BILL C-51

An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act

SUBMISSIONS

Michael Spratt
Criminal Lawyer

Standing Committee on Legal and Constitutional Affairs (LCJC)

42nd Parliament, 1st Session

Wednesday, September 19, 2018, 4:15 p.m.

Room 257, East Block
I. Preface

It is an honour and a privileged to have been invited to make submission 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 (hereinafter ‘Bill C-51’).

By way of background I received a B.Sc. (Hon) in Biology and Environmental Science from McMaster University in 2001 and was called to the Ontario Bar in 2005 after graduating from law school at Dalhousie University and completing my articles in Toronto with the criminal law firm Hicks Block Adams.

I have practiced exclusively criminal law for the past 14 years in Ottawa and I am partner at the boutique criminal law firm Abergel Goldstein & Partners.

I am a trial lawyer (although I have conducted some appeals) and I practice primarily in the Superior Court of Justice (SCJ), and the Ontario Court of Justice (OCJ). I have represented individuals accused with offences ranging from simple possession of marijuana to murder. I have represented all types of clients and I pride myself on never turning away individuals who are poor, marginalized, or racialized.

I have litigated many cases involving the Canadian Charter of Rights and Freedoms and in 2017, I successfully challenged the constitutionality of the Safe Streets and Communities Act’s retroactive amendments to the record suspension provisions of the Criminal Records Act.

I have also conducted a large number of sexual assault trials including, historic allegations, domestic allegations, allegations that involved the reliability of the complainant’s evidence, and allegations that turned on the credibility and veracity of the complainant’s allegations. I have conducted sexual assault trials in the OCJ and in the SCJ before both judges and juries.

I have appeared approximately 30 times as an expert witness before Canada’s House of Commons and Senate on issues relating to criminal justice policy.

This brief focuses on a select few issues concerning Bill C-51 and any omissions should not take as agreement – although I do certainly agree with some aspects of Bill C-51.

I would encourage the committee to contact me if there are any questions that arise from these brief submissions.
II. Introduction

Bill C-51 seeks to amend the Criminal Code to remove or repeal passages and provisions that have been ruled unconstitutional or that raise risks with regard to the Canadian Charter of Rights and Freedoms, as well as passages and provisions that are obsolete, redundant or that no longer have a place in criminal law.

These amendments are a welcome and positive development.

The repeal of reverse onus provisions gives full effect to important constitutional principles. It is, after all, a fundamental principle of the criminal law that the Crown bares the onus to prove all elements of offence beyond a reasonable doubt. Reverse onus provisions have the effect of imposing a legal burden of proof upon the accused. Presumptions of this type conflict with the Canadian Charter of Rights and Freedoms, including the right to be presumed innocent until proven guilty.

The repeal of outdated and unconstitutional provisions that are still found in the Criminal Code is also a positive aspect of bill C-51. Every Canadian is presumed to know the law. Ignorance of the law is not a valid defence. As such, the Criminal Code should be as simple a document as possible. The more complex the Criminal Code becomes the more mistakes will be made – by both the public and the judiciary. Antiquated offences like alarming her majesty or disrupting religious services are simply unnecessary. Any harm caused by these activities is adequately captured other sections of the Criminal Code (public disturbance, harassment, threats, assault).

However, for all of C-51’s talk of repealing unconstitutional and outdated sections of the Criminal Code the mandatory minimum sentences that have been ruled unconstitutional by our courts, including the Supreme Court of Canada remain untouched. This is a glaring and curious omission.

There is however one amendment contained in bill C-51 that is unlike all the others. Buried in the bill are substantive changes to sexual assault law that would fundamentally change how these offences are prosecuted and defended. Bill C-51 creates a new Criminal Code procedure that applies only to sexually based offences that compels pre-trial the disclosure of records relating to the complainant that are in lawful possession of the accused.
III. Charter Non-Compliance

Bill C-51 (section 278.92(1)) prohibits the introduction into evidence of any “record relating to a complainant 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 7 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. In short, this reverse disclosure will have the unimaginable effect of allowing an untruthful or unreliable witness – now armed with the defence strategy and the impeaching material - the time and means to tailor their evidence.

Cross-examination has long been held to be the crucible of truth our courts rely upon to deliver fair and just verdicts. In short, s. 278.92(1) will serve to undermine justice.

As Mr. Michael Cooper (St. Albert-Edmonton, CPC) noted before the Standing Committee on Justice and Human Rights: ¹

I agree with Mr. Spratt when he stated that the reverse disclosure requirements for defence could potentially tip their hand to a liar who would then be given an opportunity, as a result of sitting in and getting access to those records and having an understanding of the defence’s litigation strategy, to explain away inconsistencies and contradictions.

There is another component to this, which is that of course for these section 276 applications, the complainant would be entitled to counsel. It raises the question therefore that not only would these reverse disclosure requirements potentially tip the defence’s hand to someone who is not being truthful, but they might also make it much more difficult for a defendant to cross-examine the complainant on the basis of how that complainant prepared in light of the fact that part of that would be subject to solicitor-client privilege.

This positive disclosure obligation is unprecedented in Canadian law. It is overbroad in relation to both its scope and application. It violates the right to silence and the right to full answer and defence.

Additionally, this unprecedented reverse disclosure will result in protracted constitutional litigation, adjournments of trials, and will only serve to exacerbate the delay problems that have plagued our criminal (and civil courts).

¹ Canada, Parliament, House of Commons, Standing Committee on Justice, Minutes of Proceedings and Evidence, 42nd Parl, 1st Sess, No 71 (October 23, 2017) at 1710 (Hon M Cooper)
The defence disclosure obligations violate the right to silence

The right to silence is a fundamental aspect of Canada’s criminal justice system and is “intimately linked to our adversarial system of criminal justice and the presumption of innocence.” The Supreme Court described the right to silence as “the single most important organizing principle of criminal law.”

An accused should only under the rarest of circumstances be compelled to provide information to the Crown. A robust right to silence is necessary to preserve an accused’s dignity, autonomy and privacy interests. In giving this principle full effect the Supreme Court affirmed that while an accused is constitutionally entitled to disclosure from the Crown there is no there is no general defence disclosure obligation. In other words, the defendant is “entitled to assume a purely adversarial role towards the prosecution.”

The defence disclosure requirements of bill C-51 depart from well-established case law and foundational constitutional principles. Under bill C-51 and accused, who is presumed innocent, would be forced to decide between a fair trial (through cross-examination driven by lawfully obtained material in his possession) and the right to remain silence.

This is an impossible choice and one that will need to be made by an accused prior to any evidence being presented in court, prior to being arraigned, and prior to hearing the Crown’s theory of the case. This choice is made even more perverse in that to obtain a fair trial the accused will not only be required to participate in his prosecution but will be required to alert untruthful witnesses to the evidence the defence intends to rely upon.

The irony, of course, is that by waiving the right to silence to obtain a fair trial the accused renders the trial unfair.

Some proponents of s.278.92(1) have noted a few situations where the defence is required to disclose information – expert reports, business records, and alibi defences. These comparisons are misleading.

The defence is only required to disclose a copy of an expert report after the Crown closes their case – there is no requirement that the defence provide this information to the Crown’s expert prior to their cross-examination. Similarly, the defence must provide notice that they will produce business records but there is no requirement that the defence disclose the records in advance. And, there is no statutory requirement that an accused disclose an alibi. Non-disclosure of an alibi does not affect the admissibility of the evidence only the weight it will be given by the court. Importantly, even when advance notice of an alibi is given there is no requirement to provide the exact details or evidence that will be called in support of the alibi.

---

2 R v Henry, 2005 SCC 76 at para 2.
5 P.(M.B.), supra at para 39.
The disclosure requirements of bill C-51 are a radical and unprincipled departure from well-established case law and constitutionally enshrined principles. There is often a balance that is struck between competing rights. Bill C-51 comes nowhere close to achieving that balance. It favours the state over the accused. It favours convictions over fairness. And it favours those who offer false evidence over just and proper verdicts.

**The defence disclosure obligations violates the right to full answer and defence**

Some witnesses lie. There is no presumption of honesty or credibility in a criminal court proceeding. To approach a criminal cause with a #BelieveSurvivors attitude represents an inconceivable and dangerous erosion of the presumption of innocence. The requirement that defence disclose material that would undermine or contradict a complainant’s evidence prior to the complainant actually offering under oath evidence in court will undermine the constitutional right to full answer and defence.

A trial is the search for the truth. Bill C-51, in the absence of any compelling justification or identified injustice, will act to undermine truth seeking function of trials. Bill C-51 will compel the defence to give a deceitful witness advance notice that they could be caught in a lie and give that witness the means to tailor their evidence to avoid being caught in that lie. Bill C-51 will result in wrong full convictions.

The right to cross-examination “without significant and unwarranted restraint” is “an indispensable ally in the search for truth.” 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.

These problematic results of the disclosure requirements contained in Bill C-51 are further compounded by the overbreadth of the circumstances in which defence disclosure must be made. Bill C-51 would require disclosure of material that relates directly to the subject matter of the offence. The ‘Twin myth’ reasoning that underpins the current s. 276 regime does not apply to evidence that forms part of the very charge the court is adjudicating. Bill C-51 would also compel disclosure of evidence that does not contain any sexual activity or intimate information that would otherwise be captured by s. 276.

This overbreadth is compounded by the broad definition of the type of material that would be captured by the new disclosure regime. Material that the accused holds a join interest with the complainant, like counseling records, would need to be disclosed. Material the complainant sent to the accused, like text messages, would need to be disclosed. Material that may otherwise be publicly available, like court filings, may still need to be disclosed.

---

7 R v Lyttle, supra at paras 1-2.
8 S.(N.), supra at para 48.
As the Criminal Lawyers’ Association noted, the problems with advanced disclosure are further aggravated because under Bill C-51 the complainant will not only receive advance disclosure but they will have standing to argue for the suppression of relevant and material evidence. The associated lawyer-client privilege will act as a shield to prevent a court from ever learning how the advance disclosure of information may have influenced the complainant’s evidence:

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.

The defence disclosure obligations will compound justice system delays

Bill C-51 requires that defense provide seven days notice of their application to adduce material that is lawfully in its possession. The subsequent adjudication of that application can be anticipated to be similar to the current s. 278 and s. 276 process. In all cases the complainant must be advised that they have standing and given an opportunity to retain counsel. The result is that the new application processes created by bill C-51 will necessitate in the adjournment of trial dates - that have been set for months or years - in virtually every case.

In many cases the relevance of the material in the possession of the defence will not crystalize until the Crown calls evidence. These mid-trial applications will universally result in adjournment of trials and in the case of trials heard by juries the result is likely mistrials.

The unnecessary procedural obstacles created by bill C-51 are inconsistent with the constitutional right to speedy adjudication of criminal charges. They undermine the work of the courts and Parliament to minimize delay in the justice system. And they will make it much more difficult for compliance with the trial timelines set out by the Supreme Court in *Jordan*. There is no doubt that serious criminal charges will be thrown out of court because of unconstitutional delay due to the delays created by bill C-51.
IV. Conclusion

Bill C-51 is a solution in search of a problem. It is an obvious response to recent public outcry over specific and high-profile sexual assault cases. It is true that sexual assault trials are difficult proceedings for all parties. Bill C-51 may make that process easier for complainants. But this comes at a cost. A cost of delay and wrongful convictions.

No one is suggesting that the current s. 276 provisions that prohibit the introduction of evidence and cross-examination of a complainant about prior sexual conduct should be rolled back. No one is suggesting that irrelevant or immaterial evidence should be admitted in our courts. No one is suggesting a trial by ambush. No one is suggesting that complainants should be prevented from responding, while under oath, to defence evidence. And no one is advocating that unlawfully obtained material should be used by an accused to cross-examine a complainant.

All of these protections exist in the current system.

There are no amendments to cure the issues with bill C-51’s reverse disclosure clause. Sure, the offending provisions in the bill could be narrowed in both scope and application. The evidentiary hearing could be made an in-camera hearing where the complainant is not granted standing. These amendments may make the defence disclosure regime less-bad but they would not go far enough to cure the fundamental problems with the offending provisions.

Bill C-51’s unprecedented regime of defence disclosure will not address the rare instances where the current and narrowly tailored sexual assault evidentiary rules are not properly followed. Bill C-51 will however erode the longstanding, constitutionally enshrined and fundamental underpinnings of our adversarial system.

The only principled solution to the problems in bill C-51 is to remove the offending provisions completely.

Michael Spratt

Dated: 17-09-2018