asking family members, or even medical practitioners, about the offender's private medical information, or indeed seeking it out at treatment facilities or hospitals.

Aside from the fact that the information of this kind is subject to an extremely high privacy interest, privacy concerns in this area are especially acute for two reasons. Making this information part of a pre-sentence report would make it part of the public record. Once completed and filed, this information would be available to the public, to anyone who sought it.

In contrast, in my experience, it is possible, as defence counsel, to bring an accused's mental health status to the attention of the court, and therefore accrue the appropriate consideration without making it part of the paper record, or as an exhibit. For example, I've simply informed the court of the client's mental health issues, or read from a doctor's or expert's report, without filing that as an exhibit. In doing so, a client's private health information is exposed only insofar as it needs to be.

Of course, a very resourceful person could order the transcript of the proceeding, but that is far harder and far less likely to happen than someone simply ordering or copying the exhibits. Again, this is highly sensitive and private information, and ought not to be made public as a matter of course.

This brings me to the second major policy concern, which is that in some cases there is a nexus between an offender's mental health difficulties, but in many cases there isn't.

● (1645)

Today, I'm reading prepared remarks, but when I'm not, I often stutter because I have a stutter, which, interestingly, is a mental health disorder listed in the DSM, the *Diagnostic and Statistical Manual of Mental Disorders*. If, heaven forbid, one day I were found guilty of an offence, would my stutter be recorded, and if so, for what purpose?

That is sort of a light example, but what if someone who suffers from anorexia is found guilty of a fraud-related offence, or if an individual with post-traumatic stress disorder, stemming from a historical sexual assault, is found guilty of impaired driving? Such disorders are deeply private and have nothing to do with the offence the offender is found guilty of, but they would be publicly disclosed anyway, to the horror of the accused and to the benefit of no one.

The proposed amendment does not allow for any distinction between a mental disorder that is related to the offence and one that isn't. It simply mandates that all mental disorders must be listed. Parenthetically, I'll also mention, strictly from a criminal defence perspective, there are some mental disorders the disclosure of which does not assist the accused. Disorders such as borderline personality disorder or psychopathy rarely garner sympathy from the bench and run the risk of attracting a higher sentence than an offender may receive if it were not disclosed. Again, such disorders may be completely unrelated to the offence.

In my submission, the problem with the amendment is that it treats the mental disorder to be as central to a person as their age, maturity, character, behaviour, and attitude, which of course is wrong. With regard to practical concerns, in my experience, a large number of offenders before the court who suffer from mental disorders are, for all intents and purposes, undiagnosed. That could either be through a lack of assisted medical care or due to the fact that many offenders come into the system when their mental disorder manifests.

A similar problem, as I alluded to earlier, is that many individuals who suffer from a mental disorder will not identify as such, either to avoid the stigma of mental illness or, more commonly, because they truly don't believe they have a mental disorder, so it may be obvious to everyone in the room that there's a mental disorder at work, but the offender won't confirm it or even agree. As I think the parole officers made clear, they are simply not equipped to make a diagnosis. This is especially so when even psychiatrists have difficulty making differential diagnoses.

In effect, the amendment could lead to an assessment being ordered and made, which, in my submission, would be hugely problematic. Forensic psychiatrists are spread thin all across the country as it is, and the addition of so many new, necessary assessments would likely be unworkable.

Further, if an offender had to wait for an assessment prior to sentencing, it could have unnecessary delays. As we know from my earlier discussion, delay generally is a concern in the justice system, but is especially concerning when an offender is in custody. One could easily imagine a situation where an individual suffering from mental illness is arrested and denied bail, and then pleads guilty. A so-called stand down pre-sentence report already takes up to four weeks to complete, and all the time the offender will be in custody. An additional requirement of mental health information would extend the time needed for such reports, even if the mental health issue played no part in the offence.

Finally, for those two reasons, I think the amendment is flawed, but on a positive note, I submit that the amendment is largely unnecessary. Although not explicit in the code, the fact that mental illness plays an important role in sentencing has already been noted by the court. In R. v. Ellis, the Ontario Court of Appeal said:

> There is no doubt that an offender's mental illness is a factor to be taken into account in sentencing. Where mental illness plays a role in the commission of the offence, the offender's culpability may be diminished...

In my submission, what's missing from the amendment is that consent and relevance to the offence being sentenced are the key concepts that underlie the existing law. In my submission, defence counsel, in consultation with their clients, are in the best position to assess whether they wish to make their mental health status an issue. Defence counsel already have a duty to raise the issue if relevant, if it benefits their client, and only if their client consents. There are also cases that interpret the pre-existing sentence report provisions as authority for the court to order psychiatric assessments as part of the pre-sentence process.

In Nunavut, there was a case called R. v. Gibbons. I was following some Alberta, B.C., and Ontario decisions, and the law, as I understand it, is that an assessment can be ordered if it assists the court in determining the sentence for the offence being sentenced. The assessment has to be relevant.

The court can order an assessment without the accused's consent, but the accused cannot be compelled to participate—so the accused can just say, “I don't want anything to do with this”—and thoroughly, the order would be made following argument of the issue, and not simply as a matter of law.

Again, consent and relevance to the offence must be prerequisites. From that point of view, it is possible that the amendment be rewritten to include consent relevance, but then that would just duplicate the existing common law and therefore put us no further ahead.

● (1650)

Those are my submissions, and I thank you again.

The Chair: Thank you very much.

Ms. Latimer.

Ms. Catherine Latimer (Executive Director, John Howard Society of Canada): Thank you. I would like to express my appreciation for your inviting the John Howard Society to share our concerns and perspective on Bill C-375.

As many of you know, the John Howard Societies are charities providing services in more than 60 communities across Canada, and we are all committed to effective, just, and humane responses to the causes and consequences of crime.

The John Howard Society has been long concerned about those with mental illnesses who are involved in the criminal justice system. Too often, people default into the criminal justice system because needed services in the community are unavailable and alternatives are not in place. The end result is that we end up punishing the mentally ill rather than treating them.

I share the perspective of Savannah that correctional services or correctional institutions are not well placed to deal with people with serious mental health issues. I therefore see some hope that Bill C-375, if properly implemented, could be an advantage in keeping people who do not need to be in the criminal justice system out of it.

What the bill does, as you know—and it's a nice short bill, the kind I like—is suggest that any mental disorder from which an offender suffers as well as any mental health care program available to him or her should be noted in a pre-sentence report. This amendment, I think, would really help sentencing judges become more aware and take note of the mental health issues and programs that might be available to assist.

If an individual is about to be sentenced, he or she will have been convicted, and so a finding that the accused was not criminally responsible because of a mental disorder will not have been made. NCR is a very low bar, and many people who face very serious mental health issues will find themselves being sentenced in the criminal justice system. The fact that they are at the sentencing stage and have been found to be criminally responsible—or not found not to be criminally responsible—does not relieve us of the likelihood that someone with significant mental issues is about to come into the criminal justice system.

The sentencing judge really has two important determinations to make. One is the seriousness of the offence and the degree of responsibility of the perpetrator when assessing the quantum of penalty. The second issue they have to deal with is what sentencing option should be imposed in order to hold the person accountable in the proportionate amount.

I'm easy as to whether it comes in a pre-sentence report or, in the youth justice system, conferencing that would keep it out of a formal record and the information be available to the judge, but if that information were available, it could really help individuals who are suffering from mental health issues take a look at the extent to which they are morally blameworthy for the offence, if they have serious mental health issues. The more incapable the mental illness makes individuals of understanding the nature and consequences of their criminal behaviour or appreciating that it is wrong, the more the quantum of the penalty is appropriately mitigated.

In my experience, some people who find themselves in the formal correctional system are completely disoriented as to time and place. They are so badly riddled with senile dementia that they have no idea why they're in prison or what happened that led them to be there. It is quite conceivable that this affliction was present at the time they committed their offence and at the time of sentencing and that, whatever is currently available to sentencing judges now, this was not picked up.

We could have a flag of some sort that reinforces that if the person is not aware of the consequences of his or her behaviour, that should be taken into account in mitigating the sentence.

The other thing that would really help is trying to figure out the appropriate sentencing option for someone who is criminally responsible but suffering from a mental health problem.

In my experience, there are some mental health conditions that predispose people to commit breaches. If you gave them a probation order, they would breach the order, because if they're suffering from fetal alcohol spectrum disorder or other brain injuries, they cannot understand causality in the way that the criminal justice system requires them to understand causality to avoid breaches.

● (1655)

It is thus important, I think, when assessing whether there should be a custodial penalty or a community-based penalty as your sentencing option or what the nature of the sentencing options should be, to have a clear understanding of the mental health condition and as to whether the sentence being imposed is one the prisoner is capable of discharging without attracting further breaches and other problems with the criminal justice system.

I take Mr. Embry's point that the information needs to be relevant and that it's not fair to the individual being sentenced for incidental information about his mental health issues to be placed on the public record. I think, though, that if the provision of the requisite information were done in a way such that the individual is consenting and the information is relevant to the offence, it could be really beneficial in ensuring that the penalties being imposed and the sentences being rendered have a better chance of being just, effective, and humane, taking into account the moral turpitude of the individual and the type of sentencing option that the individual can carry out.

We believe that valid consent is needed for any treatment option imposed through a criminal sentence and also for soliciting that information. I take the point that there continues to be significant stigma against those with mental health issues and that in correctional services and other agencies, identifying mental health problems can be understood as an enhanced risk factor and operate to the detriment of the individual who reveals it. We think, however, that if there were ways to do it in a manner that helps the sentencing judge craft a sentence that is fair, just, and appropriate, there is a reason to proceed with Bill C-375.

In sum, the inclusion of mental health information in pre-sentence reports is an important step in dealing with the mental health crisis in our prisons. It will allow sentencing judges to be better informed about mental illness and be an important tool in the promotion of just, effective, and humane sentences. For that reason we would like to see Bill C-375 proceed.

Thank you.

● (1700)

The Chair: Thank you. We appreciate the testimony. Now we're going to go to questions.

We're going to start with Mr. Cooper.

Mr. Michael Cooper: I'm going to begin with a question to Mr. Embry.

In the previous panel we heard from Ontario probation officers, and you practise in the province of Ontario. They made the argument that what is in this bill is something that is basically already done by probation officers in the province of Ontario; that this would merely codify the existing practice.

I wonder whether you're able to comment on that.

Mr. Dean Embry: I think it's true; I think mental health information finds its way into pre-sentence reports, but finds its way into them on consent. Defence counsel will tell their client that this is something to tell the probation officer, or the probation officer may be alive to it.

Adding it as something that is mandatory, that has to be in the report, however, makes the case very different. Now it's a sort of voluntary thing that could be put in, but putting it into the code would make it something that has to be put into the report.

Mr. Michael Cooper: It would be your interpretation of the bill, then, that if this were included in the Criminal Code, consent would no longer be the key factor in determining this. We would basically have probation officers who, as a result of the amended wording of the section, would have to go out and more or less try to gather as much information as possible, whether there was consent or no consent.

Mr. Dean Embry: Yes. I think the problem is in the way it happens on the ground. There are many times that someone will plead guilty and say, I did x, y, or z, and that's all the judge knows. Then the judge says, this person is found guilty of these offences; then they go away for the pre-sentence report and come back for sentencing.

At that stage, the probation officers are really in a wide-open field, with no guidance as to what they're supposed to be doing other than what's in their policy. They wouldn't know what's relevant to the offence, they wouldn't know how to advise on consent, they would just have to start compiling that information. It would be very difficult.

Mr. Michael Cooper: Ms. Latimer, you indicated your general support for the bill, subject to relevancy and consent. Mr. Embry in his testimony cited, among other things, the Ellis decision and some case law and so on. From the standpoint of relevancy and consent, what do you say to his point that it's unnecessary or that it's duplicative in a best-case scenario, in his interpretation of the bill?

Ms. Catherine Latimer: I would look at the results, which are a huge number of people defaulting into the criminal justice system with significant mental health issues. I'm not talking about anxiety issues or some of the more minor issues in the DSM-IV. These people are not oriented to their environment, and they're not capable of.... How they got over the NCR issue is a mystery, but they're certainly in trouble when they get into the criminal justice system. I think if there's anything that can flag that....

Some of the ones who are the most seriously mentally ill who come into the federal corrections system have represented themselves. It is pretty clear, I would think, to everyone in the courtroom, that there are some significant mental health issues at play that have not been picked up, I don't think, in an appropriate way.

If all this bill did was highlight that these issues need to be made known to the sentencing judge when they're relevant to the offence at sentencing, that would be key. That would be a big step.

Mr. Michael Cooper: Finally, Mr. Embry, do you have any comments in response to what Ms. Latimer just stated?

● (1705)

Mr. Dean Embry: I think it's true that there are too many people who have mental health issues who end up in custody, but the answer isn't to then extract this mental health information from them. The problem with people who sort of duck under the NCR system is that once they're in that system, they could be hospitalized. I have clients who've been hospitalized for a decade for theft. Once they're in there, it's hard to get out, so a lot of individuals choose not to go that route, even though they probably are NCR, and they end up here.

What I'm trying to say is that it's up to the accused. If the accused want that mental health help, they should volunteer to get it, but if they don't want it and just want to do their sentences, they should be allowed to do that too, because again, it's their health.

The Chair: Thank you very much.

Mr. Fraser.

Mr. Colin Fraser: Thank you, Mr. Chair, and thank you all very much for being here and for sharing your knowledge on this important topic.

Ms. Latimer, do you think right now there are individuals whose relevant mental health conditions are not being taken into account in sentencing that this could address?

Ms. Catherine Latimer: I believe so. As I pointed out, the ones who I think have really slipped through the cracks are the ones who are self-representing and are completely disoriented. It's awkward for everyone in the process. If there were a pre-sentence report that indicated even what was evident at the proceedings, which was that the person seemed to have some significant mental health issues, it would inform the sentencing process in a better way.

I also think that there should be, and it would be nice if it could be attached to Bill C-375, sort of a fitness test. You may not be fit, you may not have the cognition or the mental capacity, to actually serve a federal sentence or a sentence in a custodial facility. People with mental illness in a custodial facility are often bullied. They can't follow the instructions. They're often subject to administrative segregation and other disciplinary measures by the correctional system, and some end up being killed in the correctional system. A lot of it has to do with the disjuncture between their mental health and their capacity to serve the sentence.

Mr. Colin Fraser: Would you say, as well, that it's important to ensure that if offenders are serving a sentence in the community on a conditional sentence order, for example, that taken into account are the reasonable conditions for them to access the services they're consenting to, or whatever, to help them rehabilitate so that they don't reoffend? Do you see that as an important part of informing the court of all the relevant mental health conditions they may be under to craft that type of sentence?

Ms. Catherine Latimer: Yes. Certainly the John Howard believes that individuals need to consent to treatment and therapy. If people consented, and it was part of their terms of release that they had to keep on their anti-psychotic drugs, it would be very important that they respected that while they were in the community, to ensure appropriate community safety, if there were some suggestion that when off their drugs, they presented a danger.

Mr. Colin Fraser: Thank you.

Mr. Embry, thanks very much for your interesting remarks. I picked up on what you were saying about the nexus between a mental health condition and the offence itself. If words were added or modified in this bill to say "information relevant to sentencing", do you think that would solve the problem, if we were able to identify such information?

Mr. Dean Embry: I don't think it would, because it's the probation officers who have to make that call when collecting it. How would they go about doing so? They know the person has been convicted of whatever offence they've been found guilty of, and they're going from there when collecting information. Then it finds its way into the report, and the report goes to the judge and becomes an exhibit.

With the law as it is now, the crown or the court would have to say there's something apparently wrong, that there's a mental health issue that should be sought out. Then there's a hearing about that. Then an assessment is made.

Mr. Colin Fraser: Isn't that already happening now? I know what we heard from the probation officers earlier. These sorts of judgment call are being made by probation officers all the time, about what information is relevant. I doubt very much that pre-sentence reports nowadays would contain irrelevant information about all kinds of things to be determined by the judge.

I suppose there are examples in which that's not true, but information relevant to the person's mental health condition, for example, is already in most pre-sentence reports, if it's relevant.

They can identify or pinpoint whether or not it is relevant to sentencing, can't they?

● (1710)

Mr. Dean Embry: It's such a difficult call. When coming up with examples, you say that if someone has an anxiety disorder and commits a fraud offence, it might be related. If someone has PTSD and is driving drunk, it might be related, because of their stress and their drinking.

The line between what is related to the offence and what isn't is difficult for anyone. I think it would be incredibly difficult for front-line probation officers to draw with such little information.

Mr. Colin Fraser: Right now, it's up to the defence. Implied in that, of course, is that the accused or the offender is consenting to the information's being made known to the court. If the accused is not willing to provide that information in an interview or whatever with the probation officer, then it doesn't become available. Obviously there are confidentiality requirements or obligations for any professional to whom they might be asking questions.

Don't you think that the terminology in the Criminal Code saying "wherever possible" limits the obligation upon the probation officer to go beyond whatever the person is consenting to?

Mr. Dean Embry: It would, if it were interpreted that way. Then there would have to be something during the interview about the probation officer's getting informed consent, saying, "You don't have to tell me anything about this."

The problem at that point is that you have people who, as Ms. Latimer points out, are either unfit or mentally unwell, so they don't understand even where they are. How do you get informed consent from an individual in that position?

Mr. Colin Fraser: Ms. Gentile, do you support this bill?

Ms. Savannah Gentile: I don't think the bill goes far enough. I don't think it's actually going to lead to any material change for the people it is seeking to change—

Mr. Colin Fraser: I understand there may be other things, but would you rather this bill pass or not pass?

Ms. Savannah Gentile: Without some of those features built in around consent and relevance, it's limited. I also think that once that information is obtained, there's a gross misunderstanding of how to use the information to push for alternatives, say, to incarceration where those are appropriate.

We've seen this happen with the Gladue sentencing factors. They haven't led to—

Mr. Colin Fraser: If you were a member of Parliament, would you vote in favour of this bill or not?

Ms. Savannah Gentile: I would have to say that I would not vote in favour of it.

Mr. Colin Fraser: Okay, thank you.

The Chair: Mr. MacGregor.

Mr. Alistair MacGregor: Thank you, Chair.

Ms. Latimer, let me start with you. The John Howard Society of Canada is countrywide. You have a viewpoint on the way justice is administered in each of the provinces. One thing we always have to take note of as federal legislators is that we may be able to craft amendments to the Criminal Code, but the administration is very much up to the provinces.

This line of questioning has already been covered in a few areas. We've heard in previous testimony that covering mental health disorders in a pre-sentence report is a standard practice already here in Ontario. Given your countrywide viewpoint, what are some of the experiences in other provinces?

Are you supporting this bill because you're worried about the patchwork quilt, and would like to have the same standard right across the country?

Ms. Catherine Latimer: You're raising a very interesting question. It's somewhat difficult to determine. I know that some provinces are much further advanced on certain issues that would be relevant to sentencing; for example, fetal alcohol spectrum disorder. Some provinces really understand what it does to cognition and capabilities.

I would say there is not a monolithic way in which people are dealing with mental health issues across the country and the way in which they are being recorded or supported in pre-sentence reports. This would help to standardize the practice.

The “wherever possible” gives a considerable amount of room, but what it does is flag that this is an issue you really should be looking at. The probation officer, in the interview with the individual, should be asking them whether there's anything they would like to share about their mental condition or about what they were thinking at the time the offence was committed—things like that—so that they can get some sense at to whether there are, from the offender's perspective, any relevant issues that should be pursued in the pre-sentence report.

● (1715)

Mr. Alistair MacGregor: Mr. Embry, you've identified two major flaws: the privacy concerns of the accused—or in this case of the offender, because it has happened after a judgment has been delivered—and the practical concerns.

We conducted a study into access to the justice system last year and we know from the extensive testimony and research this committee covered that access to the justice system is still very flawed. You said that it's always a matter of course that the defence should be raising issues of mental health disorders, but we know that some people don't have very adequate legal protection when they're going through the justice system and some have much better.

Couldn't an argument be made that by codifying this requirement we are actually offering some assistance? That's one question.

Is there any way to save this bill as it is written, or are you completely unhappy with it and just wanting it to be done away with?

Mr. Dean Embry: With regard to your first question, concerning the access to the justice system, I was going to say that.... I don't know whether I'll ever come back here, so if I don't, let me say that if legal aid ever comes across your desks, you should up the legal aid budget, especially for people who suffer from mental health issues. Those are the people who are desperately in need of legal aid and who desperately need their own lawyers. That is part of it: access to justice from that perspective.

The problem, though, is that codifying it codifies it on the opposite side of the adversarial divide. What these individuals need are people who can help them navigate it from their perspective. In the way it's done now in the amendment, it is put in the hands of a probation officer. I think that puts it on the wrong side of things.

Just following from what my friend said, the probation officer isn't even allowed to ask, “What were you thinking at the time of the offence?” At the time they're doing a pre-sentence report they're not supposed to ask that question; they're not supposed to be asking about the offence, because there might be appeals, etc.

That's the other side of it. There needs to be mental health support on their side.

Mr. Alistair MacGregor: Do you not think there's enough of a safeguard in consent and privacy laws as they currently exist to protect people, if we were to pass this bill?

Mr. Dean Embry: No, I don't think there is.

Mr. Alistair MacGregor: You don't. Okay.

Mr. Dean Embry: No, and unfortunately, I don't think the bill is savable. I think mental health intervention for people in the system who are mentally ill has to come in at some point, but this is the wrong point. The pre-sentence report is either too late or too early; it's just not where the intervention has to happen.

Mr. Alistair MacGregor: Thank you.

The Chair: Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you to the witnesses for your testimony today.

I'm trying to clarify something.

Mr. Embry, you've spoken a number of times about the relevance of a mental illness or mental disorder to the crime that has been committed by an offender. But my take on the importance of a judge's knowing the mental illness or mental disorder was that it would impact what kind of sentence the judge would bestow upon this person or this offender.

If somebody is, for example, convicted of fraud but has anorexia, that would hopefully in my opinion impact the way a judge would choose to punish this person who has committed fraud.

Is that a correct analysis of how a pre-sentencing report is read that would include information on a mental disorder?

Mr. Dean Embry: I think there has to be a nexus between the mental disorder and the offence. If someone has a mental disorder that is difficult to deal with but has nothing to do with the offence, they shouldn't get a lower sentence. They should only get a lower sentence if the mental disorder they were suffering from somehow contributed to the offence or prevented them from being able to avoid committing the offence. That's where there has to be a nexus.

● (1720)

Ms. Iqra Khalid: We're talking basically about providing some sort of support system with respect to mental health for offenders as they are serving their sentences.

Ms. Latimer, if you have any comments to add with respect to that nexus being part of the pre-sentencing report, I would love to hear them.

Ms. Catherine Latimer: I really think the information about the accused's or the offender's mental health can affect two elements of the judge's sentencing and lead to better sentencing—fairer, just, and more humane sentencing.

The first has to do with whether or not there is some limited moral blameworthiness because they didn't fairly understand the nature of their behaviour and the consequences of it. This goes to the quantum of the penalty: there has to be a direct link between the mental health issue at the time the offence was committed and the quantum of the penalty.

The second element is more general. If you're assessing what would be the best sentencing option, let's say that the person has a brain injury such that they can't process causality. The fact that they have hit someone may not be relevant to the offence, but it might be relevant to what kind of sentence the judge should be imposing, if you actually want the person to be able to comply with the sentence and fulfill its terms and conditions.

It's a bit subtle for me, in that you might want more information when you're looking at the range of sentencing options and saying that this person reacts very badly to confined spaces. Maybe that didn't have anything to do with the offence, but maybe they are going to act out or have real problems if you put them in administrative segregation or some other confined space. This could affect the sentencing judge's determination of what the appropriate sentence should be.

Ms. Iqra Khalid: Thank you.

Mr. Embry, how much of an impact does the information on the sentencing report have on the sentencing that judges do?

Mr. Dean Embry: It can have a great deal of impact, in my experience, and even have impact before then. It's not uncommon that a crown will say, your client pleads guilty, and my position is x or y depending upon what's in the pre-sentencing report. It even goes back into what the crown will suggest for a sentence, and then it impacts the judge. It can have a great deal of impact.

It also is the whole life of the person. I think of what my friend said about how someone who has a brain injury might have a hard time in jail. That impacts it.

Those are the same considerations as when someone has late-stage cancer or some sort of physical abnormality that makes it hard for them to be in jail. I don't think you could legislate and say that a parole officer has to go and get this person's medical record and put it in the pre-sentencing report. That would be inappropriate.

This is exactly the same thing. There's no difference between having cancer and schizophrenia. It's all just health. That's the problem, in my view.

Ms. Iqra Khalid: Ms. Latimer, Mr. Embry and Ms. Gentile indicated that they do not support this bill, but you said earlier that you are in favour, with some tweaks, with respect to some of the points Mr. Embry raised about consent and about relevance.

What kinds of amendments would you propose to this bill, if it were to pass through this committee?

Ms. Catherine Latimer: I think one would be the idea of saying that the information should be relevant to the purposes and principles of sentencing for the accused; that it has to apply to the individual's case. Also, as I indicated I think the individual has to consent to having that information brought forward. There are still lots of reasons they would not want it brought forward.

For us as a society that cares about just and effective sentencing, it is important that the sentence be fit for the individual circumstances. The extent to which people would rather take a tougher penalty because they don't want their mental health status to be factored in is a bit of a challenge.

● (1725)

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

The Chair: Mr. Nicholson.

Hon. Rob Nicholson: Thank you all for your testimony here today.

This is a procedural issue. Mr. Embry, you mentioned at one point in your testimony that the mental condition of a person may not be disclosed for one reason or another—either consent isn't given, or it's not discovered. Would this be grounds for an appeal if, after an individual has been sentenced, it were discovered that in fact he or she had some sort of mental condition?

The Chair: May I just ascertain whether there is unanimous consent to continue, irrespective of the bells?

Some hon. members: Agreed.

The Chair: Please go ahead.

Mr. Dean Embry: It might be. If it was fresh evidence and wasn't available to anyone beforehand, wasn't discoverable, and they found out after the fact, then it would be grounds for appeal.

Jaser is coming up in the Court of Appeal on the VIA Rail terrorist case. I think in the facts of that case they found out after he was convicted that he was likely unfit, and then he was found fit. A big part of that appeal is going to be dealing with what happens when a mental health thing comes out after the fact.

Hon. Rob Nicholson: Once this is a mandatory part of the pre-sentence report, and if for whatever reason it were not included, it seems to me there would be grounds for an appeal at some point in time in the future when you discovered that the individual had some mental issues.

Mr. Dean Embry: That could be, but the other practical issue is that diagnosis is all over the place. If four doctors see someone, they can give four different diagnoses, so it would be hard to say what was missed.

Hon. Rob Nicholson: I suppose that would be something for the courts, then, to determine at the appeal level.

Mr. Dean Embry: Yes.

The Chair: Mr. MacGregor.

Mr. Alistair MacGregor: This is just a quick question. I want to exhaust all my avenues with this bill.

You raised concerns, Mr. Embry, about the pre-sentence report's becoming part of the public record. I don't know whether this is yet possible, but if we could find language to make this section of the pre-sentence report a separate and confidential report to the judge for the judge's eyes only, would that satisfy some of your concerns?

Mr. Dean Embry: Yes, for sure it would.

Mr. Alistair MacGregor: That's good. Thank you.

The Chair: I have some tiny questions.

Mr. Embry, are you aware whether, under the Ontario policy that currently exists and that the Probation Officers Association of Ontario was referring to, the Ontario government requires consent from the accused before this information is inserted—as they mentioned, on a regular basis—into the reports?

Mr. Dean Embry: I don't know for sure. I think it is required, just through the Ontario Mental Health Act and through PIPEDA and the Privacy Act.

The Chair: Were we to simply insert "to the extent that the offender so consents" at the beginning of the phrase "any aspect of the offender's mental health condition that is relevant for sentencing purposes", that would, from the perspective of what you are saying, address the concern with respect to consent, because then it can only be included if the offender consents.

With respect to sentencing purposes, I agree with Ms. Latimer. If you're talking about sentencing purposes, it's relevant for sentencing purposes if, at the time of the offence, the mental condition triggered or reduced the guilt with respect to the offence or, for the purposes of sentencing, if the offender had some type of mental health condition that requires a different type of sentence. I think they're both included if we clarify that it has to be "relevant for sentencing purposes".

Would you not agree?

Mr. Dean Embry: I agree with the first part, about the consent, but for the second part, about "at the time of the offence", the Supreme Court has already ruled on it in the case of NCR. No one can bring up NCR other than the accused, unless the person is found guilty and they can raise reasonable grounds to have an assessment.

In the more serious examples, then, it's already in the accused's hands, and I think the court would follow that again in the future for sentencing.

The Chair: Thank you so much to all of our witnesses today. We really appreciate having you here.

Given that we have to get to the House for votes, the meeting is adjourned.