

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Re: 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*

From: Association for Canadian Clinical Legal Education (ACCLE)

Date: April 29, 2019

Introduction

The Association for Canadian Clinical Legal Education (ACCLE) respectfully submits feedback 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*.¹ ACCLE is concerned with several aspects of the proposed Bill C-75. We have divided these concerns into two primary categories; impacts on legal clinics and clinical law students and impacts on clients.

Impacts on Clinical Law Students

There are approximately ten law schools across Canada that have legal clinics representing clients in summary conviction criminal matters. Students are always closely supervised by licensed lawyers in each jurisdiction. In these clinics, clients are able to access law student representation if they are financially eligible and if they do not otherwise qualify for a lawyer under a legal aid scheme.

Under the proposed amendments, ss. 787(1) and 787(2) increase the maximum penalty for individuals convicted of an offence punishable on summary conviction. This results in law students no longer being able to represent these individuals because of language in section 802.1 of the *Criminal Code of Canada*.

The proposed language is as follows:

787 (1) Unless otherwise provided by law, every person who is convicted of an offence punishable on summary conviction is liable to a fine of not more than \$5,000 or to a term of imprisonment of not more than two years less a day or to both.

Imprisonment in default if not otherwise specified

(2) If the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a term of not more than two years less a day.

Limitation of the use of agents (from the current Criminal Code of Canada)

802.1 Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

¹ 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*, 1st Sess, 42nd Parl, 2018, online: <<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading>>.

As it stands, Bill C-75 will prevent students in clinical law programs from acting as agents for their clients in criminal proceedings, if the provinces do not have legislation or Orders in Council specifically allowing students to appear. The rationale for this change is not clear. There is only one House-approved change to s. 802.1 allowing students to appear only on adjournments. This will have very little impact. ACCLE suggests amendments allowing full clinic student representation under the supervision of a lawyer.

For decades, law students at legal clinics across Canada have been assisting accused persons who cannot afford to pay a lawyer or who are not eligible for legally aided lawyers. Many legal clinic programs in Canada were initiated by law students, eager to assist marginalized people navigating legal processes. Since the late 1960's, law schools have provided opportunities for law students to work at legal clinics, including representing accused persons in criminal matters. In fact, law student clinics have become a foundational aspect of increasing access to representation for marginalized accused.² Law school clinics provide quality services to marginalized people, foster and enhance legal education for law students, enhance commitments to access to justice, and prepare students for the practice of law.³ It is not at all clear what interest Parliament is responding to by eradicating this important component of access to representation for clients facing criminal charges.

Impacts on Clients

ACCLE is also concerned with several aspects of the Bill that have the potential to impact the availability of legal representation for people with low income. We summarise these below.

Charter Rights

Precluding law student representation in the proposed Bill implicates fair trial rights and could potentially violate ss.7, 11(d), and 15 of the *Charter*. Although the caselaw on the parameters of an accused's rights to state funded counsel are relatively well settled, the common underlying thread of these decisions is the availability of state funded representation for accused people.⁴

If Parliament makes sweeping changes precluding law students from representing low income clients, this combined with the evisceration of many legal aid programs across Canada⁵, may

² Frederick Zemans, "Legal Aid and Legal Advice in Canada: An Overview of the Last Decade in Quebec, Saskatchewan and Ontario" (1978) 16:3 Osgoode Hall LJ 663 at 664.

³ See for example: Sarah Buhler, "The View From Here: Access to Justice and Community Legal Clinics" (2012) 63 UNB LJ 436; Lenny Abramowicz, "The Critical Characteristics of Community Legal Aid Clinics in Ontario (2004) 19 JL & Social Pol'y 70; Sarah Buhler, Sarah Marsden & Gemma Smyth, *Clinical Law: Practice, Theory, and Social Justice Advocacy* (Emond Publishing: Canada, 2015); Stephen Wizner & Jane Aiken, "Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice" (2004) 73:3 Fordham L Rev 997; Ann Juergens, "Teach Your Students Well: Valuing Clients in the Law School Clinic" (1993) 2:2 Cornell JL & Pub Pol'y 339; Colleen F. Shanahan et al, "Measuring Law School Clinics" (2018) 92:3 Tulane L Rev 547.

⁴ *R v Rowbotham*, 1988 CanLII 147 at para 156.

⁵ For example, legal aid funding has experienced serious cuts and is plagued with under-funding in many provinces including: Ontario: Laura Howells, "Legal Aid Ontario Facing \$26M deficit, scaling back services for criminal

mean that constitutional arguments regarding state funded counsel can be reinvigorated (ss.7 and 11(d) having regard to s.15 in terms of disproportionate impact on particular groups). Insufficient attention has been paid to the interpretation of *Charter* rights with respect to those who will be most disproportionately impacted, particularly Indigenous persons and other marginalized populations.⁶

Delay and Guilty Pleas

Delays and Self-Represented Litigants

Curtailling law student representation will also result in further court delays and further burdens on the provincial courts by increasing the number of self-represented litigants. The Right Honourable Beverly McLachlin noted that “self-represented litigants... impose a burden on courts and work their own special forms of injustice”.⁷

These impacts are particularly egregious for already marginalized populations in Canada. For example, a 2017 study, “Guilty Pleas Among Indigenous People in Canada”,⁸ demonstrated that Indigenous accused disproportionately plead guilty when charged with an offence. The authors conclude that aspects of the criminal justice system incentivize guilty pleas, including the lack of access to affordable representation, the denial of bail, and the nature of bail conditions. Combined with the impacts of colonialism, this will have disproportionately negative impacts on Indigenous peoples.⁹

Greater Numbers of Summary Offences

Bill C-75 also hybridizes most indictable offences. Expanding the scope of hybrid offences in the *Criminal Code* combined with raising the maximum penalty for summary conviction offences, means that Crown Attorneys will be able to elect to proceed by summary conviction for a greater number of what are currently thought of as more serious offences. This means that more criminal cases can potentially be heard in the provincial courts of justice. Many provincial courts are already experiencing crisis levels of cases passing through this level of court. Court decisions have

matters” (18 December 2016), online: <<http://www.cbc.ca/news/canada/toronto/legal-aid-ontario-certificates-1.3902058>>; British Columbia: Clare Hennig, “Legal aid funding in BC budget doesn’t cover demand for services, CBA says (21 February 2018), online: <<http://www.cbc.ca/news/canada/british-columbia/2018-budget-falls-short-on-legal-aid-1.4545805>>; Alberta: Lauren Krugel, “Alberta defence lawyers demand boost to Legal Aid funding” (17 April 2018), online: <<https://www.theglobeandmail.com/canada/alberta/article-calgary-defence-lawyers-group-demands-boost-to-legal-aid-funding/>>.

⁶ See *R v Golden*, 2001 SCC 83 at para 83. Also see: David M. Tanovich, “Ignoring the *Golden Principle* of Charter Interpretation” (2008) Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference 42, online: <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1160&context=sclr>>.

⁷ The Right Honourable Beverly McLachlin, “The Challenges We Face” (July 2008) 4.2 The High Court Quarterly Review 33 at page 35.

⁸ Angela Bressan & Kyle Coady, “Guilty pleas among Indigenous people in Canada” (Department of Justice, 2017), online: <http://publications.gc.ca/collections/collection_2018/jus/J4-62-2017-eng.pdf>.

⁹ *Ibid* at 10.

also recognized the realities of provincial courts as being busy and overburdened.¹⁰ The rationale that more cases being heard in provincial courts will alleviate an overburdened criminal justice system simply does not accord with the realities of the lower courts.¹¹ For example, a recent Statistics Canada report indicates that 99.6% of criminal cases in Canada are heard in the provincial courts while 0.4% are heard in the Superior Courts.¹² Given these statistics, the logic that providing more options for proceeding in the provincial courts will reduce overall court delays is very difficult to understand.

Race, Indigeneity, and Bill C-75

Bill C-75 has the potential to exacerbate existing problems for racialized and Indigenous communities in Canada. Racialized (especially Black) and Indigenous people, women (especially young, racialized and Indigenous women and girls), people with lower rates of education and income, people with addictions, people with mental health challenges, and people with a history of sexual abuse all are disproportionately represented in Canada's prisons.¹³ We are also concerned that the Bill will further exacerbate the number of women, especially racialized and Indigenous women, facing carceral sanctions.¹⁴

Although Bill C-75 proposes to enact provisions that specifically call for restraint in judicial interim release decisions¹⁵, the amendments are not responsive to the current bail crisis which disproportionately impacts Indigenous and racialized people. The proposed changes leave police and judicial discretion intact while adding procedural complexity with the inclusion of the possibility of referral hearing¹⁶ at the bail stage. Less access to student representation may lead to less access to challenging unfair bail terms imposed by police¹⁷ and increased guilty pleas to administrative breach charges. Increased police and judicial discretion have not historically lead to a decrease in the over-representation of Indigenous people in custody; quite the opposite. Since the 1972 reforms to the *Criminal Code*,¹⁸ which broadened police discretion to release accused persons on bail and attempted to minimize cash bails, over-incarceration rates of

¹⁰ See for example *R v J(S)*, 2018 ONCA 489 at para 59 where Justice Fairburn noted the "...reality of extremely busy provincial courts, handling the vast majority of criminal matters".

¹¹ Obtained from: Ontario Courts, *Offence Based Statistics* (Ontario Courts, 2018), online: <<http://www.ontariocourts.ca/ocj/files/stats/crim/2018/2018-Offence-Based-Criminal.pdf>>. Ontario Courts, "The Superior Court of Justice: Realizing Our Vision, Report for 2015 and 2016" (Ontario Courts, 2016) at 643, online: <<http://www.ontariocourts.ca/scj/files/annualreport/2015-2016.pdf>>.

¹² Statistics Canada, "Adult criminal court statistics in Canada, 2014/2015, Catalogue No 85-002-X" (Ottawa: Statistics Canada, 2017), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14699-eng.htm>>.

¹³ The most recent data coming from the 2015/2016 Statistics Canada: Jamil Malakieh, "Youth Correctional Statistics in Canada, 2015/2016" *Juristat* (1 March 2017), online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14702-eng.pdf>>; Department of Canada, "Youth Criminal Justice in Canada: A compendium of Statistics" (2016), online: <http://publications.gc.ca/collections/collection_2018/jus/J4-58-2016-eng.pdf>.

¹⁴ Statistics Canada, "Study: Women in Canada: Women and the Criminal Justice System" (06 June 2017), online: <<http://www.statcan.gc.ca/daily-quotidien/170606/dq170606a-eng.htm>>.

¹⁵ *Supra* note 1 at ss 493.1 and ss 493.2.

¹⁶ *Supra* note 1 at ss 496 and ss 523.1.

¹⁷ Currently, s 503(2.2) of the *Criminal Code* allows for an application to a justice for review of police-imposed bail.

¹⁸ See the 1972 *Bail Law Reform Act*, SC 1970-71-72, c 37.

Indigenous people have dramatically increased. Instead of heading calls to overhaul the bail system for example by placing a moratorium on onerous conditions of bail¹⁹, or by abolishing the use of surety bails, Parliament is proposing to maintain the status quo.

Immigration Status and Bill C-75

The proposed amendment to the maximum penalty for summary conviction offences will also have serious impacts on the inadmissibility of individuals who hold permanent resident or foreign national status. Under the *Immigration and Refugee Protection Act*, foreign nationals (those without permanent immigration status in Canada) and permanent residents of Canada may be inadmissible on the grounds of “serious criminality”. Serious criminality is defined as “having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, **or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.**”²⁰ Under Bill C-75, all non-citizens of Canada will be at risk of a finding of inadmissibility regardless of whether they are convicted a summary or indictable offence.

Recommendations

Given the above context, ACCLE recommends that the following amendments be made to Bill C-75.

If the Senate proceeds with amending s. 787, it must consider **amending section 802.1 by adding the following wording (bolded):**

*802.1 Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province **or the agent is an articling student, or the agent is a law student providing legal services under the direct supervision of a licensed lawyer in a student legal clinic in a Canadian law school.***

We would be agreeable to other amendment wordings that would have the same effect.

Some have raised concerns about students engaging in matters beyond their expertise in the context of hybridized offences. We respectfully point out that law students and articling students

¹⁹ At least two reports call for a moratorium on abstention conditions of release. See: Canadian Civil Liberties Association, “Set up to Fail: Bail and the Revolving Door of Pre-trial Detention”, by Abby Deshman & Nicole Myers (Toronto: Canadian Civil Liberties Association and Education Trust, July 2014), online: <ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf> ; John Howard Society of Ontario, “Reasonable Bail?” (Toronto: Centre of Research, Policy & Program Development, September 2013), online: <www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>

²⁰ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 36(1)(a).

are directly supervised by licensed and insured lawyers who are ultimately responsible for the conduct of the case. Further, if law students and articling students are not allowed to appear, the clients (who do not qualify for legal aid) will have to self-represent, with the attendant risks.

If necessary, we would be agreeable that section 802.1 be amended to include a schedule of serious summary conviction offences for which law students and articling students would not be permitted to appear.

Because of the access to justice implications, we also ask that the proposed amendment to s. 787 of the *Criminal Code* be reconsidered. Do not raise the maximum penalty for summary conviction criminal offences.

About ACCLE

This brief is submitted on behalf of the Association for Canadian Clinical Legal Education (ACCLE), which is a national organization made up of lawyers, clinical legal educators, professors, clinicians, law students, and others committed to the advancement of clinical legal education in Canada. More information about our organization can be found at www.accle.ca.