FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

FOLA's RESPONSE TO BILL C-75

Submitted to: Standing Committee on Justice and Human Rights
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Submitted by:

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Bill C-75 Position Paper

The Federation of Ontario Law Associations (FOLA) is made up of the members of the 46 local law associations spread across Ontario in addition to our affiliate member, the Toronto Lawyers' Association. In total, we represent approximately 12,000 lawyers who are, by-in-large, practising in private practice in firms of all sizes across Ontario. Many of our members practice in small communities or service neighbourhoods in larger centres where they are pillars of their community. Our members are on the front-lines of the justice system and see its triumphs and shortcomings every day.

FOLA is an advocate, on behalf of practising lawyers, for a better justice system that recognizes the crucial role competent and professional lawyers play in our system of justice. Many of our members are professionals who specialize in criminal law either exclusively or as part of a broader general practice. Our members encompass a large portion of the practicing bar, especially in areas outside of Toronto and includes many criminal practitioners both inside and outside Toronto.

FOLA works with other stakeholder groups regularly and with regards to the amendments proposed in Bill C-75 we support and endorse the submissions of the Criminal Lawyers' Association.

There are numerous changes proposed by this Bill which we applaud. These include:

- allowing for an offender to be exempted from a Victim Fine Surcharge in cases which would cause undue hardship;
- incorporating a requirement that attention be given to the circumstances of Aboriginal offenders and those in vulnerable populations when determining interim release (Bail), and
- amending the *Youth Criminal Justice Act* to set out principles that encourage the use of extrajudicial measures as opposed to laying criminal charges.

Notwithstanding the positive improvements, the legal community has shown considerable concern with numerous procedural changes proposed by this Bill. Certain amendments to the Criminal Justice process are contrary to the notion of procedural fairness. Below are the three main areas of concern raised by our members.

(1) Restricting Preliminary Inquiries

The rationale that Preliminary Inquiries create further delay is not founded in fact. Instead, Preliminary Inquiries often promote a faster resolution. They narrow issues for trial and promote a fair and efficient use of Court time. They stream line the protection of rights protected under the Charter and limit the time needed of ordinary citizens sitting on juries. Further, this change would impact on procedural fairness and the chance to challenge the evidence mustered by the state before trial. When one considers the rigorous discovery process available in civil law and compares it to the way criminal matters will be dealt with if these amendments are made, it raises great concern. While there are steps which could be taken to streamline preliminary inquiries, such as allowing for an out-of-court discovery process, elimination of the ability to cross-examine witnesses prior to trial does not accord with the principles of fundamental justice, including the presumption of innocence. Full disclosure by the Crown in the post-*Stinchcombe* age is useful, but is no replacement to the ability to test evidence fully prior to trial. Further, an out-of-court discovery process may lessen the confrontational nature of criminal trials and provide a useful tool for both Crown and Defence to move matters through an already busy system.

(2) Eliminating jury peremptory challenges

This amendment reflects the public outcry for the removal of peremptory challenges following the decision in *R v Stanley*. Unfortunately, the public wrongly viewed peremptory challenges as the source of jury inequality without having an understanding as to how the juror selection process works. Peremptory challenges are a useful tool for both the defence and Crown to remove potential jurors who are perceived as having a bias in the outcome.

By removing peremptory challenges, it will be more difficult to remove jurors who are suspected of having a bias, including a racial bias, which is arguably what this amendment was aiming to prevent. It is important to remember that an accused has the right to be judged by those without an interest in the outcome. In the end, the effect of this Bill is to extremely limit the ability of both Crown and defence to ensure that a jury is fair and unbiased.

If the goal of this amendment is to promote juror equality then the focus should be on the jury selection system. Currently, the selection process fails to consider the circumstances of minority groups, including First Nations. The selection process is largely mail based, which fails to take into account communities that lack this form of communication. Additionally, First Nation communities have the option to not be included in the jury pool which further affects proper representation. Efforts should be made to promote equality in the jury selection process by engaging indigenous peoples and communities. The elimination of peremptory challenges will not help to bring about a more representative jury system.

Further, with regard to civil jury matters, at least in Ontario, each litigant is given four peremptory challenges. Suggesting that civil matters deserve greater procedural safeguards than criminal matters is highly problematic. Suggesting that lawyers in one type of case are more or less interested in the ends of justice is dubious and we reject this.

(3) Allowing routine evidence to be admitted by affidavit

There is no evidence that calling police officers causes unnecessary delays in the trial process. In addition, the term "routine evidence" is so broad that it can encompass all police activities throughout an investigation.

This amendment will create a practice whereby the Crown will have all police evidence admitted by affidavit, requiring defence to challenge this intention. Defence counsel will often seek to challenge the Crown's intention of bringing forth evidence by affidavit. This amendment creates additional steps in the process, and as a result delay, which is contrary

to the purported intention of this Bill. Already, an "Agreed Statement of Fact" allows evidence to be entered on consent. Encouraging this practice would be more beneficial than the amendment proposed. Saving time by entering evidence in chief via affidavit is already allowed but underutilized. The problem is requiring leave to allow cross-examination.

The presumption of innocence provides the fundamental underpinning to our system of criminal justice. Allowing the state to merely file written materials and forcing the defendant to seek leave to cross-examine, which may not be granted, shifts the onus and presumes truthfulness of police and guilt of the accused. A trier-of-fact can accept some, all or none of a witness's evidence. To allow the state, and only the state, to enter evidence without the need to examine their witness, would be to invite an inference that the state's evidence is of more weight and more believable than that of an accused. By requiring the defendant to apply to cross-examine, this perception is heightened. This results in a significant risk of an injustice.

Conclusion

Access to justice in the criminal sphere includes access to both procedural fairness and a strong presumption of innocence. While work needs to be done to modernize the system and allow for alternative methods of discovering witnesses and minimizing the adversarial process in certain types of cases, engagement of the practicing bar will be key in ensuring the greatest gains are made in reforming the system. We strongly encourage a review of the suggested changes and revisions to better achieve the ends sought, namely a fair and efficient criminal justice system.

FOLA is grateful for the opportunity to make these submissions. Should any questions arise or supplementary submissions be requested, we would be more than happy to respond.

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