THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Projet de loi C-75, *Modifications au Code criminel* et à la *Loi sur le système de justice pénale pour les adolescents*

ASSOCIATION DU BARREAU CANADIEN
SECTION DU DROIT PÉNAL

Septembre 2018

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AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui regroupe plus de 36 000 juristes, dont des avocats, des avocates, des notaires, des professeurs et professeures de droit et des étudiants et étudiantes en droit, dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par la Section du droit pénal de l'Association du Barreau canadien, en collaboration avec la Section du droit des autochtones et la Section du droit des enfants, avec le concours du service de Représentation du bureau de l'ABC. Ce mémoire a été examiné par le Sous-comité de la réforme du droit et approuvé à titre de déclaration publique de la Section du droit pénal de l'Association du Barreau canadien.

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La Section du droit pénal de l'Association du Barreau canadien (la section de l'ABC) est heureuse d'avoir l'occasion de formuler des commentaires sur le projet de loi C-75, modifiant le *Code criminel*, la *Loi sur le système de justice pénale pour les adolescents* et d'autres lois. Le projet de loi C-75 est un projet de loi omnibus qui constitue la réponse du gouvernement fédéral à l'arrêt *R. c. Jordan*, le précédent sur les délais judiciaires. Il comporte des réformes non liées aux délais judiciaires, y compris l'abolition des récusations péremptoires pour la sélection des jurés, et modifie la façon dont les affaires de violence familiale sont traitées et les peines en la matière sont déterminées.

Le problème complexe des délais judiciaires nécessite une solution à plusieurs volets. Certaines des propositions du projet de loi C-75 sont louables et réduiront les délais sans compromettre les droits constitutionnels de la personne qui subit un procès. Mentionnons par exemple la création d'un régime de déjudiciarisation pour certaines infractions contre l'administration de la justice et la modification du processus de mise en liberté sous caution. Ces réformes sont logiques, compatibles avec la jurisprudence actuelle et représentent une réponse empirique aux délais judiciaires.

Toutefois, d'autres propositions, dont celle de restreindre les enquêtes préliminaires et d'introduire des « éléments de preuve de routine » au moyen d'un affidavit, auraient pour effet d'empirer, plutôt que d'atténuer, les délais judiciaires, tout en sacrifiant d'importantes protections procédurales. La production d'éléments de preuve fournis par la police au moyen d'affidavits, en particulier, ferait l'objet d'un examen sérieux, augmentant les délais en occasionnant des litiges fondés sur la *Charte* et des demandes avant procès supplémentaires. De même, la quasi-abolition des enquêtes préliminaires éliminerait un outil précieux permettant tant à la défense qu'à la poursuite d'y avoir recours afin de résoudre et d' éliminer des affaires sérieuses du système par d'autres voies.

Le présent sommaire présente les faits saillants de notre mémoire plus exhaustif à l'aide d'une analyse intégrale du projet de loi C-75. La référence au mémoire intégral, y compris ses recommandations et ses renvois aux documents sources, permettra de mieux comprendre nos points de vue. En sus des éléments susmentionnés, nous :

- encourageons une étude plus poussée des récusations péremptoires et faisons une mise en garde contre la proposition actuelle d'éliminer l'un des quelques outils dont disposent maintenant les personnes racialisées subissant un procès pour garantir un jury représentatif;

- appuyons l'augmentation du pouvoir discrétionnaire par la modification du régime de suramende compensatoire, la plupart des modifications proposées à la classification des infractions et les modifications visant l'augmentation du recours à la technologie;

- nous opposons à l'inclusion d'une présomption réfutable dans les causes de traite de personnes;

- suggérons des changements au système de choix et de nouveau choix pour favoriser une plus grande efficience dans les affaires de meurtre;

- reconnaissons l'importance de redéfinir la violence contre un partenaire intime, mais nous nous opposons à certaines des réformes proposées aux étapes de la mise en liberté sous caution et de la détermination de la peine dans ces affaires.

1. Les délais judiciaires en contexte

Dans l'arrêt *Jordan*, la Cour suprême du Canada a pointé du doigt la « culture de complaisance » affligeant le système de justice pénale et a réclamé des mesures. La réaction du public fut instantanée et s'est intensifiée après que quelques affaires de meurtre ont été suspendues à la suite de la décision. Les médias, les politiciens et les observateurs s'en sont mêlés, suggérant un éventail de réformes.

La section de l'ABC appuie les mesures visant à rationaliser le système de justice pénale, mais la commodité ne peut pas l'emporter sur l'équité du procès et la vitesse ne peut pas l'emporter sur la fonction de recherche de la vérité du processus. Les réformes doivent respecter les protections constitutionnelles et procédurales qui ont démontré leur valeur au fil des décennies, prévenant les déclarations de culpabilité injustifiées et favorisant la confiance à l'égard de l'administration de la justice. Les modifications au système de justice devraient être fondées sur des preuves plutôt que de constituer une réponse à des protestations de la part de ceux qui ne connaissent pas le système et l'équilibre délicat entre les préceptes constitutionnels qu'il représente.

À l'heure actuelle, la plupart des affaires n'excèdent pas les plafonds établis dans l'arrêt *Jordan :* 99 % des affaires criminelles sont jugées en cour provinciale et 94 % de ces affaires se sont terminées dans les délais prescrits par l'arrêt *Jordan* en 2015-2016. En d'autres termes, même si les délais judiciaires demeurent une source de préoccupations, le problème n'est peut-être pas aussi grave que ce qu'on a rapporté.

Il faut faire preuve de prudence lorsqu'on élabore des réformes fondées sur l'arrêt *Jordan* et ses retombées politiques. Une étude minutieuse devrait déterminer quels aspects du système nécessitent une réforme pour atténuer les délais, et lorsqu'une réforme est possible, si le coût de la commodité vaut le coût pour l'équité du procès et pour d'autres valeurs importantes. Une pondération des intérêts s'impose pour garantir que des outils utiles ne soient pas abandonnés dans la course aux procès plus rapides.

2. La mise en liberté provisoire ordonnée par la cour

De nombreuses modifications proposées au régime de mise en liberté sous caution par le projet de loi C-75 mèneraient à des audiences plus expéditives et demeureraient compatibles avec la jurisprudence actuelle tout en respectant les préoccupations d'ordre constitutionnel, y compris la présomption d'innocence et le droit à la mise en liberté sous caution raisonnable en vertu de l'alinéa 11*e*) de la *Charte*. Bon nombre d'entre-elles remédieraient également au taux croissant de l'incarcération avant procès, tendance troublante confirmée par les statistiques.

L'article 493.1 et le paragraphe 515(2.01) du projet de loi C-75 codifieraient les principes de la « retenue » et de l'« échelle », récemment confirmés de nouveau dans l'arrêt *R. c. Antic*. Ces dispositions obligent l'agent de la paix, le juge de paix ou le juge à chercher « en premier lieu » à libérer la personne détenue « à la première occasion raisonnable » et « aux conditions les moins sévères possible » appropriées dans les circonstances et exigent que les conditions imposées soient « celles qu'il peut raisonnablement respecter ». Cela précise que la détention provisoire devrait constituer l'exception claire, et non pas la règle.

De même, l'article 493.2 exigerait l'examen de la surreprésentation des personnes autochtones et des autres « populations vulnérables » surreprésentées et désavantagées dans le système de justice pénale. Comme l'alinéa 718.2*e*), cela devrait contribuer à la réduction de l'incarcération des personnes traditionnellement marginalisées par le système.

Les paragraphes 515(2.02) et 515(2.03) décourageraient le recours aux dépôts en argent et aux cautions. Le recours exagéré à la mise en liberté sous caution a été critiqué au motif qu'il mine la présomption d'innocence et le droit à une mise en liberté assortie d'un cautionnement raisonnable. Cela a aussi entraîné des délais inutiles, car les juges demandent souvent un témoignage de la part des cautions et des tiers. Ces pratiques se sont révélées particulièrement injustes pour les personnes incapables d'identifier qui que ce soit comme caution convenable. Les modifications devraient contribuer à régler ces problèmes.

D'autres modifications prévues par le projet de loi C-75 encourageraient un processus de mise en liberté sous caution plus rationalisé, notamment les dispositions qui clarifient la capacité de modifier les ordonnances de libération sur consentement (articles 502 et 519.1), qui normalisent le témoignage des cautions proposées (article 515.1) et qui instituent un régime de déjudiciarisation pour les allégations d'omission de se conformer (articles 495.1, 496 et 523.1). L'élargissement du pouvoir de la police de libérer la personne lors de son arrestation devrait aussi réduire le nombre d'enquêtes sur cautionnement (articles 498, 501 et 503).

Toutefois, le procureur de la Couronne peut de plus en plus décider de retarder le dépôt d'accusations pour préparer la communication de la preuve ou enquêter davantage sur les allégations, évitant ainsi de faire débuter le calcul des délais prescrits par l'arrêt *Jordan*. Cela pourrait signifier que les gens passent plus de temps à être assujettis à des conditions imposées par la police entre l'arrestation et l'approbation de l'accusation. Une formation améliorée pour les agents au sujet des promesses à la police et de l'évitement des conditions excessives pourrait aider. La régulation du nombre de conditions imposées pourrait également réduire les audiences de modification des conditions de la mise en liberté au fil de l'évolution du dossier.

Une meilleure formation est particulièrement importante puisque les policiers ont tendance à imposer des conditions plus nombreuses et plus rigoureuses que les juges de paix ou les juges, pratique que le projet de loi C-75 et l'arrêt *Antic* découragent clairement. Selon une étude récente, cela fait *diminuer* la probabilité de conformité même si les personnes libérées par la police sont généralement moins violentes et ont de meilleurs antécédents que les personnes libérées par un juge.

3. L'omission de se conformer

Les infractions contre l'administration de la justice accaparent une partie disproportionnée du temps des tribunaux. Entre 1998 et 2013, le pourcentage de personnes dont l'infraction *la plus grave* était une accusation relative à l'administration de la justice a plus que doublé. Le projet de loi C-75 introduirait un régime de déjudiciarisation pour les infractions comportant certaines omissions de se conformer à des ordonnances judiciaires (c.-à-d. manquement aux conditions de mise en liberté sous caution et défaut de comparaître) lorsque le manquement n'a pas causé de dommages matériels, corporels ou moraux ou de pertes économiques à la victime. Nous appuyons cette proposition et son esprit. Elle permettrait de combler les retards au moyen de l'élimination de certaines poursuites relatives à l'administration de la justice du rôle de la cour, particulièrement lorsque les policiers sont responsables des décisions d'approbation des accusations. Le procureur de la Couronne pourrait éliminer ces affaires dans les circonstances appropriées, atténuant la pression sur le système dans son ensemble.

Nous suggérons que l'on apporte des précisions au paragraphe 523.1(3) s'il est conservé sous sa forme actuelle. Selon son libellé, le régime peut être utilisé seulement si l'omission de se conformer « n'a pas causé de dommages – matériels, corporels ou moraux – ou de pertes économiques à une victime » (paragraphe 523.1(3)), mais on ignore si cette réserve s'appliquerait si l'omission de se conformer causait des dommages matériels ou une perte économique ou si les dommages matériels ou la perte économique doivent être liés à une victime.

La personne mise en liberté sous caution ne pourrait pas se prévaloir du régime lorsque son omission de se conformer a causé à une victime des « dommages moraux », mais cette expression est floue et inhabituelle en droit criminel hormis le régime de déclaration de la victime. Elle est aussi subjective pour l'état d'esprit de la victime, ce qui soulève des préoccupations au sujet de l'uniformité de son application. Cette réserve semble également aller à l'encontre de l'objectif de la réduction des infractions mineures contre l'administration de la justice dans le système, car elle pourrait souvent englober des affaires qui devraient être déjudiciarisées. Il n'existe pas d'infraction criminelle consistant à causer des « dommages moraux », et le projet de loi ne devrait pas inutilement entraver le pouvoir discrétionnaire du ministère public d'utiliser ce régime de déjudiciarisation dans les cas qui s'y prêtent.

Pour les mêmes raisons, nous recommandons l'élimination des réserves « perte économique » et « dommages matériels ». Ces réserves limitent le pouvoir discrétionnaire du ministère public de recourir au régime de déjudiciarisation dans les cas qui s'y prêtent, malgré la perte économique ou les dommages matériels. Le ministère public conserve toujours le pouvoir d'accuser les personnes séparément de manquement aux conditions de la mise en liberté sous caution, de vol, de méfait ou d'autres infractions si la perte économique ou les dommages matériels sont importants.

Cette modification nécessiterait l'exercice du pouvoir discrétionnaire du ministère public pour entrer en vigueur. La section de l'ABC recommande que les manuels de politique des procureurs fédéraux encouragent les audiences judiciaires de renvoi pour garantir l'observation de l'objet du régime et elle encourage les homologues provinciaux et territoriaux à emboîter le pas. Autrement, des poursuivants pourraient ne pas être conscients des considérations générales en jeu (c.-à-d. la réduction des délais judiciaires et la déjudiciarisation des manquements mineurs aux conditions de la mise en liberté sous caution).

4. Les éléments de preuve de routine

La section de l'ABC s'oppose à l'article 657.01 du projet de loi C-75. Contrairement à d'autres aspects du projet de loi, cet article est incompatible avec la jurisprudence actuelle, semble détaché de toute étude empirique et exacerberait vraisemblablement les problèmes de délai. Cet article ouvrirait également la porte aux contestations fondées sur l'article 7 et l'alinéa 11*d*) de la *Charte*.

Cette proposition permettrait la présentation d'un « élément de preuve de routine » fourni par la police au moyen d'un affidavit ou d'une déclaration solennelle, au sens large du paragraphe 657.01(7). La définition du mot « policier » est aussi large et s'entend « d'un officier ou d'un agent de police ou de toute autre personne chargée du maintien de la paix publique ». Pour déterminer s'il y a lieu de permettre à une partie de produire un « élément de preuve de routine » au moyen d'un affidavit ou de permettre le contre-interrogatoire du témoin, la cour doit tenir compte de « l'intérêt de la justice », notamment des facteurs énumérés au paragraphe 657.01(2).

Concrètement, l'article 657.01 permettrait au ministère public de produire pratiquement tout aspect du témoignage d'un policier au moyen d'un affidavit. La personne qui subit un procès devrait alors donner avis de son intention de s'opposer à la procédure ou de solliciter la présence du témoin aux

fins de contre-interrogatoire. Vraisemblablement, elle devrait alors justifier que l'on exige la présence du témoin. Les facteurs énumérés au paragraphe 657.01(2) font en sorte qu'il est probable que la défense soit forcée d'exposer sa stratégie avant de faire entendre le témoin. Si la personne qui subit un procès ne peut pas convaincre la cour, aucun contre-interrogatoire ne sera permis.

Le contre-interrogatoire est essentiel pour la recherche de la vérité, et le droit de contre-interroger est reconnu par la Constitution. L'article 657.01 porte directement atteinte à ce droit en permettant l'admission de la preuve sans contre-interrogatoire. Nous ne sommes au courant d'aucune étude indiquant que la production d'éléments de preuve de routine engendre des retards ou nécessite par ailleurs une réforme. L'article 657.01 susciterait des litiges supplémentaires (les demandes de production d'éléments de preuve de routine au moyen d'affidavits, les oppositions à la procédure ou la demande de production de la preuve au moyen d'un témoignage de vive voix; la contestation de la disposition pour cause d'inconstitutionnalité, etc.). D'ailleurs, la cour pourrait devoir passer plus de temps à trancher ces demandes que si l'élément de preuve de routine était simplement présenté par témoignage au départ.

L'article 657.01 causera vraisemblablement d'autres problèmes pratiques. Si l'exactitude de l'affidavit est en litige, l'avocat qui l'a rédigé (probablement le poursuivant) pourrait-il être assigné à comparaître comme témoin? Si la personne qui subit un procès témoigne et contredit la teneur de l'affidavit policier, est-ce que cela constitue une violation de la règle établie dans l'arrêt *Browne c. Dunn*? Le ministère public pourrait-il faire témoigner le policier en contre-preuve, même après avoir décidé d'invoquer l'article 657.01? Comment le juge des faits soupèserait-il la preuve d'un affidavit policier si elle contredit le témoignage qu'a fait entendre la défense? Comment les jurys traiteront-ils un affidavit d'un policier? Ces questions non résolues ne feront qu'entraîner d'autres retards et litiges.

5. Les enquêtes préliminaires

Le projet de loi C-75 restreindrait les enquêtes préliminaires aux infractions rendant leur auteur passible d'une peine maximale d'emprisonnement à perpétuité, ce qui ne réduirait pas les délais judiciaires et affecterait le système de justice pénale dans son ensemble. En tant qu'avocats et avocates qui exercent devant les tribunaux criminels du Canada chaque jour, nous connaissons la valeur pratique des enquêtes préliminaires pour le système de justice pénale. Nous avons récemment fait part de cette expérience à la ministre de la Justice, soit en mars et de nouveau en avril 2017.

Est, au mieux, hypothétique tout lien entre les délais judiciaires et l'enquête préliminaire. Les recherches récentes indiquent notamment que seulement 25 % des affaires admissibles donnent lieu à une enquête préliminaire, que la proportion d'affaires comportant une enquête préliminaire n'est pas supérieure à 5 % de toutes les causes dans toute partie du Canada, qu'au plus 2 % de toutes les comparutions à la cour servent à une enquête préliminaire et que la vaste majorité des enquêtes préliminaires nécessitent au plus deux jours.

Les enquêtes préliminaires inutiles ont déjà été considérablement réduites. Des outils existent s'il semble qu'une enquête préliminaire causerait un retard injustifié. Le ministère public peut directement procéder par mise en accusation ou en fonction de déclarations de témoins et d'autres documents (article 540), les parties peuvent être forcées d'axer l'audience sur des questions pertinentes (articles 536.3 à 536.5) et le juge peut immédiatement mettre fin au contre-interrogatoire si celui-ci est abusif, répétitif ou par ailleurs inapproprié (paragraphe 537(1.1.)).

Restreindre les enquêtes préliminaires aux infractions rendant leur auteur passible d'emprisonnement à perpétuité est arbitraire, et la justification de cette distinction n'est pas manifeste. Souvent, les infractions rendant leur auteur passible d'emprisonnement à perpétuité sans peine minimale ne se traduisent pas par un risque sérieux d'incarcération de longue durée. Une

personne qui transmet quelques grammes de cocaïne ou vole un téléphone intelligent aurait droit à une enquête préliminaire en vertu du projet de loi C-75, mais une personne inculpée d'une infraction comportant une peine minimale obligatoire (p. ex. le trafic d'armes à feu) n'y aurait pas droit. De nombreuses infractions sont assorties d'importantes peines minimales obligatoires et d'autres conséquences incidentes sérieuses, sans que l'emprisonnement à perpétuité ne constitue la peine maximale. On retrouve parmi les autres infractions pour lesquelles l'enquête préliminaire ne serait pas permise les voies de fait graves, certaines infractions en matière de terrorisme et des infractions liées aux organisations criminelles.

Les enquêtes préliminaires peuvent réduire les délais judiciaires, et l'élimination des enquêtes préliminaires pour la plupart des affaires ne ferait que rallonger les délais. Les enquêtes préliminaires procurent l'occasion d'interroger les témoins et de rationaliser les demandes qui doivent être entendues au procès. Les avocats entendent les témoins essentiels témoigner et être contre-interrogés, ce qui entraîne souvent une résolution rapide de l'affaire, soit parce que les poursuivants constatent la faiblesse de leur preuve, soit parce que les avocats de la défense encouragent les plaidoyers de culpabilité rapides après avoir évalué la solidité de la preuve du ministère public.

Nous nous opposons à la proposition du projet de loi C-75 consistant à restreindre les enquêtes préliminaires, mais si des modifications sont apportées pour limiter davantage leur possibilité, nous suggérons la solution de rechange suivante. En plus des infractions rendant leur auteur passible de l'emprisonnement à perpétuité, les enquêtes préliminaires devraient aussi être possibles :

a) lorsque les deux parties y consentent;

b) lorsque la cour estime qu'il est dans l'intérêt de la justice de tenir une enquête préliminaire, compte tenu des facteurs suivants, aucun d'entre eux n'étant déterminant :

   i. la nature et la gravité de l'accusation ou des accusations, y compris la peine potentielle découlant d'une déclaration de culpabilité;

   ii. l'âge et la vulnérabilité d'un témoin rendant témoignage à une enquête préliminaire;

   iii. les questions à trancher à l'enquête préliminaire, y compris la question de savoir si l'incarcération est en litige;

   iv. la durée et la complexité de l'affaire;

   v. la durée de l'enquête préliminaire proposée et la question de savoir si une enquête préliminaire entraînerait des délais indus;

   vi. la question de l'existence d'autres modes de réception de la preuve (par exemple, au moyen du recours à un interrogatoire préalable).

6. Les choix et les nouveaux choix

Le projet de loi C-75 propose des modifications aux procédures de choix et de nouveau choix du *Code criminel*, dont bon nombre ont trait à la restriction de l'enquête préliminaire. La section de l'ABC encourage la modification des articles 473 et 561 pour permettre davantage de procès devant juge seul sans le consentement du ministère public. À l'heure actuelle, pour obtenir un procès devant juge seul dans une affaire de meurtre, par exemple, l'accusé doit obtenir le consentement du procureur général en vertu de l'article 473 du *Code criminel*. Il s'agit d'une des rares exceptions au droit de faire un choix (ou de faire un nouveau choix selon le cas) quant au mode du procès lorsqu'un individu fait face à des

inculpations le rendant passible d'une peine d'emprisonnement d'au moins cinq ans (alinéa 11*f*) de la *Charte*). Le consentement du ministère public est accordé différemment au Canada, ce qui crée une inégalité des chances pour les accusés selon l'endroit où ils sont inculpés. Fait plus important, un refus de procéder au procès devant juge seul cause d'importants délais dans ces affaires graves.

En 2015-2016, il fallait *en moyenne* 471 jours pour mettre un terme à une affaire de meurtre, soit une augmentation de 16 % du temps nécessaire pour se rendre à la fin du procès par rapport à l'année antérieure, même si 38 % de moins d'affaires de meurtre ont été entendues en 2015-2016. Malgré ces tendances, en Colombie-Britannique, où le consentement du ministère public pour les procès devant juge seul semble être donné plus couramment, le délai médian entre la première comparution à la conclusion en cour supérieure était de moins de 300 jours, soit l'un des taux les plus bas au pays.

Ces statistiques pourraient revêtir de l'importance lors de l'établissement des politiques publiques. Toute mesure de rationalisation du processus en cour supérieure devrait être envisagée, particulièrement *lorsqu'elle ne compromet pas les droits de l'accusé*. La réforme des articles 473 et 561 pourrait en fait être compatible avec le « droit » pour la personne qui subit un procès de renoncer à un procès devant jury en vertu de l'alinéa 11*f*) de la *Charte*. Bref, la réforme des articles 473 et 561 se traduirait par une uniformité accrue dans la façon dont les affaires de meurtre sont traitées d'une région à l'autre du pays et améliorerait l'efficience de la poursuite dans ces affaires graves.

7. La vidéoconférence et la technologie

Le projet de loi C-75 ferait augmenter le recours à la technologie pour faciliter la présence à distance des participants. Nous formulons deux suggestions relativement à la nouvelle partie XXII.01. Premièrement, l'exigence de « motifs » prévue par les paragraphes 715.23(2), 715.25(3) et 715.26(2) devrait être supprimée. Ces dispositions inverseraient la présomption de comparution en personne (article 715.21), donnant à penser que la présence à distance devrait être la norme sauf si le juge ou le juge de paix en décide autrement et consigne un énoncé de motifs en ce sens. Dans le pire des cas, cela contredit le principe général formulé à l'article 715.21 et, dans le meilleur des cas, c'est déroutant.

Deuxièmement, la nouvelle Partie devrait généralement s'appliquer seulement aux audiences non contentieuses. Dans sa formulation actuelle, elle n'établit pas de distinction entre les comparutions ou les parties de l'instance qui auraient la priorité pour la présence à distance. Les comparutions à distance – et la partie XXII.01– devraient être favorisées pour les affaires non contentieuses, comme les audiences *pro forma,* ou porter sur la gestion de l'instance, l'interpellation ou la restitution de biens saisis. Ces audiences sont généralement d'ordre procédural et ne nécessitent pas la présence en personne de l'individu qui subit son procès, du juge ou du juge de paix. Pour les audiences plus contentieuses, le juge devrait évaluer toutes les circonstances pour déterminer si certaines personnes peuvent témoigner par vidéoconférence, mais le principe général devrait toujours être que le juge est présent et que l'accusé a le droit d'être présent.

8. Les récusations péremptoires

Le projet de loi C-75 changerait considérablement le processus de sélection du jury en abolissant les récusations péremptoires, en modifiant le processus de récusation motivé, en permettant aux juges d'écarter des candidats jurés pour « le maintien de la confiance du public envers l'administration de la justice » et en permettant que les procès se poursuivent devant un juge seul, avec le consentement des parties, lorsque le nombre de jurés passe sous la barre de dix.

La modification proposée aux récusations péremptoires semble constituer une réponse à l'arrêt *R. c. Stanley*, affaire dans laquelle Gerald Stanley, un homme blanc, a été acquitté du meurtre au deuxième

degré d'un Autochtone, Colton Boushie. On a largement fait état du fait que M. Stanley aurait utilisé le processus de récusation péremptoire pour obtenir un jury entièrement composé de personnes blanches. Deux idées ont fréquemment été exprimées : M. Stanley aurait dû être déclaré coupable, et un jury plus diversifié sur le plan ethnique l'aurait déclaré coupable. Nous partageons la crainte que les récusations péremptoires soient utilisées pour faire de la discrimination raciale contre les Autochtones, mais, selon notre expérience, elles sont plus fréquemment utilisées à l'avantage des Autochtones et des autres personnes racialisées. Ces populations sont disproportionnellement entraînées dans le système de justice pénale et utilisent souvent ce processus justement pour éviter un jury entièrement composé de personnes blanches.

Le projet de loi C-75 modifierait également le processus de récusation motivé, qui donne au ministère public et à la personne subissant le procès l'occasion de faire écarter un candidat juré en raison d'idées préconçues susceptibles de nuire à sa capacité de rendre un verdict juste. Un juge peut ordonner une récusation motivée lorsqu'il y a une possibilité réaliste de partialité en fonction d'une conclusion de préjugés raciaux répandus dans la collectivité où l'infraction a eu lieu. Le juge pose des questions préétablies aux candidats jurés pour déterminer s'ils ont des idées préconçues. À l'heure actuelle, les membres du tableau des jurés déterminent au bout du compte si un candidat juré est qualifié pour servir. Le projet de loi C-75 enlèverait le processus décisionnel au tableau des jurés pour le confier au juge du procès. Étant donné que les membres de la magistrature au Canada sont généralement relativement prospères et disproportionnellement blancs, la proposition pourrait faire en sorte qu'il est moins probable que la récusation motivée soit tranchée par une personne racialisée ou par une personne ayant des moyens financiers limités.

Hormis la procédure actuelle de récusation motivée, le juge qui préside l'affaire peut ordonner la mise à l'écart d'un candidat juré « pour toute raison valable, y compris un inconvénient personnel sérieux ». Le projet de loi C-75 élargirait cette formulation pour permettre la mise à l'écart d'un candidat juré pour « le maintien de la confiance du public envers l'administration de la justice ». Cette formulation est large et floue et ne renferme aucune disposition permettant au ministère public ou à la personne qui subit un procès de poser des questions ou de faire des observations ni aucune directive au juge du procès pour l'aider à rendre sa décision. Les juges ne seraient pas tenus d'énoncer les raisons pour lesquelles le maintien de la confiance du public serait compromis lorsqu'ils ordonnent la mise à l'écart d'un candidat juré donné, de sorte que la proposition invite concrètement les juges à mener leur propre processus de récusation péremptoire. Il se peut que l'on veuille élargir le pouvoir des juges de libérer des jurés, par exemple, pour garantir qu'un jury soit plus diversifié, mais cela devrait être clairement indiqué. À tout le moins, nous suggérons que les juges soient tenus de fournir des motifs lorsqu'ils ordonnent la mise à l'écart d'un candidat juré particulier afin de garantir la transparence du processus.

Le projet de loi C-75 a été déposé moins de deux mois après le verdict dans l'affaire *Stanley*. Certaines modifications au processus de sélection du jury, y compris l'abolition des récusations péremptoires, semblent insuffisamment étudiées. Si une réforme législative est nécessaire, elle devrait être fondée sur des données empiriques produites par un examen exhaustif du système de jury. La section de l'ABC recommande au gouvernement d'effectuer des études supplémentaires avant d'apporter d'importantes modifications législatives au processus de sélection du jury.

9. La reclassification des infractions

Le projet de loi C-75 transformerait certaines infractions dont l'auteur doit être poursuivi par acte d'accusation en infractions hybrides, ferait augmenter à 12 mois le délai de dépôt des poursuites sommaires et ferait augmenter à deux ans moins un jour la peine maximale afférente à la plupart des infractions sommaires en vertu de l'article 787 du *Code criminel*.

La section de l'ABC appuie la transformation en infractions hybrides et le délai accru de dépôt de poursuites sommaires pour accorder au procureur de la Couronne un plus grand pouvoir discrétionnaire dans la façon de traiter les poursuites moins graves. Toutefois, ces modifications se traduiraient probablement par un plus grand nombre d'affaires entendues en cour provinciale, ce qui pourrait entraîner des délais supplémentaires à cette instance, sauf si davantage de ressources sont affectées.

La section de l'ABC appuie généralement la normalisation de la peine maximale pour les infractions sommaires, mais voit deux conséquences potentielles découlant de l'augmentation à deux ans moins un jour de la peine maximale.

Premièrement, l'augmentation pourrait avoir un effet défavorable sur l'accès à la justice. À l'heure actuelle, en vertu de l'article 802.1 du *Code criminel*, un représentant ne peut pas comparaître pour interroger ou contre-interroger des témoins lorsque l'accusé est passible d'un emprisonnement de *plus de six mois* (sauf s'il y est autorisé au titre d'un programme approuvé par le lieutenant-gouverneur en conseil). Concrètement, cela signifie qu'un représentant, y compris un étudiant effectuant du travail bénévole au sein d'une clinique juridique, ne peut pas représenter une personne inculpée d'une infraction sommaire qui rend son auteur passible d'une peine d'emprisonnement maximale de plus de six mois. Ce qu'on appelle ces « super infractions » sommaires rendent généralement leur auteur passible d'une peine d'emprisonnement maximale de 18 mois (p. ex. le défaut de se conformer à une ordonnance de probation visée à l'article 733.1). Le projet de loi C-75 empêcherait un grand nombre de personnes d'obtenir de l'aide auprès des cliniques des facultés de droit et d'autres organisations qui offrent des services juridiques bénévoles, puisque la peine maximale serait supérieure à la limite imposée par l'article 802.1. Ce problème pourrait être réglé si on modifiait cette disposition de manière à refléter la nouvelle peine maximale pour les infractions sommaires.

Deuxièmement, l'augmentation de la peine d'emprisonnement maximale pour les infractions sommaires pourrait entraîner l'« inflation » des peines. Avec une augmentation en flèche de la peine possible afférente à des infractions moins graves – par exemple, de six mois à deux ans moins un jour pour les voies de fait – nous constatons un véritable risque que les peines commencent à subir une « inflation » au fil du temps. Pour garantir que l'intention de normaliser la peine maximale relative aux infractions sommaires soit clairement communiquée aux tribunaux, la section de l'ABC recommande l'ajout à l'article 787 d'une expression du genre « pour davantage de certitude ». Cela préciserait que l'augmentation de la peine maximale afférente aux infractions sommaires ne signifie pas que le législateur a l'intention de traiter ces infractions d'une façon plus punitive.

10. La violence contre un partenaire intime

Le projet de loi C-75 ajouterait la définition de « partenaire intime » à l'article 2 du *Code criminel*, inverserait le fardeau de preuve quant à la mise en liberté sous caution dans certaines affaires de violence familiale et créerait un régime de peines graduées pour les infractions de violence familiale. Nous appuyons l'élargissement de la définition de l'expression « partenaire intime » de manière à ce qu'elle englobe les anciens époux.

Le projet de loi propose également l'inclusion, dans la version anglaise, de l'expression floue « dating partner » (partenaire amoureux) dans la définition de « partenaire intime ». Contrairement à « époux » et « conjoint de fait », cette expression n'est pas définie par la loi et ne laisse pas nécessairement entendre un partenaire intime (quoique l'expression française « partenaire amoureux » laisse entendre une relation intime). Quoi qu'il en soit, il faudrait savoir si, sans relations intimes, la définition s'appliquerait ou combien il faudrait de relations intimes pour qu'une personne soit un « partenaire amoureux ».

Une infraction commise contre un conjoint de fait ou un époux est actuellement considérée comme un facteur aggravant en ce qu'elle constitue un abus de confiance. Les relations amoureuses ne comportent pas toutes une relation de confiance, particulièrement celles qui sont de nature brève ou sporadique. Compte tenu des importantes modifications apportées à la mise en liberté sous caution et à la détermination de la peine par le projet de loi pour la violence contre les partenaires intimes, le terme devrait se limiter aux personnes visées (c'est-à-dire aux victimes qui, en raison de leurs relations avec l'accusé, se trouvaient dans une situation vulnérable au moment de la perpétration de l'infraction). De plus, l'inclusion du « partenaire amoureux » dans la définition causera probablement des délais aux stades de la mise en liberté sous caution, du procès et de la détermination de la peine du processus, pendant que ces questions sont débattues et clarifiées. Cela se traduirait aussi probablement par une application incohérente jusqu'à ce que les cours d'appel définissent le terme. Pour cette raison, nous recommandons que l'expression « partenaire amoureux » soit omise dans la définition de « partenaire intime ».

Le projet de loi C-75 propose qu'en déterminant s'il y a lieu d'ordonner la mise en liberté, le juge examine deux facteurs particuliers : si la personne qui subit un procès est inculpée d'une infraction dans le cadre de laquelle la violence a été utilisée, menacée ou tentée contre son partenaire intime; et si elle a déjà été déclarée coupable d'une infraction criminelle.

Ces facteurs sont rationnellement liés au deuxième motif du paragraphe 515(10), et nous en appuyons l'inclusion. Toutefois, malgré l'accusation criminelle et sa nature aggravante aux fins de la mise en liberté sous caution, les partenaires intimes peuvent toujours avoir besoin d'avoir des contacts pendant que l'affaire criminelle est examinée (par exemple, il peut y avoir des enfants ou ils peuvent devoir discuter de questions financières). Les juges doivent façonner une mise en liberté qui peut tenir compte de ces situations tout en assurant la sécurité du plaignant.

De même, le casier judiciaire est rationnellement lié à la détermination de la question de savoir si l'individu inculpé récidivera dans le cas où il serait libéré. Même ceux qui ont été déclarés coupables de plusieurs infractions par le passé sont présumés innocents. Un casier judiciaire, particulièrement pour une infraction liée à l'inculpation actuelle, est probant pour la question du deuxième motif. Cela se reflète dans la pratique actuelle consistant à produire le casier judiciaire lors d'une enquête sur cautionnement.

Le projet de loi C-75 propose également que lorsqu'une personne qui subit un procès a été déclarée coupable d'une infraction de violence familiale, le fardeau de preuve soit inversé lorsqu'il sollicite sa mise en liberté pour une inculpation postérieure. Ce fardeau inversé est concrètement inutile. Le paragraphe 515(3) modifié exige déjà que le juge de paix tienne expressément compte de ces mêmes facteurs. En outre, les dispositions portant inversion du fardeau de preuve en matière de mise en liberté sous caution dans ce contexte feraient probablement l'objet d'un examen constitutionnel.

Une nouvelle disposition d'inversion du fardeau de preuve est contraire à d'autres modifications visant à favoriser la libération des personnes présumées innocentes de crimes, particulièrement des personnes historiquement désavantagées. Compte tenu de la hausse considérable du nombre de détentions provisoires, nous sommes généralement opposés à l'inversion du fardeau de la preuve, à tout le moins en partie en raison de son effet vraisemblablement disproportionné sur les Autochtones et les autres personnes vulnérables.

Le projet de loi C-75 modifierait les articles 267 et 272 de manière à créer la présomption que l'étouffement pendant des voies de fait ou une agression sexuelle constitue une infraction distincte, que la preuve établisse ou non l'existence de lésions corporelles. L'étouffement est déjà une forme de voies de fait en vertu de l'article 266, et lorsque des lésions corporelles sont causées, il peut faire l'objet d'une poursuite en vertu des articles 267 et 272. Si l'étouffement est utilisé pour faciliter la

perpétration d'une infraction, il peut être expressément souligné au moyen d'une poursuite fondée sur l'article 246 (l'infraction consistant à vaincre la résistance en étouffant une personne). L'étouffement est déjà considéré comme un facteur aggravant lors de la détermination de la peine et figurera en évidence dans toute détermination de la question de savoir si une infraction a été établie lorsque l'étouffement est allégué. Une infraction distincte, devant vraisemblablement être traitée comme des voies de fait causant des lésions corporelles, ajouterait peu de choses au cadre actuel. Au moment où on prend des mesures légitimes pour simplifier le *Code criminel*, ces modifications semblent particulièrement inutiles.

À l'heure actuelle, le sous-alinéa 718.2*a*)(ii) crée seulement la présomption que des voies de fait contre un époux ou un conjoint de fait actuel constitue un facteur aggravant lors de la détermination de la peine. Nous appuyons l'application de cette présomption aux « anciens époux », reconnaissant que la même dynamique peut se poursuivre après la fin de la relation. Nous n'appuyons cependant pas l'application des facteurs prévus au sous-alinéa 718.2*a*)(ii) aux « partenaires amoureux ».

Le projet de loi C-75 modifierait également l'article 718.3 afin de créer des peines graduées pour les délinquants déclarés coupables de plus d'une infraction de violence familiale (ce que certains ont qualifié de peines « supermax »). La section de l'ABC n'appuie pas cette modification puisque les antécédents judiciaires en matière de violence familiale constituent déjà un facteur aggravant lors de la détermination de la peine. Constitue également un facteur aggravant la perpétration de l'infraction dans le contexte d'une relation conjugale.

11. La suramende compensatoire

Les fonds recueillis au moyen des peines imposées en ce qui concerne les infractions au *Code criminel* et à la *Loi réglementant certaines drogues et autres substances* peuvent appuyer les programmes d'aide aux victimes d'actes criminels, lesquels, par exemple, offrent des services de thérapie ou aident les gens à comprendre le système de justice et le processus judiciaire. Les modifications apportées par le projet de loi C-37 en 2013 ont doublé la suramende compensatoire et ont éliminé le pouvoir discrétionnaire des juges de dispenser les délinquants de la suramende lorsque celle-ci causerait un préjudice injustifié. Depuis, les suramendes compensatoires *ne peuvent pas* faire l'objet d'une dispense à la détermination de la peine même si elles causaient un préjudice injustifié au délinquant ou à ses personnes à charge. Le défaut de payer la suramende peut entraîner des sanctions comme la suspension de permis et l'impossibilité d'obtenir un pardon.

Cette modification a causé non seulement des préjudices graves à de nombreux délinquants et à leurs familles, mais a aussi entraîné certains résultats inusités. Certains juges ont imposé des amendes théoriques en sus d'autres sanctions (par exemple, une amende d'un dollar pour que la suramende compensatoire s'établisse, à raison de 30 % de l'amende, à 30 cents) ou ont accordé de longs délais de paiement de l'amende imposée. Le projet de loi C-75 rétablirait le pouvoir discrétionnaire des juges : en cas de préjudice injustifié, un juge pourrait dispenser le délinquant de payer la suramende. À notre avis, le rétablissement du pouvoir discrétionnaire des juges de dispenser la victime des suramendes compensatoires permettrait aux juges de veiller à un résultat juste et d'éviter l'effet injuste que les dispositions actuelles ont sur les personnes pauvres et marginalisées qui se présentent devant les tribunaux.

Les modifications proposées exigeraient également l'imposition de la suramende compensatoire pour chaque infraction, « sauf à l'égard de certaines infractions contre l'administration de la justice lorsque le cumul des suramendes compensatoires imposées à un contrevenant pour ces types d'infractions serait disproportionné dans les circonstances » (projet de paragraphe 737(1.1)). Si le montant total des suramendes imposées est disproportionné par rapport à la capacité de payer du délinquant, il devrait y avoir possibilité de dispense nonobstant la nature de l'infraction.

Enfin, nous soulignons que certaines régions disposent de programmes permettant aux délinquants d'effectuer des travaux tenant lieu de paiement des amendes. Cette possibilité devrait être offerte plus uniformément dans toutes les régions.

12. Conclusion

La section de l'ABC apprécie avoir eu l'occasion de formuler des commentaires sur le projet de loi C-75 et recommande l'examen de notre mémoire intégral sur le projet de loi C-75 pour des explications supplémentaires de nos positions. Nous appuyons certains aspects de ce projet de loi omnibus sur la justice criminelle, mais nous croyons que d'autres parties du projet de loi seront vraisemblablement jugées inconstitutionnelles et sont dénuées de fondement probatoire. Ces parties pourraient contribuer aux délais judiciaires plutôt que de les atténuer.

Il faut davantage de travail pour garantir que le système de justice pénale demeure efficace et juste pour tous les participants. Nous faisons remarquer l'absence évidente de réforme significative des dispositions législatives canadiennes sur la détermination de la peine, particulièrement en ce qui a trait aux peines minimales obligatoires et à la possibilité d'ordonnances d'emprisonnement avec sursis. Toute analyse utilise de la réduction des délais judiciaires devrait comporter ces sujets importants compte tenu de leur effet considérable sur l'efficacité du système de justice pénale.

Bill C-75 *Criminal Code and Youth Criminal Justice Act amendments*

I. INTRODUCTION

The Canadian Bar Association Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. Bill C-75 is omnibus legislation that represents the federal government's response to *R. v. Jordan*,[1] the leading case on court delays. Bill C-75 also includes reforms unrelated to court delay, including the abolition of peremptory challenges in the jury selection process and changes to how cases involving domestic violence are handled and sentenced.

The CBA Section recognizes that the complex problem of court delays requires a multi-faceted solution. Some of Bill C-75's proposals are commendable and will work to reduce delays in the system without compromising the constitutional rights of people on trial. Examples include the creation of a diversionary regime for certain administration of justice of offences and changes to the bail process. These reforms are logical, consistent with existing case law and represent an empirically-based response to the question of delay.

Unfortunately, other proposals, including curtailing preliminary inquiries and introducing "routine police evidence" by way of affidavit, are misguided in their attempts at streamlining the court process. They would not address the real causes of delay, and would simultaneously sacrifice important procedural protections. The introduction of police evidence by way of affidavit, in particular, is likely to be subject to serious constitutional scrutiny, and would only exacerbate court delays with additional *Charter* litigation and pre-trial applications. Nearly abolishing preliminary inquiries, as proposed by Bill C-75, would also eliminate a valuable tool both defence counsel and prosecutors use to resolve and otherwise eliminate serious cases from the system. Put simply, these two changes are not evidence-based, and would exacerbate, rather than alleviate, the problem of court delays.

In this submission, the CBA Section also offers its perspective on other proposed reforms. Briefly, we:

- encourage further study of peremptory challenges, urging caution about the current proposal to eliminate one of the few tools racialized and Indigenous people have to ensure a representative jury. We believe that the proposed changes may run directly against the stated objective of addressing racial bias in the system

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1 2016 SCC 27.

- support the increased discretion that would result from amending the victim fine surcharge regime, most of the proposed changes to the reclassification of offences, and amendments related to promoting greater use of technology in the courtroom
- oppose the inclusion of a rebuttable presumption in human trafficking cases
- suggest changes to the (re)election system to promote greater efficiency in murder cases
- recognize the importance of redefining intimate partner violence, but oppose some of the proposed reforms to the bail and sentencing phases of these cases

II. COURT DELAYS IN CONTEXT

The majority judgment in *Jordan* identified a "culture of complacency" in the criminal justice system and called for action. Public reaction to the judgment was swift, and grew after a small number of murder cases were stayed in the aftermath of the ruling. Media, politicians and commentators have weighed in on the issue of delay and suggested an array of reforms.

The CBA Section generally supports measures to streamline the criminal justice system. However, expediency cannot supersede trial fairness and speed cannot supersede the truth-seeking function of the process. Reforms must recognize the importance of constitutional and procedural protections that have proven their worth over decades. These protections prevent wrongful convictions and otherwise promote confidence in the administration of justice. Any changes to the justice system should be evidence-based, rather than influenced by the outcry of those unfamiliar with the system and the delicate balance of constitutional tenets it represents.

The reality is that the vast majority of cases do not run afoul of the *Jordan* ceilings (i.e. 18 months for cases tried in provincial court and 30 months for cases tried in superior court). The average criminal case in 2015/2016 took 127 days to complete (approximately 4 months).[2] 99% of all criminal cases are tried in provincial court. In 2015/2016, 94% of those cases were completed within the *Jordan* timelines, even without taking into account the deductions permitted in *Jordan* (i.e. defence delay, waiver, exceptional and discrete events).[3] In other words, while court delays remain an ongoing concern for those involved in the justice system, the problem may not be as critical as the public has been led to believe from recent media coverage.

Certainly, in the nearly two years since *Jordan*, there have continued to be applications for stays of proceedings because of delay. However, this is not near the fallout that occurred after the decision in

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2 Justice Canada, *JustFacts: Jordan, Statistics Related to Delay in the Criminal Justice System*, December 2017 at 1.

3 *Ibid*. at 2-3.

R. v. Askov[4], when approximately 47,000 cases were stayed in Ontario alone in just under eleven months.[5] In the six months following the *Jordan* decision, there were approximately 51 stays of proceedings because of delay.[6] A more recent study showed that in the 12 months after *Jordan*, 204 stay applications were granted across Canada, with 333 others being dismissed.[7]

To put those numbers into context, over 328,000 criminal cases were completed in the year it took Mr. Jordan's case to move from the British Columbia Court of Appeal to the Supreme Court of Canada (i.e. from 2014 to 2015).[8] As for the murder cases stayed after the *Jordan* decision, nearly all have been overturned on appeal.[9]

Some questions about the timelines set out in *Jordan* are also emerging. For example, in *R. v. J.M.*[10], Judge Paciocco (as he then was) held that youth cases, due to their unique circumstances, should be adjudicated using a ceiling of 12 to 15 months.[11] In *York (Regional Municipality) v. Tomovski*,[12] the Court held that the *Jordan* timelines should not apply to provincial ticket offences, opting instead for a ceiling of 13 to 15 months.[13] In *R. v. MacIsaac*,[14] the Ontario Court of Appeal held that the presumptive ceilings were too long in the circumstances of a retrial and should not be followed in that context.

Even in *Jordan* itself, Cromwell J. (in dissent) highlighted the absence of any evidence to support the ceilings set by the majority. He characterized the ceilings as illogical and concluded that it would be unwise to follow them, as they were "so high they risk being meaningless" in most cases.[15]

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4 [1990] 2 S.C.R. 1199.

5 *R. v. Morin*, [1992] 1 S.C.R. 771 at 779.

6 See, Jessica Patrick, "Six Months of *Jordan*: A Statistical Overview" (2017) 35:2 CR at 2. This figure represents the number of stays reported in decisions that were publicly available to the author. Undoubtedly there were more stays of proceedings granted as a result of section 11(b) violations that were not reported. It is indisputable however that there have been nowhere near the number of stays following *Jordan* as compared to what happened after the *Askov* decision in 1990-1991.

7 Matthew Gourlay, "After Jordan: The Fate of the Speedy Trial and Prospects for Systemic Reform" (2017) 36:2 Advocates' Journal at 22.

8 Justice Canada*, JustFacts, Preliminary Inquiries,* June 2017 at 1.

9 For example, see *R. v. Regan*, 2016 ABQB 561; 2018 ABCA 55 (CanLII) and *R. v. Picard* 2016 ONSC 7061; 2017 ONCA 692 (CanII).

10 2017 ONCJ 4.

11 *R. v. J.M.*, 2017 ONCJ 4 at paras. 112-145.

12 2017 ONCJ 785.

13 *York (Regional Municipality) v. Tomovski*, 2017 ONCJ 785 at paras. 8, 123-157.

14 2018 ONCA 650 at paras. 23-28.

15 *Jordan*, *supra,* note 1 at paras. 274-281.

These comments and statistics raise concerns that *Jordan* may have been decided without a complete factual record. For this reason, we suggest caution be exercised in developing government policy based on the decision and its political fallout.

Careful study is needed to determine whether all aspects of the system require reform to mitigate delay, and even where reform is possible, whether the price of expediency is worth the cost to fair trial interests and other important values. Some balancing of interests is required to ensure that useful tools which may or may not contribute to delay are not hastily cast aside in the rush to have speedier trials.

III. JUDICIAL INTERIM RELEASE

The CBA Section supports many of the amendments to the bail regime proposed in Bill C-75. They will lead to more expedient hearings while being consistent with existing case law and constitutional concerns, including the presumption of innocence and the right to reasonable bail under section 11(e) of the *Charter*.

As an added benefit, many of the proposed reforms will address the increasing rate of pre-trial incarceration, a troubling trend that has been statistically confirmed. Between 2005 and 2015, the number of days people in custody spent awaiting trial increased by 29% in Ontario, 33% in British Columbia, and up to 82% in some of the territories.[16] A recent study also established that the number of people awaiting trial in custody has more than tripled since 1979, even though crime rates have declined since that time. Since 2005, more people have been held in remand while legally presumed innocent (or at least unsentenced) than offenders serving custodial sentences following a conviction.[17] Put another way, for more than a decade, more people have been in jail awaiting trial than those serving a sentence. As the Supreme Court of Canada recently affirmed, this trend is inconsistent with the presumption of innocence and the right to reasonable bail in the modern age.[18]

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16 *Supra*, note 2, at 4.

17 Cheryl Webster, "Broken Bail" in Canada: How We Might Go About Fixing It" (Ottawa: Justice Canada, 2016) at 1-2. See also, K. Beatty, A. Solecki and K. Morton Bourgon, *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study* (Ottawa: Research and Statistics Division, Justice Canada, 2013) at 5.

18 *R. v. Antic*, 2017 SCC 27 at paras. 64-67.

Relying too heavily on pre-trial detention also puts tremendous pressure on the system and society as a whole. In her recent report entitled "'Broken Bail' in Canada: How We Might Go About Fixing It", Cheryl Webster described in detail the far-reaching impacts of this trend.[19]

Bill C-75 would take meaningful steps towards rectifying these problems. For example, sections 493.1 and 515(2.01) codify the "restraint" and "ladder" principles, recently reaffirmed in *R. v. Antic*.[20] These sections explicitly direct the officer, justice or judge to give primary consideration to releasing the person at the earliest reasonable opportunity and on the least onerous conditions appropriate in the circumstances. The section also directs that conditions imposed be "reasonably practicable for the accused to comply with." Much of the content of section 493.1 has already been recognized in case law, but codifying it will send a clear message that pre-trial detention should be the exception, not the rule.

Similarly, section 493.2 will require consideration of the overrepresentation of Indigenous people on trial, as well as other vulnerable populations overrepresented and disadvantaged in the criminal justice system. This, much like section 718.2(e), should operate to reduce the number of people detained in custody, with a particular focus on individuals traditionally marginalized by the system. Section 493.2 is also consistent with several cases which have commented on the over-incarceration of Indigenous peoples, the mentally ill and certain racialized groups.[21]

The CBA Section also supports sections 515(2.02) and 515(2.03) which explicitly discourage use of cash deposits and sureties. Several judgments and reports have commented on the overreliance on surety bail as a form of release, widely criticized as undermining the presumption of innocence and the right to reasonable bail.[22] Overreliance on sureties is also responsible for unnecessary delays in the system, as judges frequently require *viva voce* evidence from proposed sureties and others. These hearings often resemble trials and may include direct and cross-examinations of police officers, affiants and sometimes even the detainee.[23] Such practices have been particularly harmful to the Indigenous community, the poor and other marginalized people who are disadvantaged in obtaining a suitable surety.[24] The amendments in Bill C-75 will likely alleviate some of these issues.

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19 *Supra*, note 17, "Broken Bail" at 2-3.

20 *Supra*, note 18.

21 *R. v. Jackson*, 2018 ONSC 2527.

22 *Antic, supra*, note 18, para. 65; *R. v. Mirza*, 2009 ONCA 732 at para. 47; *R. v. Tunney,* 2018 ONSJ 961 at paras. 30-35, 39-42, 46, 50-53.

23 *Tunney*, *ibid*., at paras. 30-35, 39-42, 46, 50-53.

24 *Supra*, note 17, "Broken Bail" at 6-7.

The CBA Section supports other amendments in Bill C-75 to encourage a more streamlined bail process, including clarifying the variance of release orders by consent (sections 502 and 519.1), standardizing the evidence of proposed sureties (section 515.1), and instituting a diversionary regime for breach allegations (sections 495.1, 496 and 523.1).

Expanding police powers to release an accused on arrest should also reduce the number of bail hearings (sections 498, 501, 503). However, going forward, Crown counsel may increasingly delay charges to prepare disclosure or for further investigation, so as not to engage the *Jordan* timelines (triggered by laying a charge). More people will likely spend more time on police-imposed conditions between arrest and charge approval. It is already common for a person to be given an appearance notice for a date many months in the future. Police should be better trained about not imposing excessive conditions because of an unjustified concern for liability or public safety. Reducing conditions imposed on arrestees would also reduce the need for bail variation hearings as the file progresses.

Better police training is particularly important because police officers tend to impose more (and stricter) release conditions than justices or judges, a practice which Bill C-75 and the *Antic* decision clearly discourage. A recent study showed that this trend actually *diminishes* the likelihood of compliance with bail, even though people released by the police have better records than those ultimately released by a judge in court.[25]

IV. FAILURE TO COMPLY

Administration of justice offences consume a disproportionate amount of court time. In 2015-2016, 23% of all court cases concerned these types of offences - nearly 78,000 court matters. Almost half of those cases included an allegation of breach of bail.[26] Between 1998 and 2013, the percentage of people whose *most serious* offence was an administration of justice charge more than doubled.[27]

Bill C-75 would introduce a diversionary regime for certain failures to comply with court orders (i.e. breaches of bail and failures to appear) where the breach did not cause property damage, economic loss or physical or emotional harm to a victim. The police or prosecutor would have the option in these circumstances to divert the person charged to a judicial referral hearing under section 523.1. If,

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25 *Supra*, note 17, Beatty *et al*, at 4, 10-11, 14, 15, 20-21, 23.

26 *Supra*, note 2 at 5.

27 *Supra*, note 17, "Broken Bail" at 8.

at the hearing, the person was found to have breached the order (determined on a balance of probabilities), the court could

- take no action
- re-release the person on a new bail order, or
- detain the person if cause has been shown under the factors set out in section 515(10).

Once a determination is made at a judicial referral hearing, any existing charges related to the failure to comply would be dismissed. If no charge had been laid, the Crown would be statute-barred from laying one.

The CBA Section supports the proposed regime and the intent behind it. If used, it will have a clear impact on delay, as it will reduce the number of administration of justice offences in the system, particularly in jurisdictions where the police are responsible for charge approval. Crown counsel would have the option to eliminate these cases in appropriate circumstances, alleviating the pressure they put on the system.

We recommend the following changes to further improve the proposal:

1. Clarify section 523.1(3)

The diversionary regime set out in section 523.1 is not available for all breach allegations. It cannot be used unless the failure to comply "did not cause a victim physical or emotional harm, property damage or economic loss" (section 523.1(3)).

The wording of this section is somewhat ambiguous. It is unclear whether a person would be disqualified if the breach caused *any* property damage or economic loss, or whether the property damage or economic loss must be *related to a victim*. The Bill's *Charter Statement*[28] suggests the provision is to be interpreted with the former meaning, but this remains uncertain. The disqualification should be reworded for greater clarity if it is retained in the Bill.[29]

2. Remove the "emotional harm" disqualifier

The CBA Section is concerned that people would be disqualified from the diversionary regime because their failure to comply caused a victim "emotional harm". The term is vague and unfamiliar to the criminal law, outside the victim impact statement regime. It is also purely subjective to the victim's state of mind, raising concerns about its consistent application.

Disqualifying people due to emotional harm seems contrary to the intent of reducing the number of low-level administration of justice offences in the system. Consider the following example:

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28 http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html.

29 We note however that the same ambiguity is not found in the French version of the Bill.

> Mr. Smith is an alcoholic charged with assaulting his long-time friend, Mr. Jones. Mr. Smith is released on conditions that he not drink or contact Mr. Jones in any way. Mr. Smith is distraught with the breakdown of the relationship with his friend and begins drinking after his release. One night, he calls Mr. Jones to apologize. The call does not go well once Mr. Jones realizes that Mr. Smith has been drinking. Mr. Jones reports the call to the police, explaining that he is emotionally upset over the phone call and Mr. Smith's continued drinking. Mr. Smith is charged with breaching the terms of his bail by drinking and contacting Mr. Jones.

Similar breaches occur in domestic files, where a spouse drinks and/or contacts a child or partner in violation of conditions. These breaches undoubtedly cause emotional harm, particularly when the victim and the person accused are in a close relationship. However, the emotional harm is subjective and may be transitory, and the benefit of prosecuting an alcoholic who breaches a no-alcohol condition is questionable. This type of case would benefit from a judicial referral hearing, where conditions could be reworded, or the person detained if their conduct merited that response.

Also, there is no criminal offence of causing "emotional harm" so that should not form the basis for disqualifying someone from an important diversionary regime that would benefit both the individual and the system as a whole. In our view, the proposed legislation should not unnecessarily interfere with the Crown's discretion to use this diversionary regime in appropriate circumstances, as doing so would defeat the purpose of the regime.

3. Remove the "economic loss" and "property damage" disqualifiers

For many of the same reasons, the CBA Section recommends removing the "economic loss" and "property damage" disqualifiers. People often cause minor economic loss or property damage during a breach of conditions (e.g. breaking a glass while arguing with someone a person is prohibited from contacting).

Crown counsel can be relied upon to decide when economic loss or property damage should disqualify someone from the benefit of the diversionary regime. The Crown is also able to charge individuals separately with theft, mischief or other offences if the economic loss or property damage is significant. Crown may also elect to proceed with the breach of bail charge. We see no need to limit the Crown's discretion as proposed.

4. Encourage judicial referral hearings

The diversionary regime is to be used solely at the Crown's discretion, so it may be questionable whether this regime would be used at all, given the availability of section 524 of the *Criminal Code* when a person breaches conditions of release.

Section 523.1 clearly aims to reduce delay in the system overall, but this rationale may not be immediately apparent in individual cases. The CBA Section recommends that federal Crown policy manuals be amended to encourage the use of judicial referral hearings. This would ensure the purpose of the regime is observed, and hopefully encourage provincial and territorial counterparts to follow suit.

RECOMMENDATIONS:

1) **The CBA Section recommends clarifying the language of section 523.1(3) to ensure that breaches unrelated to the victim are not disqualified from proceeding to a judicial referral hearing.**

2) **The CBA Section recommends that Crown counsel policy manuals be amended to encourage the use of judicial referral hearings under section 523.1.**

3) **The CBA Section recommends amending section 523.1(3) to remove the disqualification due to "emotional harm," "economic loss," and "property damage".**

V. ROUTINE POLICE EVIDENCE

Bill C-75 would permit the introduction of "routine police evidence" by way of affidavit or solemn declaration. Routine police evidence is broadly defined in section 657.01(7) and may include evidence of any police officer related to:

(a) gathering evidence and making observations;

(b) analyzing, preserving or otherwise handling evidence;

(c) identifying or arresting an accused or otherwise interacting with an accused; or

(d) other routine activities similar to those set out in paragraphs (a) to (c) that the police officer undertook in the course of their duties.

The definition of "police officer" is also broad and includes any "officer, constable or other person employed for the preservation and maintenance of the public peace."

In determining whether to permit a party to enter routine police evidence by way of affidavit, *and* whether to permit cross-examination of the witness, the court is to take into account the "interests of justice", including the factors in section 657.01(2):

(a) the nature of the proceedings in which the evidence is sought to be received by affidavit or solemn declaration;

(b) the extent to which that evidence is central or peripheral to the issue before the court;

(c) whether and the extent to which that evidence is expected to be contested;

(d) the accused's right to make full answer and defence;

(e) the importance of promoting a fair and efficient trial; and

(f) any other factor that the court considers relevant.

In practice, we expect that section 657.01 would allow the Crown to call virtually any aspect of a police officer's evidence by affidavit. It would then be up to the person on trial to give notice of intent to object to the procedure or request the attendance of the witness for cross-examination. Presumably, the person would then be required to justify calling the witness, based on the factors in section 657.01(2), likely requiring the defence to expose its strategy before calling the witness. If the person on trial could not persuade the court, no cross-examination would be permitted.

The CBA Section opposes the introduction of section 657.01 in its entirety. In stark contrast to other amendments in Bill C-75, section 657.01 is inconsistent with existing case law, does not appear to be connected to any empirical study, and is likely to exacerbate, rather than alleviate problems of delay. We believe the section would also be vulnerable to challenge under sections 7 and 11(d) of the *Charter*.

A. Constitutionality and Truth-seeking

Cross-examination is vital to the search for truth, and the right to cross-examine is a principle of fundamental justice enshrined in section 7 of the *Charter*. Wilson, J. confirmed this point in *R. v. Potvin*[30] nearly 30 years ago. More recently, in *R. v. Lyttle*,[31] the Court explained why the right to cross-examine must be vigorously protected:

> [41] As mentioned at the outset, the right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence…
>
> [42] In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at p. 663, explained why cross-examination plays such an important role in the adversarial process, particularly, though of course not exclusively, in the context of a criminal trial:
>
> > There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence….

30 [1989] 1 S.C.R. 525.

31 [2004] 1 S.C.R. 193.

> [44] The right of cross-examination must therefore be jealously protected and broadly construed…

We believe that any law that limits the right to cross-examine would be vulnerable to a *Charter* challenge, and certainly, section 657.01 limits that right. A comparison to other sections which have sought to limit cross-examination may assist in understanding the problems with section 657.01.

Section 715.1, for example, permits a judge to allow into evidence a videotaped statement of a victim or other witness who was under the age of 18 at the time of the offence. The video recording must be made within a reasonable time after the alleged offence and the victim or witness must, *while testifying*, adopt the contents of the video recording. The person on trial is then permitted to cross-examine the witness in the normal course.

Section 715.1 was challenged as an infringement to the right to a fair trial and right to face the accuser. It was also argued that the section contravened the principles underlying the hearsay rule (a complaint which could also be made about the proposed section 657.01). In *R. v. D.O.L.*,[32] the Supreme Court of Canada upheld the constitutionality of section 715.1, but only because of its narrow application and other procedural protections noticeably absent from section 657.01. The Court recognized that section 715.1 was supported by study showing that the quality and reliability of a child's testimony is enhanced in a smaller, more intimate environment outside of the courtroom. The Court also considered that video-recording shows how the witness was questioned during the interview. Above all, the Court placed emphasis on the requirement of cross-examination at trial:

> Reliability arises from the presence of the child at trial, the adoption under oath of her videotaped statements, the opportunity to observe the child in the videotape and in court and the accused's ability to cross-examine the child.

Unlike child sex assault victims (who are afforded fewer protections under section 715.1 than those proposed under section 657.01), police officers are not vulnerable witnesses subject to fear, shame or pressure. They are trained adults who understand that testifying is a typical part of their occupation. In fact, the pressure of a trial may actually encourage police witnesses to be more forthcoming. Unlike section 715.1, the procedure in proposed section 657.01 would actually diminish the court's ability to get at the truth.

Other procedural protections related to section 715.1 are also absent in proposed section 657.01. For example, there will be no contemporaneous video recording of the police witness creating the

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32 [1993] 4 S.C.R. 419.

affidavit under section 657.01. In *R. v. K.G.B.*,[33] Chief Justice Lamer explained the significance of a contemporaneous recording of a prior statement and its potential impact on the ability to assess the declarant's credibility and reliability:[34]

> Proponents of the orthodox rule emphasize the many verbal and non-verbal cues which triers of fact rely upon in order to assess credibility. When the witness is on the stand, the trier can observe the witness's reaction to questions, hesitation, degree of commitment to the statement being made, etc. Most importantly, and subsuming all of these factors, the trier can assess the relationship between the interviewer and the witness to observe the extent to which the testimony of the witness is the product of the investigator's questioning. Such subtle observations and cues cannot be gleaned from a transcript, read in court in counsel's monotone, where the atmosphere of the exchange is entirely lost.

Under section 657.01, the trier of fact (and the person accused) will not know much if anything about how the affidavit was created. The questions asked of the officer in preparation of the affidavit will be unknown, and the officer's reaction to the questions and demeanour in answering them will be lost.

In these ways, section 657.01 directly infringes the right to cross-examine and the right to a fair trial.[35] While section 657.01 allows for the possibility of cross-examination, it is not mandatory. The fact that the person on trial may have to reveal aspects of his or her defence to justify calling police witnesses may be a separate violation of the rights to remain silent and be presumed innocent. Indeed, requiring a justification for witnesses to be called at trial smacks of reversing the burden of proof and is otherwise inconsistent with basic principles underlying our system.[36]

Section 657.01 would also interfere with the truth-seeking function of the trial process. Both direct and cross-examination of police officers is vital to the trier of fact in assessing many issues at trial. Police officers are the witnesses most heavily relied on to collect evidence in criminal cases, particularly in cases without a readily discernible complainant (e.g. drug offences, administration of justice offences). Many trials could theoretically be run solely on paper if section 657.01 were enacted. This runs contrary to the goal of pursuing the truth.

The Supreme Court of Canada in *R. v. Darrach* commented on the value of cross-examination on affidavits: [37]

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33 [1993] 1 S.C.R. 740.

34 *R. v. K.G.B.*, [1993] 1 S.C.R. 740 at 767-768, 781, 787, 792-794.

35 *Ibid.* at 779.

36 *R. v. J.Z.S.*, 2008 BCCA 401 at paras. 36, 49, 55.

37 2000 SCC 46.

> *The Crown's right to cross-examine on the affidavit under s. 276 is essential to protect the fairness of the trial.* Cross-examination is required to enable the trial judge to decide relevance by assessing the affiant's credibility and the use to which he intends to put the evidence. (emphasis added)

Judges cannot assess the nuances, tone and demeanour of a witness through affidavits. More importantly, the absence of the witness deprives the court of information that could be revealed by cross-examination, a point highlighted by the Court in *Lyttle*:

> [1] …At times, there will be *no other way* to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> [2] That is why the right of an accused to cross-examine witnesses for the prosecution – without significant and unwarranted constraint – is an essential component of the right to make full answer and defence. [emphasis in original]

B. Section 657.01 – Unneeded, Unworkable and Likely to Cause Delays

The CBA Section is unaware of any statistics or studies that suggest the proposal in section 657.01 is required to alleviate delay, or that the introduction of "routine" evidence needs reform for some other reason. Truly routine police evidence is already admitted on a daily basis by way of admissions. Unrepresented people on trial or counsel who unreasonably refuse to make admissions are often dealt with swiftly by the courts, particularly considering *Jordan* and its commentary respecting counsel's duty to ensure trial efficiency. Indeed, we expect that litigation surrounding the use of section 657.01 would take up more court and preparation time than simply calling the routine witnesses to testify in the first place.

Other practical problems would arise if section 657.01 is enacted. If there is a dispute as to the accuracy of an affidavit, would the lawyer who drafted it (likely the prosecutor) then be subject to a subpoena? If the person on trial testifies and contradicts a police affidavit, is that a violation of the *Browne v. Dunn* rule? Will the Crown be able to call the police witness in rebuttal, despite have chosen to rely on section 657.01? How is a trier of fact to weigh the evidence of a police affidavit if it conflicts with *viva voce* evidence called by the defence? How will juries treat a police affidavit? These unresolved questions will lead to further delays and litigation.

In sum, section 657.01 will not address the problem of court delay. To the contrary, it will encourage fewer admissions and more pre-trial applications for disclosure and the right to cross-examine. We also expect the constitutionality of the proposal will attract serious scrutiny.

RECOMMENDATION:

4) The CBA recommends that section 657.01 (Clause 278) and all amendments related to it be omitted from Bill C-75.

VI. PRELIMINARY INQUIRIES

The CBA Section supports retaining preliminary inquiries. As lawyers who practice in Canada's criminal courts on a daily basis, we know the practical value they provide to the criminal justice system. We recently shared this experience with the Justice Minister.[38]

The proposal in Bill C-75 to restrict preliminary inquiries to offences with a maximum sentence of life imprisonment will not reduce court delays and will negatively impact the criminal justice system. Any connection between court delays and the preliminary inquiry is speculative at best.

More specifically, we offer the following points which militate against the proposal:

1) **Statistics show preliminary inquiries are not the problem:** recent research shows that only 25% of eligible cases opt for a preliminary inquiry; the proportion of cases with a preliminary inquiry does not exceed 5% of the overall caseload in any part of Canada; at most, 2% of all court appearances are used for preliminary inquiries; and the vast majority of preliminary inquiries take two days or less.[39]

2) **Unnecessary preliminary inquiries have already been significantly curtailed:** where it appears that a preliminary inquiry would lead to delay, several tools are available. The Crown can elect direct indictment or proceed based on witness statements and other documents (section 540 of the *Criminal Code*); the parties can be required to focus the hearing on relevant issues (sections 536.3–536.5); and, the judge can curtail cross-examination if abusive, repetitive or otherwise inappropriate (section 537(1.1)).

3) **Preliminary inquiries mitigate court delays:** examination of witnesses at a preliminary inquiry can avoid the need to call those witnesses later in a *voir dire* at trial.

   Preliminary inquiries also provide a valuable preview of the case for both Crown and defence counsel. Prosecutors can then eliminate weak cases and defence counsel can then encourage early and timely guilty pleas where warranted.[40]

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38 CBA Section letters to Justice Minister Jody Wilson-Raybould (Ottawa: CBA, March/April 2017).

39 Cheryl M. Webster and Howard H. Bebbington, "Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations" (2013) 55(4) Canadian Journal of Criminology and Criminal Justice 513 http://ow.ly/znQR309KTWW.

40 For example, a recent study of Legal Aid cases in Manitoba showed that between 2014 and 2016, only 96 out of 12,397 cases in the system elected to have a preliminary inquiry. In those 96 cases, 72 were disposed of after the preliminary inquiry, with only 23 continuing to a trial. That is nearly a 75% clearance rate for cases that included a preliminary inquiry.

4) **Eliminating the preliminary inquiry will not reduce stays of proceedings:** the *Jordan* time limits include the time needed to conduct a preliminary inquiry. Existing *Jordan* time limits would almost certainly be reduced to account for the elimination of preliminary inquiries. This may imperil cases that would have survived the two-stage analysis in *Jordan*.

Restricting preliminary inquiries to offences punishable by life imprisonment is arbitrary, as such offences often not do not result in a lengthy period of imprisonment. Offences punishable by life imprisonment include:

- trafficking cocaine;
- breaking and entering into a dwelling-house;
- robbery; and
- mischief which endangers life.

In contrast, people charged with offences carrying mandatory minimum sentences would not be entitled to a preliminary inquiry. For example, trafficking firearms and possessing child pornography carry significant mandatory minimum sentences and other serious collateral consequences, although the maximum sentence is not life imprisonment. Other serious offences would also be ineligible for a preliminary inquiry merely because the maximum sentence is not life imprisonment, including aggravated assault, terrorism-related offences, and criminal organization-related offences.

The Justice Minister has justified the proposed amendment, in part, as a way to shield vulnerable complainants from having to testify twice. But, the proposal would not assist complainants in cases of attempted murder, kidnapping, aggravated sexual assault with a firearm, and aggravated sexual assault of a person under 16, to name a few examples. In this way, Bill C-75 arbitrarily protects some complainants, but not others.

Without preliminary inquiries, trials will be derailed by last minute applications that could have been canvassed at a preliminary inquiry. Examples include third-party records applications, section 278.3 applications in sexual offence cases and section 276 applications. As a practical example, consider a complainant in a sexual assault case testifying during the trial to having gone for counselling or keeping a journal about the alleged offence – matters that were not canvassed in any prior police statement. This would prompt the defence to bring an application mid-trial for production of these items. For a jury case, especially, this would derail the trial, and may even result in a mistrial. Had there been a preliminary inquiry, these issues would have been resolved before trial, in the absence of the jury. This is just one example of how the preliminary inquiry contributes to the smooth functioning of the criminal justice system.

For these reasons, we oppose curtailing preliminary inquiries as proposed in Bill C-75. However, should the move to limit preliminary inquiries proceed, we suggest the following alternative. In addition to offences punishable by imprisonment for life, preliminary inquiries should also be available:

a) where both parties consent; or

b) where the court is satisfied that it is in the interests of justice to hold a preliminary inquiry, having regard to the following factors:

   i. the nature and seriousness of the charge(s), including the potential sentence arising from a conviction;

   ii. the age and vulnerability of any witnesses providing evidence at a preliminary inquiry;

   iii. the issues to be decided at the preliminary inquiry, including whether or not committal is in issue;

   iv. the length and complexity of the case;

   v. the length of the preliminary inquiry proposed and whether or not a preliminary inquiry would cause undue delay;

   vi. whether or not alternative mechanisms for receiving the evidence are available (for example, through use of a discovery hearing).

RECOMMENDATION:

5) The CBA Section recommends that eligibility for preliminary inquiries remain unchanged. In the alternative, if amended, preliminary inquiries should remain available where the parties consent, where a preliminary inquiry would be in the interests of justice having regard to a series of factors, and/or where the maximum penalty is life imprisonment.

VII. (RE)ELECTIONS

Bill C-75 proposes several changes to the (re)election procedures in the *Criminal Code*, many related to the proposal to limit preliminary inquiries. To address court delays, the CBA Section supports amending sections 473 and 561 to allow for more judge-alone trials without consent of the Crown.

Currently, to have a judge-alone trial in a case involving a charge of murder, the person on trial must obtain the consent of the Attorney General under section 473 of the *Criminal Code*. This is one of the few exceptions to the right to elect or re-elect the mode of trial on charges carrying five or more years' imprisonment (section 11(f) of the *Charter*).

Crown consent to judge-alone trials is exercised differently across the country, usually pursuant to local policy manuals. In British Columbia, for example, the general Crown practice is to consent to a

timely re-election, but this does not seem to be the practice in Ontario. There is an uneven playing field for accused people depending on where they happened to be charged.

Judge-alone murder cases are more efficient than jury trials on murder charges, which are among the lengthiest and most inefficient cases in the criminal justice system. Jury trials usually involve repeating testimony heard on *voir dires*, and additional motions to protect trial fairness (e.g. to exclude inflammatory evidence or evidence of the accused's discreditable conduct).

In 2015/2016, it took an *average* of 471 days to complete a murder case. This was a 16% increase over the previous year, even though 38% fewer murder cases were heard in 2015/2016. In British Columbia, where Crown consent to judge-alone trials is more common, the median time from first appearance to conclusion in Superior Court was less than 300 days, one of the lowest rates in the country.[41]

In the post-*Jordan* era, these statistics should have significant import when determining public policy. Any measure to streamline the process in superior courts ought to be seriously considered, particularly *where it does not compromise the rights of the person on trial*. Reforming sections 473 and 561 may accord with the "right" to waive a jury trial under section 11(f) of the *Charter*.[42]

In sum, reforming sections 473 and 561 would bring greater uniformity in the way murder cases are dealt with across the country, and promote efficiency in prosecuting these serious matters.

Similar considerations apply to whether Crown consent should be required for re-election of a trial before a provincial court judge after a preliminary inquiry. Removing the requirement for Crown consent would reduce the number of jury trials in superior courts, promoting efficiency in the prosecution of serious cases.

RECOMMENDATION:

6) The CBA Section recommends that sections 473 and 561 be amended to allow the person on trial to elect (or re-elect) to have a judge-alone trial in murder cases without the consent of the Attorney General.

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41 StatsCan, "Adult criminal court processing times, Canada, 2015/2016", http://www.statcan.gc.ca/pub/85-002-x/2018001/article/54900-eng.htm.

42 *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1313-1316.

VIII. VIDEO CONFERENCING AND TECHNOLOGY

Bill C-75 would increase the use of technology to facilitate remote attendance by any person in a proceeding through:

- changes to the wording of sections which already allow for the use of audioconferencing or videoconferencing; and
- adding Part XXII.01, entitled "Remote Attendance by Certain Persons", to allow an accused, participants and the Judge or Justice to appear by way of audioconference or videoconference.

We have two suggestions to improve the new Part XXII.01. First, the reasons requirement under sections 715.23(2), 715.25(3) and 715.26(2) should be removed. Second, the new Part should generally apply only to non-contentious hearings.

Sections 715.23(1), 715.25(2) and 715.26(1) list circumstances that shall be taken into account by decision-makers in determining when remote attendance is appropriate. As drafted, the Part requires a judge or justice to record reasons for denying a motion to appear electronically (sections 715.23(2), 715.25(3) and 715.26(2)). These sections appear to reverse the presumption of personal appearance (section 715.21), suggesting that remote attendance should be the norm, unless the judge or justice decides otherwise and records reasons to that effect. We recommend that the sections requiring reasons be removed (sections 715.23(2), 715.25(3) and 715.26(2)), to eliminate any contradiction or confusion.

In addition, Part XXII.01 does not distinguish between the appearances or parts of the proceeding that would be prioritized for remote attendance. In our view, remote appearances – and more generally Part XXII.01– should be favoured for non-contentious matters. Examples would include hearings that are *pro forma*, or deal with case management, arraignment, and/or the restitution of goods seized. These hearings are usually procedural and do not require the person on trial, judge or justice's physical presence. The CBA Section believes that for contentious hearings, the judge should assess all the circumstances to decide if witnesses can testify by videoconference, but the general principle should remain that the person on trial, judge and witness be present.

A. Technological Resources Need to Keep Pace with Law Reform

It is desirable, whenever possible, to facilitate the use of technology to promote access to justice, as long as the fair trial rights of the accused are properly safeguarded. However, many Canadian communities are not currently equipped for the type of remote appearances contemplated in Part

XXII.01. Many communities that stand to benefit most from remote appearances lack the infrastructure and technology to allow for such procedures. For instance, in Whitehorse, a new facility was built with only two meeting rooms in the entire facility. Access to broadband internet in Canada's northern communities is generally quite limited.[43] In some parts of the country, courts only sit on certain days and may not even have teleconference capabilities.

In its report, *Delaying Justice is Denying Justice*, the Senate Committee on Legal and Constitutional Affairs recommended that the "Minister of Justice ensure that resources are invested in technological solutions to the problems presented by small, scattered populations in remote and isolated communities."[44] The CBA Section echoes the Senate Committee's recommendation.

B. Telecommunications that Produce a Writing

Bill C-75 proposes reforms to embrace technology in the courtroom setting. A further suggestion to facilitate access to justice and reduce court delays would be to allow court appearances via email, or what the *Criminal Code* terms "telecommunications that produce writing".

Currently, many routine appearances require the attendance of the judge, lawyers and sometimes witnesses and other court staff. If lawyers were able to communicate directly with court staff and judges by telecommunications that produce writing (i.e. email), these routine appearances could be removed from the court docket. Designating counsel, setting a *pro forma* date, requesting or granting an adjournment and providing disclosure are examples of court appearances that could be conducted electronically, saving court time and resources. This proposal was first introduced by the CBA Section at the Senate Committee on Legal and Constitutional Affairs hearings on delays and was adopted by that Committee in its final report.[45]

RECOMMENDATIONS:

7) The CBA Section recommends that sections 715.23(2), 715.25(3) and 715.26(2) be amended to delete the requirement for reasons when denying an application for electronic appearances.

8) The CBA Section recommends that Part XXII.01 be limited to non-contentious hearings.

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43 www.theglobeandmail.com.

44 https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf.

45 CBA Criminal Justice Section, *Study on matters pertaining to delays in Canada's criminal justice system* (Ottawa: CBA, 2016).

9) The CBA Section recommends that the *Criminal Code* be amended to allow counsel to appear by way of email (or a "telecommunication that produces writing") for non-contentious hearings.

IX. OMNIBUS LEGISLATION

As noted in our introduction, Bill C-75 is omnibus legislation. Before turning to the aspects of Bill C-75 unconnected to court delays, we wish to comment about the general nature of this legislation.

The CBA Section has, like the current federal government, publicly criticized the practice of enacting criminal justice reform through omnibus legislation. The Prime Minister expressed his commitment to avoid such legislation in the 2015 Mandate Letter to the Leader of the House of Commons, which included the direction to:

> Change the House of Commons Standing Orders to end the improper use of omnibus bills and prorogation.

The CBA Section has frequently commented on this legislative practice. In 2011, commenting on Bill C-10, the so-called *Safer Communities Act*, we expressed our concerns this way:

> The CBA Section is of the view that bundling several critical and entirely distinct criminal justice initiatives into one omnibus Bill is inappropriate, and not in the spirit of Canada's democratic process…some of these initiatives have received no Parliamentary committee consideration to date, yet contain fundamental shifts in Canada's approach to criminal law and the treatment of offenders. Even without an arbitrary 100 day deadline for passage, it is unrealistic to expect that, as part of a huge legislative package, those unstudied proposals will receive the detailed and careful consideration that is appropriate when considering significant legislative change.[46]

We reiterate these general concerns. Bill C-75 introduces numerous important reforms to the criminal justice system, many of which are unrelated. Each of these areas should be subject to rigorous debate and study. The CBA Section discourages the use of omnibus legislation, as it has the effect of hindering informed and reasoned debate. Indeed, parties have been limited to 10-page written submissions on a Bill over 300 pages in length with changes to at least a dozen discrete aspects of the *Criminal Code*. It is difficult to have meaningful input with that limitation.

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46 CBA Submission responding to Bill C-10, *Safe Streets and Communities Act* (Ottawa: CBA, 2011) at 2.

X. PEREMPTORY CHALLENGES

Bill C-75 would change the jury selection process in four significant ways:

- abolish peremptory challenges;
- alter the challenge for cause process;
- allow judges to stand aside potential jurors in order to "maintain public confidence in the administration of justice"; and
- allow trials to continue by judge alone, with the consent of the parties, where the number of jurors is reduced below 10.

A. Abolishing Peremptory Challenges

Bill C-75 would eliminate the peremptory challenge process. Peremptory challenges give the person on trial and the Crown an equal opportunity to cause a certain number of prospective jurors to be excused. These challenges are "peremptory" in the sense that they are granted as of right and without obliging the challenging party to give a reason.

This proposal appears to respond directly to the controversy surrounding the verdict in *R. v. Stanley*, where Gerald Stanley, a white man, was acquitted of the second-degree murder of an Indigenous man, Colton Boushie. It was widely reported that Stanley used the peremptory challenge process to secure an "all-white" jury. In the immediate aftermath of the verdict, two ideas were frequently repeated: that Stanley should have been convicted; and a more ethnically diverse jury would have convicted him.

The presumption of innocence requires the Crown to prove a person on trial guilty beyond a reasonable doubt, based on admissible evidence. The law requires the jury to judge the case based solely on the evidence presented, rather than sympathies or prejudices toward the person on trial. Jurors take an oath to bind their conscience to this task. Assuming jurors are able to be true to this oath, the verdict should ideally be the same regardless of the jury's racial makeup.

The CBA Section recognizes the concern that peremptory challenges may be misused to discriminate against Indigenous people. However, proposed remedies must not themselves deprive Indigenous people of tools to obtain a representative jury.

The overrepresentation of Indigenous people in the criminal justice system is a fact.[47] If an Indigenous person in Canada is in the unenviable position of having to pick a jury, the process of the *voir dire* and challenge for cause may be insufficient to protect that person from potential bias. One goal of the

47 *R. v. Gladue,* [1999] 1 S.C.R. 688.

peremptory challenge is to eliminate jurors who a person on trial feels may have biases against him or her. Removing peremptory challenges will deprive Indigenous people and other vulnerable, marginalized groups of a valuable and well-used tool for mitigating the potential for a biased verdict.

In his 2013 study of the Ontario jury system[48], the Honourable Frank Iaccobucci recognized the problem of peremptory challenges being used to exclude Indigenous people from juries. Still, he did not recommend that peremptory challenges be abolished altogether, but simply that the *Criminal Code* be amended "to prevent the use of peremptory challenges to discriminate against First Nations people serving on juries". [49] The recommendation acknowledges that peremptory challenges, with certain adjustments, have a valuable function in the Canadian justice system.

Eliminating peremptory challenges for both Crown and defence will not necessarily result in more diverse juries. In many jurisdictions, jury rolls are populated by names from the Provincial Health Care databases. With universal health care, all residents' names are captured in that database. However, in Ontario, the rolls are populated using municipal enumeration lists. This is a smaller pool of potential jurors and eliminating peremptory challenges will not diversify the jury pool.

For these reasons, the CBA Section recommends further study to determine whether a change to the peremptory challenge system is needed, and if so, what form it should take.

B. Challenge for Cause Process

Bill C-75 would alter the challenge for cause process. Challenges for cause give both the Crown and the person on trial an opportunity to have a prospective juror excused for a pre-existing bias that could affect their ability to render a just verdict. A judge may order a challenge for cause to proceed when there is realistic potential for partiality based on a finding of widespread racial bias in the community where the offence took place.[50] Where this threshold is met, the judge asks pre-determined questions to prospective jurors to determine whether such a bias exists.

Currently, members of the jury panel are tasked to determine whether a prospective juror is qualified to serve. Bill C-75 would take the decision-making process from the jury panel and assign it to the trial judge.

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48 Report of the Independent Review conducted by The Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries* (Toronto: ON AG, February 2013) [*Iacobucci Report*].

49 *Ibid.* at para. 44.

50 *R v. Williams*, [1998] S.C.J. No. 49.

The rationale for this proposal is unclear. Most judges in Canada remain white people of higher socio-economic standing and the amendment would make it less likely that the challenge for cause will be decided by an Indigenous or racialized person, or someone with limited financial means. This seems contrary to the concerns behind the public outcry arising from the *Stanley* verdict.

C. Public Confidence in the Administration of Justice

Currently, apart from the challenge procedures in the *Criminal Code*, the presiding judge may direct a prospective juror to be stood aside "for reasons of personal hardship or any other reasonable cause". Under Bill C-75, this would be expanded to include "maintaining public confidence in the administration of justice". This is a broad and vague power and there is no provision for the Crown or accused to participate by asking questions or making submissions. There is also no guidance on what specific process a trial judge should follow in making this determination. In essence, it appears that judges would be invited to engage in their own peremptory challenge processes.

If the government wishes to take peremptory challenges away from the parties, it seems inappropriate to then confer that right on trial judges. If the goal is to expand judges' powers to excuse jurors, for example, to ensure a jury is more diverse, that should be clearly stated in the legislation. If this proposal is enacted, we recommend that a judge should give reasons for standing aside a particular juror and afford counsel a right to make submissions. Otherwise, we expect that successful appeals will result from the exercise (or non-exercise) of this discretion by the trial judge.

D. Fewer than Ten Jurors

Currently, when the number of jurors drops below ten during a jury trial, a mistrial is declared, regardless of the wishes of the parties and the length or stage of the proceeding. Bill C-75 would allow the trial to continue as a judge-alone trial if both parties consent. In multi-month trials, juror attrition is common. This amendment is a sensible alternative that would increase the efficiency of the trial process without abrogating the constitutional right to a jury trial.

E. Conclusion Regarding Amendments to the Jury Process

Bill C-75 was introduced less than two months after the *Stanley* verdict. Some of the amendments in the Bill, especially the abolishing of peremptory challenges, seem insufficiently considered and hurried responses based on the perceived facts of the *Stanley* case.

The jury process is at the heart of the Canadian criminal justice system. Legislative reform may well be required, but should be based on empirical data generated by a thorough examination of the jury

system. This government was elected on the promise of adhering to evidence-based decision-making.[51] Before making significant amendments, we suggest the government should live up to that promise and put the jury system through a comprehensive examination.

There is precedent for this process. In 1980, the Law Reform Commission of Canada produced Working Paper No. 27, "*The Jury in Criminal Trials*"[52] where it "reviewed the law with respect to most aspects of jury trials, explained the policy underlying the present law, set out alternative proposals, outlined the commission's provisional views for reform of the law in most areas relating to jury trials and invited comments."[53]

The *Stanley* verdict has sparked an important conversation, but the conversation should not end with a knee-jerk legislative response. Instead, it should signal the beginning of a detailed examination of how best to improve Canada's jury system. The CBA Section recommends that the government undertake further study of this matter before making any major legislative amendments.

RECOMMENDATION:

10) The CBA Section recommends that there be further study of how best to improve Canada's jury system before any major legislative amendments in this area.

XI. RECLASSIFICATION OF OFFENCES

Bill C-75 proposes amendments which would:

- convert certain "straight indictable" offences into hybrid offences;
- lengthen the limitation period for laying summary charges to twelve months; and
- increase the maximum penalty for most summary conviction offences to two years less a day under section 787 of the *Criminal Code*.

The CBA Section supports the hybridization of offences and the lengthened limitation period for summary conviction charges. These amendments would afford Crown counsel greater discretion in how to proceed with less serious prosecutions. However, more cases will likely be heard in provincial

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51 http://www.cbc.ca/news/politics/wherry-liberals-data-1.4079609.

52 Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980).

53 Law Reform Commission of Canada, *Report 16: The Jury* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1982).

court, the level of court where almost all criminal cases are tried. This may result in further delays, unless more judges and court resources are allocated to accommodate the increase in summary cases.

The CBA Section generally supports standardizing the maximum sentence for summary conviction offences. However, we see two unintended results that could flow from increasing the maximum sentence to two years less a day.

A. Access to Justice and Section 802.1

Increasing the maximum sentence for summary convictions would likely have an adverse impact on access to justice. Currently, under section 802.1 of the *Criminal Code*, agents may not examine or cross-examine witnesses on behalf of a person where that person is liable to a term of imprisonment of *more than six months* (unless authorized to do so by a provincial program approved by the lieutenant governor in council). In practice, agents including students doing *pro bono* work with legal clinics cannot represent people charged with summary conviction offences that carry a maximum sentence of more than six months. These so-called "super summary offences" typically carry a maximum term of 18 months imprisonment (e.g. breach of probation under section 733.1).

By creating a maximum term of two years less a day for summary offences, Bill C-75 would hinder many people from getting help from law school clinics and other organizations that offer *pro bono* legal services.[54] Many people are already disqualified under legal aid programs because they make a modest income or minimum wage (e.g. in British Columbia, people who make more than about $22,000 in gross annual income are disqualified from legal aid).

The proposed reform of section 787 would negatively affect the working poor in their ability to obtain legal assistance. This was undoubtedly not the government's intent in standardizing the maximum term of imprisonment for summary conviction offences, and could be remedied by amending section 802.1 to reflect the new maximum term for summary offences.

B. Inflationary Sentences

Increasing the maximum term of imprisonment for summary convictions may also create an "inflationary ceiling" on sentences. This is analogous to the "inflationary floor" effect of mandatory minimum sentences, which courts have been cautious to adopt in the past.[55]

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54 For example, see Jacques Gallant, "How the underfunding of legal aid is clogging up the justice system" July 9, 2018 *Toronto Star*.

55 *R. v. Lloyd*, 2014 BCCA 224 at paras. 48-58.

Sentencing case law for summary conviction offences has been based on the maximum sentences currently available. With a sudden significant increase in the possible sentence – for example, from six months to two years less a day for assault – we see a risk that sentences will begin to inflate over time, even though this may not be Parliament's intent. This trend would be inconsistent with the Supreme Court of Canada decision in *R. v. Solowan*, which discouraged "scaling up" and "scaling down" sentences on the basis of the Crown's election.[56]

To ensure that the intent of standardizing the maximum sentence for summary offences is clearly communicated to the courts, the CBA Section recommends a "for greater certainty" clause be added to section 787. This could clarify that the increase in the maximum sentence for summary conviction offences does not mean that these matters are to be treated more punitively going forward.

RECOMMENDATIONS:

11) The CBA Section recommends that section 802.1 be amended to reflect the new maximum sentence for summary conviction offences.

12) The CBA Section recommends the enactment of a "for greater certainty" clause to ensure that the standardization of summary sentences does not create an "increased ceiling" effect.

XII. INTIMATE PARTNER VIOLENCE

Bill C-75 incorporates the concept of "intimate partner" into the *Criminal Code*, and proposes changes to the bail and sentencing phases of cases involving domestic violence.

A. Intimate Partner

Bill C-75 adds the definition of intimate partner to section 2 of the *Criminal Code*. The CBA Section believes this will aid in clarifying:

- the jurisdiction of specialized domestic violence courts throughout the country, ensuring uniformity in the prosecution of these offences; and
- that an intimate partner includes a former spouse or common law partner, which will ensure uniform application of the law to all spouses, current and former.

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56 2008 SCC 62.

However, the CBA Section is concerned about including "dating partner" in the definition of "intimate partner", given the vagueness of the term. Unlike spouse or common-law partner, "dating partner" does not have a legal definition and does not necessarily mean an intimate partner. On the other hand, the French definition "partenaire amoureux" does imply an intimate partner. Even if the French definition were to prevail, it is unclear whether one intimate encounter would make someone a dating partner, or whether more would be required.

An offence committed against a common-law partner or spouse is aggravated because it represents a breach of trust. Not all dating relationships involve a relationship of trust, particularly where they are short or sporadic in duration. Given the significant bail and sentencing changes proposed in Bill C-75 for intimate partner violence, the term "intimate partner" must be limited to those individuals who by virtue of their relationship with the accused were in a vulnerable position). Including "dating partner" could cause delays at both the bail and trial stages, while that term is litigated. Litigation will cause inconsistent application of the law for some time until appellate courts interpret the term.

We recommend that "dating partner" be omitted from the definition of intimate partner.

B. Bail Amendments

Bill C-75 proposes that a judge must consider two factors in determining whether release should be ordered, as well as the terms of the release:

> (3) In making an order under this section, the justice shall consider any relevant factors, including,
>
> (a) whether the accused is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner; or
>
> (b) whether the accused has been previously convicted of a criminal offence.

These factors are rationally connected to the secondary ground enunciated in section 515(10), and we support their inclusion. Despite the criminal charge and its potentially aggravated nature, intimate partners may still need ongoing contact during the criminal matter. For example, the partners may have children or may need to discuss financial issues. Judges must fashion releases that address any need for ongoing contact between the parties, while ensuring the safety of the complainant.

Similarly, the criminal record of a person on trial is rationally connected to determining whether or not that person will commit further offences if released. Even those convicted of multiple offences in the past are presumed innocent, but a criminal record, especially for an offence related to the current charge, is probative to the secondary ground.

Bill C-75 also proposes that, where a person in a domestic violence case has been convicted of a previous domestic violence offence, there will be a reverse onus when seeking release from custody. The CBA Section does not support the reverse onus for the following reasons:

1. It is unnecessary from a practical perspective. The amended section 515(3) already requires a justice to specifically consider the same factors. Weighing these factors will likely result in the same outcome regardless of who bears the onus. For example, if the prior convictions are quite dated, then even with a reverse onus, the detainee would likely be released. On the other hand, a recent conviction for a similar offence, or against the same complainant, would likely result in a detention order, even if the Crown bore the onus.

2. A reverse onus in the intimate partner context would likely be subject to serious constitutional scrutiny. It is true that reverse onus provisions have been constitutionally upheld in other contexts including drug trafficking offences: see *R. v. Pearson*[57] and *R. v. Morales*.[58] However, those provisions were upheld on the basis of unique features of those offences, which do not apply in the intimate partner violence context.

   For example, trafficking in narcotics is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. This justification for the reverse onus at issue in trafficking cases arguably does not apply in domestic violence cases.

3. The creation of a new reverse onus provision runs contrary to other amendments in Bill C-75 aimed at encouraging the release of those presumed innocent, particularly those historically at a disadvantage in obtaining their release. Given the great increase of people detained in pre-trial custody, the CBA Section discourages the use of reverse onus provisions generally, in part, because of their disproportionate effect on Indigenous accused.[59]

C. Offence of 'Choking'

Bill C-75 would change sections 267 and 272 to deem any choking during an assault or sexual assault to constitute a separate offence, whether or not bodily harm was established by the evidence. The CBA Section opposes this amendment for the following reasons:

- The aggravating feature of choking or strangling a victim can already be addressed by prosecution under section 246, the offence of choking someone with the intent to commit an indictable offence.

- Where choking causes bodily harm, it is already captured under the existing versions of sections 267 and 272.

- The effect of choking on the complainant already can be taken into account as an aggravating factor on sentencing.

- Deeming all choking, whether it was a transient or trifling, as akin to causing bodily harm could be considered overbroad and in violation of section 7 of the *Charter*.

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57 [1992] 3 S.C.R. 665.

58 [1992] 3 S.C.R. 711.

59 2014 Canadian Civil Liberties Association, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention;* 2013 John Howard Society of Ontario, *Reasonable Bail?*

D. Abuse of an Intimate Partner as an Aggravating Feature on Sentencing

Bill C-75 would add abuse of an intimate partner as an aggravating feature on sentencing. Currently section 718.2(a)(ii) only deems an assault of a current spouse or common law partner as an aggravating feature on sentence. The CBA Section supports extending that rationale to former spouses as contemplated in the definition of intimate partner, recognizing that the same dynamic can exist after a couple breaks up. For the reasons outlined earlier, however, we suggest not extending this principle to dating partners.

E. Creating a "Supermax" Penalty

Bill C-75 would amend section 718.3 to create an escalating system of maximum sentences for accused persons convicted of multiple offences against intimate partners. Such regimes are sometimes referred to as "supermax" penalties.

The CBA Section does not support the amendments to create supermax sentences. Evidence indicates that Canada already over-incarcerates its citizens, in particular, vulnerable people, Indigenous people and racial minorities.[60] Without evidence that the current maximum sentences are insufficient to separate offenders from society when required, we believe that supermax sentences would be crushing sentences for these same populations. Multiple convictions are already considered aggravating, particularly when they relate to the same offence or type of offence. The fact that the offence occurred in the context of a domestic relationship is a codified aggravating factor on sentence. In other words, the aggravated nature of multiple domestic violence convictions is already addressed and there is no need to create a supermax regime.

RECOMMENDATIONS:

13) The CBA Section recommends that the term "intimate partner" should not include "dating partner" or "partenaire amoureux".

14) The CBA Section recommends that the proposed reverse onus in section 515(6)(b.1) be deleted from Bill C-75.

15) The CBA Section recommends that clauses 95, 99 and 297 ("choking" and "supermax" penalties) be deleted from Bill C-75.

60 Adult correctional statistics in Canada, 2015/2016

XIII. VICTIM FINE SURCHARGE

The CBA Section supports victim surcharges, money collected through sentencing for *Criminal Code* and *Controlled Drug and Substance Act* offences. These funds can support programs to assist victims of crime, for example, by providing counseling services or aiding in understanding the justice system and the court process.

Following Bill C-37 amendments in 2013,[61] section 737 of the *Criminal Code* requires sentencing judges to impose a 30% victim surcharge in addition to any fine imposed. This surcharge may be increased if the judge considers it appropriate and the offender is able to pay more. In cases where no fine is ordered, a sentencing judge must impose a $100 surcharge for summary conviction matters and $200 for indictable matters.

In addition to doubling the surcharge, Bill C-37 removed judges' discretion to exempt offenders from the surcharge where it would impose hardship. Victim surcharges can no longer be waived even if a fine would cause undue hardship to the offender or the offender's dependents. Failing to pay the surcharge can result in penalties such as licence suspension, in addition to imprisonment.

As was widely predicted,[62] this change resulted in serious hardship for many offenders and their families. It also led to unusual results. Some judges imposed nominal fines on top of other penalties (for example a one dollar fine so the victim fine surcharge was, at 30% of the fine, 30 cents) or granted extended periods to pay.

Bill C-75 would reinstate judicial discretion so, in cases where it would cause undue hardship to an offender, a judge may exempt the offender from paying the fine. It is essential to a fair justice system that judges are able to use their discretion to consider all the individual circumstances, including the offender's ability to pay a fine.

We support this aspect of Bill C-75. It would restore compliance with fundamental principles of sentencing by allowing judges to tailor penalties to individual offenders and offences. People experiencing poverty, mental illness or cognitive disabilities are often unable to pay even a modest sum and have suffered disproportionately because of Bill C-37.

The Bill would also require the imposition of the victim fine surcharge for each offence, except "for certain administration of justice offences if the total amount of surcharges imposed on an offender for

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61 Bill C-37, *Increasing Offenders' Accountability for Victims Act*.

62 As one example, see submission of CBA Criminal Justice Section on Bill C-37 (Ottawa: CBA, 2013).

these types of offences would be disproportionate in the circumstances" (737 (1.1)).[63] If the total amount of surcharges is disproportionate to the offender's ability to pay, exemptions should be available without regard to the nature of the offence. For example, if multiple summary conviction offences for mischief were added to three indictable offences for theft over, a surcharge of about $1000 could be owing. The judge should be able to waive all or some of the surcharge if that achieves a fair result in the circumstances.

Finally, some regions have programs to allow offenders to work off any fines. This option should be more uniformly available in all regions.

XIV. HUMAN TRAFFICKING

Bill C-75 would make some changes to the offence of human trafficking first proposed in Bill C-452,[64] creating a rebuttable presumption against the person on trial and requiring any sentence to be served consecutively.

Currently, to establish the offence of human trafficking, the Crown must, among other things, prove two main elements beyond a reasonable doubt:

1. that the person on trial recruited, transported, transferred, received, held, concealed or harboured a person, *or* exercised control, direction or influence over the movements of a person; *and*
2. for the purpose of exploiting that person *or* facilitating their exploitation.

The offence is committed where the accused exercises control over another person *for the purpose* of exploitation.[65] No consent is valid in these circumstances (see, sections 279.01(2) and 279.011(2)).

Bill C-75 would amend section 279.01 to create a rebuttable presumption of guilt against any person who lives with or is habitually in the company of a person who is exploited, but who is not themselves exploited. This presumption tracks the language of the presumption related to living off of the avails of prostitution under former section 212(3) of the *Criminal Code*.[66] The Crown would only need to

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63 From the Summary to Bill C-28, at (b).

64 See Bill C-452.

65 Exploitation is defined in section 279.04 as causing a person to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the person to believe that their safety or the safety of a person known to them would be threatened if they fail to provide, or offer to provide, the labour or service.

66 This offence was recently found to be unconstitutional in *Canada (Attorney General) v. Bedford*, 2013 SCC 72. The presumption in section 212 (formerly section 195) had been previously upheld by the Supreme Court of Canada in *R. v. Downey* (1992), 72 C.C.C. (3d) 1. Critically, however, the wording of section 212 did not create a presumption of control or exploitation by merely living with or

prove that the alleged victim was exploited by someone, and that the person on trial lived with, or was habitually in the company of the victim. In other words, the Crown would *not* have to prove that the accused *actually* exercised control, direction or influence over the movements of the alleged victim for the purpose of exploiting them or facilitating their exploitation. The person on trial would be required to provide evidence that there was no exercise of control, direction or influence over the movements of the alleged victim, or that any exercise of control was not for the purpose of exploiting the victim or facilitating the victim's exploitation.

The CBA Section believes that this proposal reintroduced in Bill C-75 should not be adopted, for the reasons given in our submissions on Bill C-452 in December 2014.[67] The proposed presumption does *not* require proof that the person on trial intended to participate in the victim's exploitation, or had any knowledge of the exploitation. Further, the presumption applies even if that person had no involvement in the actual exploitation of the victim. Given the serious nature of this offence and the penalties and stigma associated with it, the presumption would likely be found unconstitutional as an infringement of the right to be presumed innocent under section 11(d) of the *Charter*. The presumption is unlikely to be saved under section 1 of the *Charter*, as it would criminalize people other than those who exploit the vulnerable.

RECOMMENDATION:

16) The CBA Section recommends that clause 389 (enacting of the rebuttable presumption in human trafficking cases) be deleted from Bill C-75.

XV. YOUTH CRIMINAL JUSTICE ACT

Amendments to the *Youth Criminal Justice Act* (YCJA) are in clauses 364 – 386 of Bill C-75. Most of the proposed amendments would help ensure that the YCJA is internally consistent, direct decision makers to ensure that its principles are upheld, and respond to Canada's international obligations under the United Nations *Convention on the Rights of the Child* and the United Nations *Minimum Standards for the Administration of Juvenile Justice*.

habitually being in the company of a sex trade worker. The presumption merely related to the more logical deduction that if one lives with a sex trade worker, they are likely living off of the avails of that individual's work. Conversely, Bill C-75 proposes a presumption of exploitation *and* control by virtue of merely living with or habitually being in the company of someone who is exploited.

67 Bill C-452 (Ottawa: CBA, 2014).

The amendments appear to be focused on unburdening the criminal justice system by eliminating administration of justice offences (sections 4.1 and 24.1). The proposals would direct police and prosecution agencies toward Extra Judicial Sanctions (EJS) for failures to comply, except failures causing harm or risk of harm to the public. There are also proposed restrictions on imposing conditions of release and probation, including an expansion of the principle *not* to use custody to address social issues. We support these amendments.

There are "housekeeping" amendments to make the YCJA consistent with the proposed *Criminal Code* amendments in the Bill, limiting pretrial detention for administration of justice offences. Other amendments would remove the requirement that Attorneys General consider adult sentences, and would repeal the section permitting publication of certain young offenders' names. We support these amendments as well.

A. Youth Records

Bill C-75 would strengthen and clarify rules for the disposal and destruction of youth records. Currently, there does not seem to be any explicit direction to police agencies to destroy youth records or not use them.

The records provisions in Part 6 of the YCJA are dense and complex. While there are clear limitations on access periods under section 119(2), and some requirements for destruction, disparity exists in the practices of record-holders, especially police. There are many instances of youth records being disclosed long after they should have been destroyed or archived. This results in negative consequences for young people, including those who have rehabilitated and reintegrated into society.

To rectify this, the government should consider amending section 128 to require the destruction of all records kept pursuant to sections 114-116 once their access periods have expired.

RECOMMENDATION:

17) The CBA Section recommends amending the YCJA to better ensure that youth records are not disclosed after their access periods have expired.

XVI. CONCLUSION

The CBA Section appreciates the opportunity to comment on Bill C-75. While we support aspects of this omnibus criminal justice legislation, we consider other parts likely to attract constitutional

scrutiny, as they are not grounded in evidence and are apt to contribute to, rather than alleviate, court delays.

More work remains to be done to ensure our system becomes efficient and fair to all participants. The CBA Section notes the conspicuous absence of any meaningful reform to sentencing laws, particularly mandatory minimum sentences and the unavailability of Conditional Sentence Orders. We look forward to proposals addressing these important issues. They have a significant impact on the effectiveness of the criminal justice system, and to ignore them is a disservice to all Canadians.

SUMMARY OF RECOMMENDATIONS:

1. **The CBA Section recommends clarifying the language of section 523.1(3) to ensure that breaches unrelated to the victim are not disqualified from proceeding to a judicial referral hearing.**
2. **The CBA Section recommends that Crown counsel policy manuals be amended to encourage the use of judicial referral hearings under section 523.1.**
3. **The CBA Section recommends amending section 523.1(3) to remove the disqualification due to "emotional harm," "economic loss," and "property damage".**
4. **The CBA Section recommends that section 657.01 and all amendments related to it be omitted from Bill C-75.**
5. **The CBA Section recommends that eligibility for preliminary inquiries remain unchanged. In the alternative, if amended, preliminary inquiries should remain available where the parties consent, where a preliminary inquiry would be in the interests of justice having regard to a series of factors, and/or where the maximum penalty is life imprisonment.**
6. **The CBA Section recommends that sections 473 and 561 be amended to allow the person on trial to elect (or re-elect) to have a judge-alone trial in murder cases without the consent of the Attorney General.**
7. **The CBA Section recommends that sections 715.23(2), 715.25(3) and 715.26(2) be amended to delete the requirement for reasons when denying an application for electronic appearances.**
8. **The CBA Section recommends that Part XXII.01 be limited to non-contentious hearings.**
9. **The CBA Section recommends that the *Criminal Code* be amended to allow counsel to appear by way of email (or a "telecommunication that produces writing") for non-contentious hearings.**
10. **The CBA Section recommends that there be further study of how best to improve Canada's jury system before any major legislative amendments in this area.**
11. **The CBA Section recommends that section 802.1 be amended to reflect the new maximum sentence for summary conviction offences.**

12. **The CBA Section recommends the enactment of a "for greater certainty" clause to ensure that the standardization of summary sentences does not create an "increased ceiling" effect.**

13. **The CBA Section recommends that the term "intimate partner" should not include "dating partner" or "partenaire amoureux".**

14. **The CBA Section recommends that the proposed reverse onus in section 515(6)(b.1) be deleted from Bill C-75.**

15. **The CBA Section recommends that clauses 95, 99 and 297 ("choking" and "supermax" penalties) be deleted from Bill C-75.**

16. **The CBA Section recommends that clause 389 (enacting of the rebuttable presumption in human trafficking cases) be deleted from Bill C-75.**

17. **The CBA Section recommends amending the YCJA to better ensure that youth records are not disclosed after their access periods have expired.**