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Submissions on Bill C-51: *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*

Standing Committee of Justice and Human Rights

THE CRIMINAL LAWYERS' ASSOCIATION

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PREFACE

The Criminal Lawyers' Association (CLA) is a non-profit organization founded on November 1, 1971. The Association is one of Canada's largest legal specialty organizations, comprised of approximately 1300 criminal defence lawyers, many of whom represent both clients charged with sexual offences, and complainants or witnesses in sexual crime prosecutions. One of the objects of the CLA is to educate the membership on issues relating to criminal law. To that end, the CLA presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Program. The CLA publishes a nationally-circulated newsletter aimed at highlight current developments in criminal and constitutional law five times per year.

The CLA is routinely consulted and invited by Parliamentary Committees to share its views on proposed legislation pertaining to criminal law issues. The CLA is often consulted by the Government of Ontario and the Attorney General of Ontario on matters concerning provincial legislation, court management, legal aid assistance and various other issues that involve the administration of criminal justice in the province. The CLA has been granted standing to participate in many significant criminal appeals and government commissions of inquiry. On the questions of defendants' and complainants' rights in sexual offence prosecutions, the CLA has been granted intervener status in leading appellate cases, including *R. v. Mills,* [1999] 3 S.C.R. 668, *R. v. Shearing,* 2002 SCC 58 and *R. v. Quesnelle,* 2014 SCC 46.

The CLA appreciates the opportunity to express its views on the proposed changes to the provisions of the *Criminal Code* relating to sexual offences in Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*.

INTRODUCTION

Bill C-51, the 'zombie law' bill, aims to update the *Criminal Code* and repeal outdated and unconstitutional provisions. Embedded in the bill, however, are substantive changes to sexual assault law that would fundamentally change how these offences are prosecuted and defended.

The goals of the proposed amendments are to ensure sexual assault complainants and witnesses are treated with respect and alleviate the increasing public upset about how sexual offenders are prosecuted, defended and judged.[1] The CLA supports these goals, but says Bill C-51 is the wrong way to get there.

Bill C-51 as drafted is unconstitutional and ineffective. The CLA's position is that the law of sexual assault needs no update. The law, properly applied, already protects complainants and witnesses in criminal trials from illegal, myth-based conduct.

The CLA will focus its submissions on the following issues:

1. *Charter* non-compliance: The proposed amendments are unconstitutional, as they infringe the *Charter* rights to silence, a fair trial, the presumption of innocence, the principle of overbreadth, as well as undermine the right to a speedy trial.
2. Limited value: The proposed amendments are ineffective, counter-productive, and will do more harm than good.

THE PROPOSED AMENDMENTS

Bill C-51 proposes two important changes to the law of sexual assault:

1. It creates a positive disclosure obligation requiring defence counsel to share "record[s] relating to a complainant or witness" in their possession with the Crown, complainant and court as part of a pre-trial admissibility application.

2. It expands the reach of the 'rape shield' protection (s. 276) that limits use of evidence of a complainant's other sexual activity at trial, by

    a. giving the complainant an automatic notice and participation right on s. 276 applications, including the right to make submissions and be represented by counsel; and

    b. expanding the definition of "other sexual activity" to include "any communication made for a sexual purpose or whose content is sexual in nature."

The CLA identifies the constitutional and practical shortcomings of the proposed changes below.

[1] See introductory comments of Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, 2nd reading, June 15, 2017 at 1635-1645.

CHARTER NON-COMPLIANCE

1. The defence disclosure obligation is unconstitutional

Bill C-51 prohibits the introduction into evidence of any "record relating to a complainant or witness that is in the possession or control of the accused – and which the accused intends to adduce" unless the defendant brings a pre-trial application, at least 60 days before trial, asking for permission to use them. In practical terms, this would require defendants to show the prosecutor and the complainant, who has standing on the application, any documents in their possession that they *might* want to use in cross-examination, or otherwise in the defence case. This obligation extends to materials that "relate to" witnesses other than the complainant.

This positive disclosure obligation is unprecedented in Canadian law. It is overbroad in relation to Parliament's purpose. It violates the right to silence and the right to full answer and defence.

i. The defence disclosure obligation is overbroad

Bill C-51 is overbroad, in that it goes beyond what is necessary to achieve Parliament's stated objective: to put in place stricter rules regarding the admissibility of complainants' private records in the possession of the defendant.[2] The following examples illustrate the potential reach of the new defence disclosure obligation:

> Complainant A alleges defendant B committed a sexual assault against him. Prior to trial, A is sentenced for an unrelated offence. As part of the sentencing, the court orders a non-confidential *Mental Health Act* assessment, in which the assessing psychiatrist opines that A has anti-social personality disorder and is prone to lying. B obtains a copy of the exhibit from the court clerk's office.[3]
>
> Complainant C alleges defendant D committed a sexual assault against her. In support of her story, she testifies that D impregnated her and she terminated the pregnancy. D denies sexual contact. He is in possession of personal medical records showing he is infertile. The records arguably 'relate to' the complainant under the new s. 278.92(1) because they provide a basis for the defence's cross-examination of her and will be central to the court's finding about her credibility.

None of the documents are private records vis-à-vis the defendant, but the new defence disclosure rule arguably still applies to them. Under Bill C-51, if the defendant wanted to confront a witness with a school schedule in his possession, his own medical records or his own Facebook conversations, or otherwise introduce them into evidence, he will have to provide copies of to the Crown *and the complainant* 60 days before trial. Such an application would do nothing to advance Parliament's stated goal of protecting witness privacy. As discussed below, it would come with a significant constitutional cost.

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[2] Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, 2nd reading, June 15, 2017 at 1635

[3] Sexual assault complainants do not retain a privacy interest in documents filed on consent as public court exhibits: see *R. v. Bartholomew,* 2017 ONSC 3084.

ii. The defence disclosure obligation violates the right to silence

The right to silence has been described by the Supreme Court as "intimately linked to our adversarial system of criminal justice and the presumption of innocence"[4] and "the single most important organizing principle of criminal law."[5] It encompasses the defendant's right not to participate in building the Crown's case against her. There are two rationales underlying the right to silence. First, there is a risk that compelling a defendant to participate in her own prosecution will produce unreliable information. Second, the defendant's dignity, autonomy and privacy interests demand the state give her a choice about whether to co-operate or be left alone.[6] For these reasons, the Supreme Court has explained that disclosure of relevant material in advance of trial is a one-way street: there is no general defence disclosure obligation.[7] The defendant is "entitled to assume a purely adversarial role towards the prosecution."[8]

The defence disclosure obligation in Bill C-51 is in tension with this right. It would force defendants to decide, before hearing the Crown's offer of proof, whether they will participate in the case against them by providing information to the Crown and the complainant that the Crown and complainant would not otherwise have.

It would be the only example in Canadian criminal law where a defendant is statutorily obligated to share its anticipated evidence with the court, the Crown *and the prosecution's key witness* before the trial starts. The few examples of mandatory defence disclosure that exist – e.g., the duty to produce an expert report,[9] the duty to produce business records,[10] and the duty to disclose an alibi or third-party suspect defence[11] – are carefully tailored to minimize their incursion into the right to silence. For example:

- The defence need only provide the Crown with a copy of its expert report at the end of the Crown's case. The timing of this disclosure obligation minimizes the infringement of the right to silence while accommodating competing interests.[12]

- The defence need only notify the Crown about its intent to produce business records seven days before the date of intended introduction. The court retains the discretion to deviate from the statutory timeline.[13]

- The alibi exception to the right to silence allows the court to draw a negative inference against the defendant who does not provide reasonable notice of the alibi before trial, or who fails to testify in support of her alibi. The adverse inference is appropriate because alibi evidence can be easily fabricated unless proper notice – which gives the Crown an opportunity to investigate – rebuts this possibility. But the alibi disclosure rule is not a

[4] *R v Henry*, 2005 SCC 76 at para 2.
[5] *R v P.(M.B.)*, [1994] 1 SCR 555 at para 37.
[6] *R v B.(S.A.),* [2003] 2 SCR 678 at para 57*; R v D'Amour*, [2002] OJ No 3103 (C.A.) at paras 34-35.
[7] *P.(M.B.)*, *supra* at para 39.
[8] *R v Stinchcombe*, [1991] 3 SCR 326 at paras 11-12.
[9] *Criminal Code*, RSC 1985, c C-46, s. 657.3.
[10] *Canada Evidence Act*, RSC 1985, c C-5, s30(7).
[11] *R v Noble*, [1997] 1 SCR 874; *R v Vezeau*, [1977] 2 SCR 277.
[12] *R v Hong*, 2015 ONSC 4840 at para 56.
[13] *Canada Evidence Act*, *supra*, s. 30(7).

statutory requirement or an all-or-nothing proposition; failure to provide notice or testify is just one factor used to assess credibility.[14]

These examples show how statutes and the common law have struck a careful balance between the right to silence and competing values of the criminal justice system. Bill C-51's proposed defence disclosure obligation does not reflect such a balance, given the expansive category of records that it would capture and the substantial (and inflexible) notice requirement. The marginal privacy gains for the complainant do not justify this major and unprecedented intrusion into the right to silence.

iii. The defence disclosure obligation undermines the right to full answer and defence

The right to make full answer and defence includes the right to independently investigate and to call the defence case as the defendant sees fit.[15] The new disclosure obligation may improperly limit defendants' use of their investigative fruits and their ability to call the best defence to the Crown case *as it emerges at trial*. It requires defence counsel to assess the case months before the Crown's proof is offered, based on an assumption about what it will be. Yet trial evidence rarely unfolds as the disclosure or prior proceedings might suggest. There will be many cases where the defence does *not* disclose a record to the Crown and complainant in advance because its relevance only becomes apparent at trial. In such cases, the defence disclosure requirement will either prevent the defence from introducing the record (because they failed to comply with the statutory precondition to admissibility) or cause lengthy delay, as the trial halts for a mid-trial application involving notice, argument, and full participation rights for the complainant.

2. Expanding the reach of s. 276 applications jeopardizes the right to a fair trial

i. The history and purpose of s. 276

Parliament enacted s. 276 of the *Criminal Code* to combat the practice of unfairly discounting a sexual assault complainant's evidence using "twin myths": that her sexual history makes her less believable or more likely to have consented to sexual contact.[16] Section 276 requires the defendant to bring a pre-trial application to introduce evidence of the complainant's off-indictment sexual activity so the court can ensure it is admitted for a proper purpose. The prohibition is narrow: it does not prohibit legitimate inquiries into a witness' history that are relevant to an issue at trial – e.g., motive to lie, or mistaken belief in consent.[17] It is not designed to make the witness feel comfortable, safe or vindicated. It exists simply to ensure the defence does not ask questions that would be legally irrelevant and inadmissible *in any event.*

In practice, the operation of s. 276 means sexual assault prosecutions often unfold differently from other cases. S. 276 effectively requires the defence to share with the prosecutor and the court, well before trial, what would normally be litigation-privileged information about the its

[14] *Noble*, *supra* at para 111.
[15] See generally *R v Barros*, 2011 SCC 51 at paras 28, 37; *R v Seaboyer*, [1991] 2 SCR 577 at para 39; *R v Lyttle*, 2004 SCC 5 at para 2; *R v S.(N.)*, 2012 SCC 72 at para 24; *R v Rose*, [1998] 3 SCR 262 at para 103; *R v Garofoli*, [1990] 2 S.C.R. 1421 at para 112.
[16] *R v Darrach*, 2000 SCC 46 at paras 32-33.
[17] *Ibid*, at para 59.

theory and anticipated lines of examination. There are no other crimes of violence where the defence must so extensively 'vet' its proposed line of defence. Unsurprisingly, the rape shield provision has always walked a fine line between constitutionality and unconstitutionality.[18]

The current version of s. 276 is constitutional in part because it is restricted to evidence of *other* sexual activity (not the subject of the charge), and because the invasive inquiry into the defence theory and lines of questioning is performed by the trial judge and the prosecutor, both of whom perform a public duty and have a duty to act judicially.[19]

ii. Expanding s. 276 undermines the right to full answer and defence

The proposed expansion of s. 276 applications may limit the defence's ability to cross-examine witnesses about *relevant* issues, thereby jeopardizing the right to full answer and defence.

As the Supreme Court explained, the right to cross-examination "without significant and unwarranted restraint" is "an indispensable ally in the search for truth."[20] Full answer and defence includes the right to fully test a witness' evidence through cross-examination. Effective cross-examination is an integral safeguard against wrongful conviction.[21] As sexual assault prosecutions most often turn on the evidence of two persons, in which the court has to weigh testimony and decide who to believe, the need for effective cross-examination is heightened.[22]

In a criminal case, an important part of effective cross-examination is the ability to confront a witness with unexpected questions or contradictory evidence, so the trier of fact can gauge his reaction and response first-hand. As the Supreme Court has explained, the unexpected nature of the questions can be crucial for assessing credibility through demeanour: "The look which says '*I hoped not to be asked that question'*, sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive."[23] The significance of the ability to observe the witness' reaction to confrontation is reflected in the high level of deference shown by appellate courts to trial judges' credibility assessments.[24]

The proposed changes to s. 276 may undermine the ability to test evidence through cross-examination in two ways.

First, ambiguities in the new statutory language could expand the reach of s. 276 to require applications to introduce evidence about *the very transaction* before the court. Many sexual crimes in the 21st-century are bookended by, or even committed via, electronic text-based conversations between witnesses, or between complainant and defendant. When these take place before, during, and after the allegedly illegal event. They provide relevant context for the alleged

[18] The predecessor provision to the current s. 276 (a blanket exclusion of all evidence going to prior sexual conduct, subject to three exceptions) was found by a majority of the Supreme Court to be an unjustified infringement of the defendant's right to a fair trial: *Seaboyer*, *supra*. After Parliament enacted the current s. 276, the Supreme Court held that the provision was constitutional: *Darrach*, *supra*.
[19] *R v Boucher*, [1955] SCR 16 at para 26. *R c Piccirilli*, 2014 SCC 16 at para 61.
[20] *R v Lyttle*, *supra* at paras 1-2.
[21] *S.(N.)*, *supra* at para 48.
[22] *R v M.(S.C.)*, [1997] OJ No 1624 (C.A.) at para 3.
[23] *S.(N.), supra* at para 26.
[24] *R v Francois*, [1994] 2 SCR 827 at para 14.

offence and may be admissible for other reasons.[25] 'Twin myth' reasoning does not apply to evidence of sexual conversations that are *part of the impugned transaction*. As such, these conversations should not be captured by s. 276. By expanding the definition of 'other sexual activity' to include "any communication made for a sexual purpose or whose content is sexual in nature," Parliament has drawn a blurry/impossible-to-distinguish line between the activity on trial and the 'other' activity, arguably triggering a pre-trial application for evidence to which s. 276 should not apply.

Second, the proposed changes grant the complainant notice, standing and a right to counsel on s. 276 applications, giving the prosecution's key witness and her counsel advance knowledge of sensitive, normally-privileged information about the defence theory and proposed questions. This is not a problem in and of itself: there has never been a bar to *the Crown* sharing information from a s. 276 application with the complainant, or using the application materials to prepare the witness. But that process is only fair to the defendant because the discussions are not privileged: the defence can ask the complainant what she did to prepare, whether she reviewed the materials and what the Crown told her to expect. The method and degree of the witness' preparation can be laid out for the court and parties to see. Under the new legislation, where the complainant is represented by counsel, the witness' ability to prepare is enhanced and the defendant's ability to ask her about it is limited by the operation of solicitor-client privilege.

Over-limiting cross-examination creates an unacceptable risk of wrongful convictions. There is a debate about the number of sexual offence allegations that are unfounded or fabricated. Accepting the number is low (e.g., 2%), this still means that 2% of all sexual assault suspects are wrongfully accused – and *nobody knows who they are*. Canada has a long history of wrongful convictions stemming from unfair trial processes.[26] This history reminds us that every source of evidence, whether of sexual assault or another crime, must be subjected to strict scrutiny.

3. The enhanced requirement for procedural steps will lengthen and delay court cases, jeopardizing defendants' rights to a speedy trial

Bill C-51 creates unnecessary procedural obstacles that are inconsistent with Parliament's recent efforts to streamline trial proceedings and minimize justice system delay. These additional steps make it more difficult to comply with *Jordan* timelines and risk undermining the defendant's (and the public's) interest in speedy justice.

The speedy trial right is a basic component of civilized legal systems. It recognizes that it is medieval for the state to level accusations without giving the target his or her "day in court." In the *Magna Carta*, the king promised that "[t]o no one will we … delay right or justice." The *International Covenant on Civil and Political Rights* calls for trial "without undue delay."[27] In the United States, the sixth amendment ensures that, in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" – a constitutional guarantee bolstered by federal and state statutes that require dismissal unless the right is respected. In Canada, the speedy trial

[25] In *R v D.(D.L.)*, 2014 ABCA 218, for example, the Crown sought to introduce the complainant's contemporaneous text messages as *res gestae*.
[26] See e.g. *The Royal Commission on the Donald Marshall, Jr., Prosecution*, *The Commission on Proceedings Involving Guy Paul Morin*, and *The Inquiry Regarding Thomas Sophonow*.
[27] (1966), Can TS 1976 No 47, art 14(3)(c).

guarantee is the "right ... to be tried within a reasonable time."[28] It is a "free-standing right" with "intrinsic value."[29] Unreasonably slow proceedings hurt defendants sitting in jail or living on bail with charges hanging over their heads. Justice Cory famously described the wait for one's trial as "exquisite agony."[30] Victims too prefer a speedy trial to a delayed trial. In this respect, defendants' and the public's interests align perfectly.

Yet justice system delays have only increased in the past 25 years. Last year, in *R. v. Jordan,* a divided Supreme Court admitted that Canada's delay problem was worse than ever. It attributed the problem to endless flexibility in interpreting the speedy trial right and a "culture of complacency." It set firm ceilings beyond which trial delay is presumptively unreasonable.[31] In response to *Jordan,* Parliament and provincial governments have prioritized justice system efficiency and allocated resources to reduce trial delays. This includes hiring more judges, prosecutors, legal aid lawyers and court support staff, investing in front-end programs as alternatives to incarceration, and the revision of complex trial procedures.[32] The public continues to be preoccupied with delayed justice and Parliament has promised to fix the problem.

Bill C-51 will make the delay problem worse. It creates additional procedural steps for a wide range of sexual offence prosecutions. It expands the categories of evidence for which pre-trial admissibility applications are required. It expands the right of the complainants to participate, meaning trial coordinators will have to find application dates that work for multiple counsel and clients. It creates the prospect of lengthy mid-trial delays as defence counsel seek to introduce evidence that suddenly becomes relevant but was not the subject of a pre-trial application. The ambiguous statutory language regarding when an application is required creates a risk of further delay in cases where the defence thinks no application is required, the Crown objects to the evidence, and the trial halts for a debate about whether the statutory regime applies at all.[33]

If the proposed changes filled a gap in the law, or somehow advanced Parliament's goal of protecting complainants' interests, the extra delay might be justified. But, as discussed below, the changes are mostly useless and sometimes counter-productive. There is no pressing objective justifying the procedural hurdles and risk to the speedy trial right that Bill C-51 would create.

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[28] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 11(b).
[29] *R v Jordan,* 2016 SCC 27 at para 157 [*Jordan*]; *R v Beason*, (1983) 36 CR (3d) 73 (Ont. C.A.) at 96 per Martin JA, cited with approval in *R v Morin*, [1992] 1 SCR 771.
[30] *Morin*, *supra* at para 43.
[31] *Jordan*, *supra* at paras 4–5.
[32] "How provinces have tried to speed up the justice system since the Jordan ruling", *The Canadian Press*, July 6, 2017, online: http://www.ctvnews.ca/canada/how-provinces-have-tried-to-speed-up-the-justice-system-since-the-jordan-ruling-1.3491493
[33] See e.g., the procedural complications that arose in one criminal case, where the debate proceeded simultaneously in criminal and civil court: *S.C. v. N.S.*, 2017 ONSC 5566 at paras 10-11.

LIMITED VALUE: THE PROPOSED CHANGES ARE INEFFECTIVE AND COUNTER-PRODUCTIVE

1. The criminal law already does what the proposed amendments set out to do

Most of the procedural protections proposed in Bill C-51 already exist. The law of sexual assault, properly applied, already provides robust protection for victims and witnesses. The CLA acknowledges that these protections are not always consistently applied; some complainants continue to face unacceptable unfair or disrespectful treatment. This is not a result of the law, but of its misapplication. It is a problem that cannot be solved by *Criminal Code* amendments.

Statutory rules protecting complainants already offer significant protection, many of which place significant limits on the right to full answer and defense.[34]

- Section 276 governs the admission of evidence of the complainant's sexual history and reputation, records. Under s. 276, evidence of the complainant's prior or subsequent sexual activity is presumptively inadmissible. The defendant has to bring an application demonstrating that the evidence is relevant to an issue at trial and that its probative value outweighs its prejudicial effect.

- Section 278 governs the production of private records to the sexual assault defendant. It prevents the sexual assault defendant from accessing *any* records, in which the complainant has a privacy expection, except through an application for production showing the records are likely relevant to an issue at trial. The statute requires the trial judge to engage in a contextual, multi-factorial analysis balancing the defendant's right to make full answer and defense against the complainant's right to privacy and equality.

- Various provisions of the *Criminal Code* permit the Crown or a witness to apply for orders excluding the public from the courtroom for all or part of the proceedings, permitting the complainant to testify without being seen by the public, preventing the accused from personally cross-examining the complainant, and banning publication of information that could identify the complainant.[35]

Where the statutory protections do not apply, the common law fills the gaps:

- The proposed enhanced participation rights for complainants are largely unnecessary because the Crown's quasi-judicial role includes a duty to consult with complainants and represent and advance third-party interests.[36]

- The proposed *a priori* rules governing the use or admissibility of private records in the defendant's possession are unnecessary because the common law already requires trial judges to apply a substantially similar test before admitting this kind of evidence.[37]

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[34] See e.g. P. Sankoff, "Crown Disclosure After *Mills*: Have the Ground Rules Suddenly Changed?" (2000), 28 CR (5th) 285; D.A. Stein, "Admissibility of Sexual Conduct Evidence after *D. (A.S.)*" (1998), 13 CR (5th) 312; M. Peters, "Third Party Disclosure under *O'Connor*: Defence Concerns" (1996), 44 CR (4th) 179.
[35] *Criminal Code*, *supra*, s. 486; s. 486.2; 486.3; 486.4.
[36] For the duty to consult, see *Darrach*, *supra* at para 55.
[37] *R v Osolin*, [1993] 4 SCR 595 at paras 161-164.

A priori rules rarely work. Trial judges are typically best-positioned to decide the admissibility of evidence in sexual assault (and other) cases. Ontario's Divisional Court recently rejected a proposal for an *a priori* procedural rule governing the admissibility of civil discovery documents at a sexual assault trial. It reasoned that the tools already available to the criminal trial judge protected the complainant's interests.[38] The CLA endorses the Divisional Court's approach and says it applies equally to the proposed *a priori* rules in Bill C-51. Every sexual assault case is different. The existing combination of statutory and common law rules gives judges the tools they need to prevent unfairness in individual cases without the clunky inflexibility of statutory rules that may or may not operate fairly on a particular set of facts.

2. The proposed increases to third-party participation will cause more harm than good

As noted above, the Crown is duty-bound to consult with complainants and consider and advance their interests in criminal cases.[39] In this context, there will rarely be a need for an enhanced participation right, particularly given the practical and constitutional costs. Turning complainants into litigators and injecting them indiscriminately into sexual assault cases risks causing delay and frustrates the search for truth.

Third parties traditionally have no place in a criminal prosecution. It is the Crown's job to prosecute, because the stakes for the defendant are high and trial fairness is jeopardized if private parties are permitted to intervene and align themselves against the defendant. The words of Dambrot J. of the Ontario Superior Court are apt:

> Restricting access to a criminal prosecution does not merely serve the Crown's convenience. Rather, it serves the public interest, protects the rights of the accused and furthers the proper administration of justice. *Fairness to the accused demands that anyone who speaks in opposition to his or her interests in a criminal prosecution does so bearing he duties and restraints placed on Crown counsel*: to be a minister of justice; to conduct the prosecution fairly; to refrain from inflammatory tactics and unsupportable positions; to make full disclosure - the list goes on.[40]

For this reason, third party participation in criminal trials should be permitted only where necessary to preserve trial fairness. In most cases, it will not be necessary. One exception is s. 278.3/*O'Connor* applications for record production. In this limited circumstance, third party participation makes sense; the complainant is uniquely positioned to make submissions about her interest in records the parties have not seen. The rationale for participation on questions of production does not apply with the same force to questions of admissibility (under s. 276 or the common law). In most cases, third-party help is not required to decide questions of admissibility.

Incorporating third parties into criminal justice decision-making also creates the risk that prosecutions will be delayed and derailed. As McLachlin J (as she then was) observed in *Seaboyer*, there is a valid policy concern about controlling the "plethora of interlocutory appeals and the delays which inevitably flow from them."[41] The recent related cases of *R. v. N.S.* (criminal) and *N.S. v. S.C.* (civil) are illustrative of this problem. In *N.S.*, the criminal trial judge ruled that the s. 278 production regime did not apply to complainant medical records in the

[38] *S.C. v. N.S.*, *supra* at paras 29, 35-38.
[39] *Darrach*, *supra* at para 55.
[40] *R v United States*, (2004) 184 CCC (3d) 427 (O.N.S.C.) at para 20.
[41] *Seaboyer*, *supra* at para 122.

defendant's possession. Instead, he said he would rule on the admissibility of questions arising from the medical records on a question-by-question basis, using the established *Seaboyer/Osolin* admissibility test.[42] Before he could do so, however, the complainant brought an application for *certiorari* and *mandamus* to quash his ruling that s. 278 did not apply. The criminal trial ground to a halt for months, and the *certiorari* judge eventually dismissed the application as premature.[43] Had the Crown not stayed the charges, the complainant would likely have renewed the *certiorari* application after the final ruling on admissibility, causing further months of delay. Limiting third-party participation minimizes the risk of unnecessarily protracted proceedings of this sort.

Finally, over-participation by third parties risks undermining court orders excluding witnesses and the complainant's relationship with her counsel. Witness exclusion orders are a standard part of almost every criminal trial. Witnesses on the stand are routinely asked to step out of court while counsel argue a point of law. Such orders reduce the risk that the witness will be contaminated by exposure to argument and other evidence. Their purpose is frustrated when the prosecution's key witness is offered a broad right to participate in evidentiary and legal argument through counsel. Courts attempting to preserve the effect of an exclusion order may be faced with the difficult choice between (a) prohibiting counsel from discussing the case with her client and (b) permitting cross-examination of the complainant on the extent to which she learned about the case from her lawyer. Both options create problems for the solicitor-client relationship.

3. The proposed amendments do not solve the 'problems' of misapplication of the law, quality of evidence or burden of proof.

Bill C-51 relies on the mistaken assumption that changes to black-letter law will stop justice system participants from misapplying it and somehow improve the conviction rate for sexual offenders. Neither is true.

The criminal law is a blunt tool; it is designed to seek out the truth in a fair way that avoids wrongful convictions or outcomes based on impermissible reasoning. It is not designed to solve the social problems of misogyny, sexism and patriarchy that give rise to sexual violence, or educate the public about the importance of respect, consent, and sexual autonomy. Statutory rules limiting cross-examination or forcing defendants to produce medical records and text messages to their accusers will not make the problem of sexual violence go away. Only preventative, educational measures can do that.

Neither will the proposed changes improve 'outcomes' (i.e., conviction rates) for sexual assault victims and advocates. A fundamental principle of Canadian law is that wrongful convictions must be avoided at all costs; it is better to let ten guilty people go free than convict one innocent person. The high burden of proof beyond a reasonable doubt protects against wrongful convictions. A necessary, if sometimes frustrating, corollary of that rule is that the quality of evidence must be extremely high in order to support a conviction. This makes the criminal law an inapt tool for getting at the truth in *any* case that pits the memory of one person (the defendant) against the contradictory memory of another (the complainant) – whether the alleged crime is a sexual assault or a fist fight in an empty alley. As long as the burden of proof remains, prosecutions based on this kind of evidence are inherently less likely to result in conviction than prosecutions involving independent, objective evidence.

[42] *R v N.S.*, 2017 ONCJ 128.
[43] *S.C. v N.S.*, unreported (29 May 2017), Toronto, per Forestell J. (S.C.)

It may be that the primary positive effect of the proposed changes in Bill C-51 is to make complainants and witnesses feel more involved in, supported by, and prepared for trial. If so, this is a happy side effect, not a justification for intruding on the defendant's procedural rights. The rules of evidence and procedure exist to advance the search for truth in a fair (not perfect) way. Fairness requires that witnesses be protected against disrespect, unfair treatment, myth-based interrogation and intrusive production orders based on bald assertions and fishing expeditions. They are *not* entitled to protection against uncomfortable or unexpected questions or the legitimate testing of their evidence. In any criminal trial, a witness' interests must give way where protecting those interests would undermine the right to a fair trial.[44]

CONCLUSION

The debate about how to try sexual assault cases is highly charged. The criminal law's response to sexual harm is constantly evolving, never quickly or adequately enough to solve the social problem. No one in the justice system assumes they know everything or handles cases perfectly. For many witnesses, a sexual assault prosecution is their first and only contact with the criminal justice system, putting an extra onus on institutional actors to behave with scrupulous rigour and sensitivity. All justice system participants should commit themselves to the goal of ensuring the law is properly applied and takes into account the nuances of human sexual behaviour and the unique features of crimes of sexual violence. The CLA supports the goal of improving witnesses' experience with the criminal justice system, but only to the extent compatible with the defendant's protected *Charter* rights. Bill C-51 is not the way.

[44] *R v Mills,* [1999] 3 SCR 668 at para 94; *R v McNeil*, 2009 SCC 3 at paras 41-43.