Montreal, April 29, 2019

To the members of the Standing Senate Committee on Legal and Constitutional Affairs
Senate of Canada, Ottawa

Attention: Ms. Keli Hogan, Clerk of the Committee
Keli.Hogan@sen.parl.gc.ca

Subject: Recommended amendment to subclause 225(6) of Bill C-75

Dear Senators,

[1] I am writing to you as an individual to recommend an amendment to Bill C-75, which is currently under review by your committee. More specifically, I suggest that you amend subclause 225(6) of the bill so as to repeal paras. 515(6)(c) and (d) of the Criminal Code (CC).

[2] Paras. 515(6)(c) and (d) state a criminal procedural rule that affects thousands of accuseds and subjects them to pre-trial detention, also called “custodial remand”. These paragraphs apply where an individual is detained in custody by police officers following arrest and arraigned in court to answer a charge of breach of a release condition or of trafficking in certain drugs (e.g. cocaine). In this case, paras. 515(6)(c) and (d) direct a judge to incarcerate the accused before trial, unless the latter can prove that detention was not justified. The current versions of CC 515(6)(c) and (d) and subclause 225(6) of Bill C-75 read as follows:

515(6) Order of detention—Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused’s detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or

(d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence.

225.(6) Paragraph 515(6)(c) of the Act is replaced by the following:

(b.1) with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs;

(c) with an offence under any of subsections 145(2) to 30 (5) that is alleged to have been committed while they were at large after being released in respect of another offence under the provisions of this Part or section 679, 680 or 816; or

[3] In this letter, I want to convince you that retaining paras. 515(6)(c) and (d) in the Criminal Code runs directly counter to a major objective of Bill C-75, “reducing the overrepresentation of Indigenous people and vulnerable populations in the criminal justice system, including those with addictions and mental illness.” In my view, since repealing paras. 515(6)(c) and (d) is consistent with this aim of the bill, those provisions can be deleted by amending subclause 225(6) of the bill.

1 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 (Second reading in the Senate, April 4, 2019), 1st Session, 42nd Parliament, (Can.) [Text of Bill C-75 on 2nd reading in the Senate].
3 Controlled Drugs and Substances Act, S.C. 1996, c.19.
4 Department of Justice Canada, Canada tables legislation to modernize the criminal justice system and reduce court delays, News release, March 29, 2018.
I am writing to you today because I am familiar with paras. 515(6)(c) and (d). These rules are if fact the central topic of my master’s thesis, entitled *La constitutionnalité du par. 515(6) du Code criminel et d’autres sujets touchant la libération provisoire au Canada*, which was reviewed by a panel of three law professors in 2018. My thesis was also recently submitted as evidence to the Commission d’enquête sur les relations entre les Autochtones et certains services publics au Québec : écoute, réconciliation et progrès.

**I. Introduction to my master’s thesis**

To summarize, in my thesis, I analyze the procedures provided for under ss. 503 to 526 of the Criminal Code, which include paras. 515(6)(c) and (d). Those procedures, called “judicial interim release procedures,” determine the cases in which a judge may or may not detain an accused in custody before trial. In my thesis, I analyze this procedural regime based on recent case law, the parliamentary debates that led to the adoption of ss. 503 to 526 in the 1970s and statistics on the imposition of custodial remand and release conditions in Canada. I also examine the practical application of interim release procedures in Quebec, that is to say that I describe and critique unwritten rules under ss. 503 to 526 that are followed by judicial stakeholders, including police officers, criminal lawyers and judges.

Chapter 3 of my dissertation, which is more relevant to this letter, concerns the constitutionality of paras. 515(6)(c) and (d). In it, I outline a legal argument that might convince the Supreme Court to reconsider two of its judgements—in *R. v. Pearson*, [1992] 3 S.C.R. 665, and *R. v. Morales*, [1992] 3 S.C.R. 711—in which it confirmed the constitutionality of two cases in which para. 515(6) applied. In *Pearson*, the court acknowledged the constitutionality of para. 515(6)(d), which concerns an accused person charged with drug trafficking. In *Morales*, it confirmed the constitutionality of subpara. 515(6)(a)(i), which concerns an accused charged with committing an indictable offence while on interim release in respect of another indictable offence. To date, however, the court has not considered the constitutionality of para. 515(6)(c), which applies to an accused charged with breaching an interim release condition. In chapter 3, I contend that paras. 515(6)(c) and (d) derogate from ss. 7 and 11(e) of the *Canadian Charter of Rights and Freedoms*, more specifically because those rules contribute to the excessive use of custodial remand in the case of aboriginal offenders. I also argue that paras. 515(6)(c) and (d) may lead to the needless detention of other vulnerable accuseds, such as homeless persons or individuals with addiction and mental health problems.

In the following paragraphs, I will first review the elements of Bill C-75 that are relevant to my letter. Then, referring to my master’s thesis, I will explain why you should move to repeal paras. 515(6)(c) and (d) by introducing an amendment to subsection 225(6) of the bill.

**II. Bill C-75 measures intended to improve the interim release system**

As you know, Bill C-75 was sponsored in the House of Commons by the Hon. Jody Wilson-Raybould, then Minister of Justice, who delivered a major speech on second reading of the bill in the House on May 24, 2018. In that speech, she noted that “indigenous people and marginalized Canadians, including those suffering from mental illness and addictions, continue to be

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6 Professors Anne-Marie Boisvert, Hugues Parent and Marie-Ève Sylvestre.
8 M. Chenette, *op. cit.*, note 5 supra, pp. 198-236.
11 *Id.*, pp. 203-219. Sections 7 and 11(e) of the Charter provide as follows:
   7. **Life, liberty and security of the person** – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
   11(e) **Proceedings in criminal and penal matters** – Any person charged with an offence has the right…not to be denied reasonable bail without just cause.
overrepresented in the criminal justice system." \(^\text{13}\) To correct the problem, the former minister committed to reforming interim release procedures. According to her speech, her intention in introducing Bill C-75 was not only to “modernize and streamline” those procedures but also to “enhance our approach to addressing administration of justice offences.” \(^\text{14}\) Those offences, which, in practice, are called “failure to appear” or “breach of condition” offences, are provided for by CC 145(2) to (5). They criminalize an accused’s failure to appear in court at a stage in the judicial process (first appearance, preliminary investigation, trial, etc.). They also criminalize breaches of interim release conditions, such as a condition prohibiting an accused from consuming alcohol or imposing a curfew. In her speech, the former Minister of Justice criticized the frequent imposition of unreasonable and needless conditions on accuseds:

> Across Canada, accused people are routinely burdened with complex and unnecessary bail conditions that are unrelated to public safety and that may even be impossible to follow, such as when a curfew is broken by an accused because he or she missed the bus in a remote area. In other words, accused people are being placed in circumstances in which a breach is virtually inevitable. We are setting them up to fail. \(^\text{15}\)

\[9\] In the circumstances, Ms. Wilson-Raybould underscored the need to state expressly a “principle of restraint” in the Criminal Code. Her intent was that this principle would direct judges “to consider the least restrictive and most appropriate means of responding to criminal charges at the bail stage rather than automatically detaining an accused.” \(^\text{16}\) She also noted:

> The individual circumstances of an indigenous accused and a vulnerable accused, such as a homeless person or one with mental illness and addiction issues, would become required considerations when making bail decisions. \(^\text{17}\)

\[10\] In fact, the former minister observed that these vulnerable accuseds are more often subject to legal proceedings for breaches of condition and that, as a result of those proceedings, are more often detained and subject to harsher release conditions. More specifically, she said:

> Indigenous people and marginalized Canadians are disproportionately impacted by breach charges, often because of their personal circumstances, such as a lack of family and community supports. As a result, indigenous people and marginalized Canadians are more likely to be charged, more likely to be denied bail, and if released, more likely to be subject to stricter conditions. \(^\text{18}\)

\[11\] Senator the Honourable Murray Sinclair spoke along the same lines in a speech he gave as the sponsor of Bill C-75 in the Senate on February 19, 2019:

> We also know that administration of justice offences have contributed to an increase in remand populations over the years, and an increase in the over-representation of Indigenous persons and of individuals from vulnerable populations in the criminal justice system. \(^\text{19}\)

\[12\] The Department of Justice is introducing specific measures in Bill C-75 to achieve the objective of reducing the imposition of unwarranted release conditions and the excessive use of custodial remand on marginalized accuseds. For example, the bill proposes to add new sections 493.1 and 493.2 to the Criminal Code. \(^\text{20}\) These sections provide that judges must follow two instructions when reaching a decision in a custodial remand proceeding. First, s. 493.1, which states the “principle of restraint”, provides that the judge shall seek to release the accused “at the earliest reasonable opportunity” to prevent the accused from needlessly languishing in custodial remand. \(^\text{21}\) Second, this section requires the judge to impose “the least onerous conditions that are

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\(^\text{14}\) Id.

\(^\text{15}\) Id.

\(^\text{16}\) Id.

\(^\text{17}\) Id.

\(^\text{18}\) Id.


\(^\text{20}\) Text of Bill C-75 on second reading in the Senate, note 1 supra, clause 210. Ss. 493.1 and 493.2 are discussed in my thesis: M. Chenette, note 5 supra, pp. 60, 98, 211 and 239.

\(^\text{21}\) 493.1 Principle of restraint – In making a decision under this Part [Part XVI Compelling Appearance of Accused Before a Justice and Interim Release], a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the
appropriate in the circumstances”.

Based on my understanding of s. 493.2, the Department of Justice would like judges to pay special attention to the principle of restraint in the case of aboriginal offenders because they are part of a vulnerable population that is overrepresented in the criminal justice system and is disadvantaged in obtaining release.22 That intent is more clearly expressed in Senator Sinclair’s speech:

The bill also directs police and judges to give particular consideration to the unique circumstances of people from Indigenous and other vulnerable communities when considering bail. This might include considerations related to poverty, such as unstable housing, or the absence of reliable means of transportation.23

[13] Another measure proposed in the bill to reduce the excessive use of custodial remand and to enhance the approach to addressing administration of justice offences is the creation of new Criminal Code section 523.1.24 This section provides for a new procedure that would help avoid the prosecution of breach of condition and failure to appear offences where the offence “did not cause a victim physical or emotional harm, property damage or economic loss.”25 In my understanding, however, this new procedure is optional because police officers and Crown prosecutors have the discretion not to resort to s. 523.1 and instead to bring charges for breach of an interim release condition.26 As is the case today, the filing of such charges will trigger the application of para. 515(6)(c).

III. Why repeal paras. 515(6)(c) and (d)?

[14] Having described Bill C-75, I can now explain paras. 515(6)(c) and (d) in greater detail. These provisions apply where a police officer decides to detain an individual in custody following arrest and where that individual is charged with breaching an interim release condition or with trafficking in drugs, including cocaine.27 In those conditions, the police officer shall cause that person to be taken before a justice of peace within a period of 24 hours.28 Under paras. 515(6)(c) and (d), the onus is on that person to justify his interim release at what, in practice, is called a “bail hearing”.29 Consequently, if an accused subject to paras. 515(6)(c) and (d) fails to adduce evidence at the bail hearing, the judge must order that he continue to be detained in custody.30 This incarceration order, which, in the Criminal Code, is called a “warrant for committal,”31 is valid for an indeterminate period of time but expires no later than the end of the trial or the date on which charges are withdrawn by the public prosecutor.32

[15] It should be noted that an accused who has not committed an offence under subs. 515(6) has no burden of proof to discharge at his bail hearing. In that case, under subs. 515(1), (2), (3) and (5) of the Code, the onus is on the public prosecutor to prove to the judge that custodial remand is

493.2 Aboriginal accused or vulnerable populations—In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
(a) Aboriginal accused; and
(b) accused who belong to a vulnerable population 20 that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

22 M. Chenette, note 5 supra, p. 211. Section 493.2 of the Criminal Code provides as follows:

21 Id. pp. 66, 183 and 184.

20 Criminal Code, s. 943 “warrant”, subsections 515(6) and 519(3)

23 M. Chenette, note 5 supra, p. 66, 84, 172, 183 and 184. I explain in my thesis that this detention order may be subject to review under ss. 520, 523(2) and 525 of the Criminal Code but that several shortcomings in these review procedures may contribute to the needless detention of certain accuseds concerned by paras. 515(6)(c) and (d): id., p. 71-118.
necessary.33 However, subss. 515(1), (2), (3) and (5) apply to very serious offences not contemplated by subs. 515(6), such as attempted murder without firearm,34 aggravated assault35 and even manslaughter.36 This situation reveals an illogical aspect of paras. 515(6)(c) and (d). In them, the legislator presumes it necessary to release a person charged with a very violent offence but also to detain a person charged with trafficking in a small quantity of drugs or of breaching an interim release condition who presents no danger to the public.37

A. Paras. 515(6)(c) and (d) encourage custodial remand in non-serious cases.

[16] Consequently, repealing paras. 515(6)(c) and (d) would do even more to reduce the excessive use of custodial remand on the vulnerable accuseds identified in Bill C-75. As I explain in my thesis, these provisions needlessly encourage the incarceration of abused persons who are already overrepresented in the custodial remand population, that is to say, aboriginal offenders, homeless persons and individuals suffering from mental illness and addiction problems.

[17] In fact, on pages 3 to 5 of my thesis, I outline the following four cases in which accuseds may be detained in custodial remand for no obvious reason under paras. 515(6)(c) and (d).38 These situations are fictional but based on realistic facts. All four cases clearly show that paras. 515(6)(c) and (d) presume that custodial remand is necessary in non-serious cases or for vulnerable accuseds who are overrepresented in the criminal justice system.

[18] Case 1: Ray is an aboriginal accused and has no criminal record. He has been charged with trafficking in less than one gramme of cocaine,39 an offence contemplated under para. 515(6)(d).40 Ray is in detention because he waived his right to present evidence justifying his interim release when he first appeared before the justice of the peace.

[19] Case 2: Leah is homeless. She is subject to para. 515(6)(c) because she was charged with a minor breach of condition. In fact, police officers arrested Leah and took her before a justice of the peace because she had breached her curfew condition, which prohibited her from possessing alcohol.41

[20] Case 3: Ali suffers from schizophrenia. He received a summons to appear in court because he had been charged with shoplifting, a theft offence punishable by summary conviction.42 He is subject to para. 515(6)(c) because he was subsequently charged with a summary offence of failing to appear in court.43 In fact, Ali did not appear in court because he lives in a remote area and missed his bus on that day.

33 Subsections 515(1), (2), (3) and (5) of the Criminal Code are explained in detail in my thesis: id., pp. 75, 92, 124-127, 145-149, 171-173, 183, 186-192 and 194-197.
34 CC subs. 24(1), s. 229 and para. 239(1)(b). Attempted murder is contemplated by subs. 515(6) only where a weapon is used. CC subpara. 515(6)(a)(vii); R. v. Dang, 2015 ONSC 4254, 21 C.R. (7th) 85, paras. 1, 25 and 26.
35 CC s. 268.
36 CC subs. 222(1), (2) and (4), s. 234 and para. 236(b).
37 I discuss this argument in my thesis: M. Chenette, note 5 supra, pp. 145, 146 and 195.
38 In this letter, I have slightly modified three of the four cases outlined in my thesis.
39 This case is inspired by the following cases, in which individuals were convicted of trafficking in cocaine, or possession for the purpose of trafficking, and the quantities involved were less than one gramme: L. H’Eureux c. R., 1992 CanLII 3929 (C.A.Q.)(0.5 g); Rousselot c. R., 2013 QCCA 1203, para. 2, including the facts of the trial decision; R. c. Rousselot, C. Q. Baie-Comeau, n° 655-01-007077-125, 20-02-2013, j. Dionne, pp. 4-7 (two transactions involving 0.25 g in each case for a total amount of $40); R. v. Morris, [2002] O.J. No. 5684 (S.C.J.), paras. 1 and 2 (0.4 g); R. v. Pilon, 2005 BCPC 527, paras. 2 and 10 (two packets of less than 0.5 g each); R. v. Silva, 2005 BCSC 1817, para. 2 (0.39 g); and R. v. Baddock, 2008 BCCA 48, paras. 1 and 6 (slightly less than 1 g).
40 Cocaine-trafficking is an offence under para. 5(3)(a) of the Controlled Drugs and Substances Act and subs. 5(2) of Schedule 1 of that act. It is contemplated by para. 515(6)(d) of the Criminal Code because it is an offence under the Controlled Drugs and Substances Act and punishable by life imprisonment.
41 This breach falls under para. 515(6)(c) because it is an offence under CC subs. 145(3).
42 Theft of property of less than $5,000 is a summary offence under CC s. 322 and subpara. 334(6)(ii). Under CC subs.787(1), the maximum penalty for this offence is currently six months in prison.
43 Ali’s case is based on the 20,424 adults in Canada against whom a charge of failure to appear was made or recommended by police in 2014 (this statistic is discussed in my thesis: M. Chenette, note 5 supra, p. 19). Note that failure to appear in response to a summons is contemplated under CC 515(6)(e) because it constitutes an offence under CC 145(2)(b) or(4). Under CC subs. 145(4), an individual may be charged if he fails to report to court for his first appearance on the date stated in the summons: R. v. Coombs, 2016 CanLII 9874 (Nfld. Prov. Ct.), para. 5, citing R. v. King, 2002 CanLII 40375 (Nfld. Prov. Ct.), para. 10; see also R. v. Jerrett, 2017 NLCA 65, paras. 14 and 18.
[21] **Case 4:** Eve has a serious addiction to cocaine, methamphetamine and heroin. She sells drugs on the street to pay for her habit and is subject to para. 515(6)(d) because she was charged with trafficking in a small quantity of cocaine.

[22] In these four cases, the burden of proof under paras. 515(6)(c) and (d), which presume the necessity of custodial remand for bail hearings, runs counter to objectives that Bill C-75 aims to achieve. When the accused fails to present evidence to the judge, the latter must order that the accused be detained, without regard to the seriousness of the offences, and may not apply the principle of restraint stated in the new ss. 493.1 and 493.2. In other words, to paraphrase the speech of the former Minister of Justice, the presumption of detention under paras. 515(6)(c) and (d) may preclude the judge from "consider[ing] the least restrictive and most appropriate means of responding to criminal charges at the bail stage rather than automatically detaining an accused" and from considering "the individual circumstances of an indigenous accused and a vulnerable accused, such as a homeless person or one with mental illness and addiction issues."

**B. Paras. 515(6)(c) and (d) undermine procedural fairness.**

[23] What is more, the burden of proof under paras. 515(6)(c) and (d) needlessly undermines the fairness of the judicial proceeding conducted against the accused. Even where they have no burden of proof, accuseds find themselves in a position of weakness when they appear at their bail hearing because the proceeding must, in principle, take place before a justice of the peace at their first appearance, that is to say, within 24 hours of being arrested. According to the Supreme Court, accused persons at this stage have only "a limited understanding of the court system and the charges facing them, and a limited ability to instruct counsel." The accused may not even have been able to consult his or her counsel of choice and is unaware of the evidence the Crown intends to adduce. On the other hand, the Crown prosecutor is in a position of strength since he or she "knows exactly what allegations are to be made against the accused and also knows what evidence will likely be introduced at trial." The prosecutor also has the cooperation of police officers, who may, as necessary, conduct additional investigations and testify in court to support the grounds for custodial remand. In the circumstances, the fact that paras. 515(6)(c) and (d) require accused persons to justify their release contributes substantially to the inequality between the government and the accused at the bail hearing.

[24] This inequality is even greater when the accused belongs to a vulnerable population that is overrepresented in the criminal justice system, including indigenous and homeless persons and persons suffering from addiction and mental illness problems. A marginalized accused, who in many instances cannot count on the support of reliable friends or relatives with financial resources, finds it more difficult to suggest bail to the justice of the peace. The accused may not even have been able to consult his or her counsel of choice and is unaware of the evidence the Crown intends to adduce. On the other hand, the Crown prosecutor is in a position of strength since he or she "knows exactly what allegations are to be made against the accused and also knows what evidence will likely be introduced at trial." The prosecutor also has the cooperation of police officers, who may, as necessary, conduct additional investigations and testify in court to support the grounds for custodial remand. In the circumstances, the fact that paras. 515(6)(c) and (d) require accused persons to justify their release contributes substantially to the inequality between the government and the accused at the bail hearing.

**C. Paras. 515(6)(c) and (d) exacerbate systemic discrimination against indigenous accuseds.**

[25] The presumption of detention under paras. 515(6)(c) and (d) is particularly prejudicial to indigenous accuseds since it perpetuates the tendency of Canadian institutions to deny them bail. The Supreme Court acknowledged this discrimination in *R. v. Gladue*:

> The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from
an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.\textsuperscript{54}

[26] Furthermore, by presuming that custodial remand is necessary, paras. 515(6)(c) and (d) is not conducive to an acknowledgement that incarceration is in many cases unsuited to the situation of indigenous accuseds. Again in \textit{Gladue}, the court wrote that:

\ldots aboriginal offenders are, as a result of\ldots unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.\textsuperscript{55}

[27] In addition, statistically speaking, paras. 515(6)(c) and (d) affect indigenous accuseds more particularly, at least in certain regions of Canada where a greater overrepresentation of aboriginal inmates in custodial remand is observed. I summarize the statistics in the following excerpt from my thesis:

\textbf{[Translation]}
Para. 515(6)(c) has a greater impact on aboriginal persons living in Saskatchewan and Yukon, where the use of interim detention and the overrepresentation of aboriginal inmates in custodial remand are unusually high. The reasons for this are as follows:

In Canada in 2014, police brought breach of condition charges, or recommended that such charges be brought, against 312.4 adults per 100,000 adult inhabitants. However, the rate was 5.4 times higher in Saskatchewan and 3.5 times in Yukon. Saskatchewan’s rate was 10.5 times higher than that of Quebec and Yukon’s 6.7 times greater.

Furthermore, in 2010-2011, the rate of persons in custodial remand (including non-aboriginal accuseds) was 2.0 times higher in Saskatchewan than in Quebec and 4.4 times higher in Yukon.

In Saskatchewan, however, aboriginal persons formed 11% of the adult population according to the 2006 census but represented 78% of admissions to custodial remand for that province in 2008-2009. In Yukon, aboriginal persons formed 22% of the adult population according to the 2006 census but represented 80% of admissions to custodial remand for that territory in 2008-2009.

Para. 515(6)(d) has a greater impact on aboriginal persons living in Manitoba and Yukon, where the use of custodial remand and the overrepresentation of aboriginal inmates in custodial remand are unusually high. The reasons for this are as follows:

In Canada in 2014, police brought cocaine trafficking charges, or recommended that such charges be brought, against 27.5 adults per 100,000 adult inhabitants. However, in that same year, the rate was 2.1 times higher in Manitoba and 4.0 times higher in Yukon. Manitoba’s rate was 3.0 times higher than that of Quebec and Yukon’s 5.7 times greater.

Furthermore, in 2010-2011, the rate of persons in custodial remand (including non-aboriginal accuseds) was 4.2 times higher in Manitoba than in Quebec.

In Manitoba, however, aboriginal persons formed 12% of the adult population according to the 2006 census but represented 68% of custodial remand admissions for that province in 2008-2009.\textsuperscript{56}

[28] Given the statistical link between paras. 515(6)(c) and (d) and the overrepresentation of aboriginal persons in custodial remand, I recommend that the committee move to repeal those paragraphs, which presume the necessity of incarcerating these individuals who are already subject to serious discrimination in the criminal justice system. This could be accomplished by proposing, in your report, an amendment to subclause 225(6) of Bill C-75.

\textbf{D. Conclusion}

\textsuperscript{56} M. Chenette, note 5 supra, pp. 213 and 214 (I have omitted the references). These statistics are explained in detail on pp. 22, 25, 278, 281 and 285-287 of my thesis.
The presumption of detention under paras. 515(6)(c) and (d) is irreconcilable with the principles of the new CC ss. 493.1 and 493.2 proposed under Bill C-75. If a person subject to paras. 515(6)(c) and (d) fails to adduce evidence to justify his release at his first appearance before a justice of the peace, the latter must order that that person be detained without examining the strength of the prosecutor’s evidence or the personal situation of the accused. Subsection 515(6) provides that “the justice shall order…that the accused be detained in custody” unless the accused “shows cause why the accused’s detention in custody is not justified.” In the French wording, the verb ordonne is used in the present indicative and is rendered in the English text as “shall”. These elements confer an imperative character on the expression.\(^{57}\)

Since the justice of the peace is bound by the presumption under subs. 515(6), he may not prefer an alternative to custodial remand, such as establishing appropriate release conditions, if the accused waives his right to present arguments to justify his release. The effect of this legal presumption thus thwarts the proposed s. 493.1, which, if adopted, requires the judge to exercise restraint in imposing custodial measures and to release the accused promptly where that measure is justified. Paras. 515(6)(c) and (d) thus also defeat s. 493.2, which directs the judge to give particular attention to the principle set forth in s. 493.1 in the case of an aboriginal accused because the latter belongs to a vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining interim release.

In closing, I want to note the genuine efforts the Department of Justice has made in Bill C-75 to reduce the overrepresentation in custodial remand of aboriginal and homeless persons and individuals suffering from addiction and mental illness problems. The bill constitutes a major advance in that direction, but I believe that repealing paras. 515(6)(c) and (d) would be another step toward establishing more consistent interim release rules and a fairer Canadian criminal justice system.

Thank you in advance for your attention to this letter.

Yours sincerely,

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