ACCLE and Bill C-75: Implications for Student Legal Clinics & Communities in Canada

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ACCLE and Bill C-75: Implications for Student Legal Clinics & Communities in Canada

JILLIAN ROGIN, GEMMA SMYTH & JOHANNA DENNIE

IN THE SPRING OF 2018, the federal Liberal government introduced Bill C-75, an omnibus criminal law reform Bill that proposed significant changes to the Criminal Code, including reforms impacting law student representation of accused persons facing criminal charges. Included in the Bill was an amendment to section 787(1) to increase the maximum penalty for all summary conviction offences from six months of incarceration to two years less a day. However, there was no corollary amendment proposed to section 802.1 of the Code, the section that allowed non-lawyers to represent accused persons as long as the maximum penalty did not exceed six months of incarceration (unless a provincial Order in Council authorized appearances on matters where greater penalties were possible). As such, agents, including law students, would not be able to represent persons accused of criminal offences—unless the provinces were to enact Orders in Council allowing them to do so—as there would no longer be any Criminal Code offences containing a penalty of less than six months. The gap in legal representation that this change would create threatened to deepen the access to justice crisis for already marginalized clients and impact the education of law students at student legal clinics across Canada. Due to the urgency of the varied impacts of Bill C-75, the Association of Canadian Clinical Legal Education (ACCLE) responded by providing written submissions to the Standing Committee on Justice and Human Rights and by sending a representative to Ottawa to make submissions before the Committee. Notwithstanding the compelling arguments of ACCLE and other organizations, these provisions of Bill C-75 were passed and have now taken effect.

While ultimately unsuccessful in its efforts to forestall these Criminal Code reforms, as ACCLE discovered in responding to Bill C-75, removing student appearance rights has provided an opportunity to reflect on the important role student legal clinics have come to play both in providing meaningful representation and in educating law students. In what follows, we outline ACCLE’s contribution in responding collectively to Bill C-75 and expand on portions of our submission that were truncated due to page limits. We review the changes to section 787(1) and the implications for clients of legal clinics. We also provide an overview of legal clinics in Canada that will assist in understanding ACCLE and ACCLE’s role in responding to Bill C-75. A review of the current landscape of law student representation of clients facing summary conviction

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1 Canada, Bill C-75, An act An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 1st Sess, 42nd Parl, 2018 (first reading 29 March 2018).
2 Bill C-75 received Royal Assent on 21 June 2019. An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, SC 2019, c 25 [Bill C-75].
3 Ibid, s 316.
4 Criminal Code, RSC 1985, c C-46, s 802.1 [Criminal Code].
offences will then be presented. Finally, avenues for further advocacy will be suggested. We then reproduce the submission made by ACCLE to the Standing Committee in its entirety. It is our hope that ACCLE’s involvement in responding to Bill C-75 generates renewed interest in the role of legal clinics in advocating for access to justice and the importance of ensuring ongoing student representation of persons accused of criminal offences.

I. LAW STUDENT LEGAL CLINIC REPRESENTATION IN CANADA AND SECTION 787(1)

As mentioned, Bill C-75 is an omnibus criminal law bill that has made numerous amendments to the Criminal Code, the Youth Criminal Justice Act, and other Acts. The change to section 787(1) of the Code addresses the default maximum penalty for summary conviction offences. Generally, there are three classifications of offences in the Criminal Code: 1) summary conviction offences, 2) indictable offences, and 3) hybrid offences, also referred to as Crown option offences or dual offences. With hybrid offences, the Crown can choose to proceed by way of summary conviction or by way of indictment.5 Indictable offences are those that are the most serious in the Criminal Code and carry the lengthiest available terms of incarceration, while summary conviction offences tend to be considered less serious and attract lesser penalties. Largely in response to the Supreme Court of Canada’s decision in R v Jordan,6 which redefined the constitutional contours of unreasonable delay contrary to section 11(b) of the Canadian Charter of Rights and Freedoms (Charter), Bill C-75 aims to reduce inefficiencies in the process of getting matters to trial.7 As one part of achieving this overarching concern the reforms,

- hybridize or reclassify indictable offences that are punishable by 10 years imprisonment or less so they are punishable either as indictable or summary offences [and]
- standardize the maximum penalty of imprisonment for all summary conviction offences to 2 years less a day.8

The rationale here is that these changes will provide Crown Attorneys with broader discretion in selecting the forum for trial, thereby allowing for more matters to be heard in the provincial courts. Criminal matters that proceed in the provincial courts tend to be less time consuming as they impose much less complicated procedural requirements than those heard in the superior courts. On the one hand, the expansion of hybridized offences may benefit accused persons; there will be more opportunities for the accused to avoid the more serious consequences engaged with being tried (and perhaps convicted) of indictable offences. On the other hand, where

5 Per s 34(1)(c) of the Interpretation Act, RSC, 1985, c I-21, hybrid offences are deemed to be indictable until the Crown makes an election.
6 2016 SCC 27.
8 Department of Justice, “Reducing Delays and Modernizing the Criminal Justice System,” online: <justice.gc.ca/eng/cj-jp/redu/index.html> [perma.cc/Y89W-SNE8].
the Crown proceeds by way of summary conviction, the penalty will be more severe upon conviction than in the past, and the risk of deportation for minor matters much expanded. Additionally, hybridization, coupled with the change to the maximum default penalty for summary offences, means that already overburdened lower courts will be further overwhelmed at the same time that agent representation in lower court proceedings is being eroded.

The changes that will most impact student legal clinics and clinic clients arise from the amendment to section 787(1) which raises the maximum penalty for all summary conviction offences. In its prior iteration, section 787(1) set out the default maximum penalty for summary conviction offences as follows:

Unless otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both.”

This meant that if convicted for a summary conviction offence, the accused faced a maximum term of six months of incarceration. Bill C-75 raised the maximum penalty for all summary conviction offences to two years less a day.

Under section 802.1 of the Criminal Code, law students working in legal clinics are only permitted to represent defendants facing sentences of less than six months. More specifically, section 802.1 limits the use of agents by outlining that defendants cannot be represented by agents (non-lawyers) unless the maximum penalty for the summary conviction offence is less than six months.

Read together, the prior iteration of section 787(1) and section 802.1 enabled non-lawyers, including law students, to appear for accused persons in defence of their criminal charges on summary conviction offences. Provincial law society legislation and by-laws allow law students to provide some legal services, even though they are not licensed lawyers, if they are working at a legal clinic under the supervision of a licensed lawyer who assumes responsibility for the student’s work.

Presumably, the limit on agent or non-lawyer representation in the Criminal Code recognizes that law students (and other agents) are not sufficiently skilled to represent clients who are facing significant periods of incarceration if convicted and that clients facing significant jail time should only be represented by licensed lawyers. Although section 802.1 of the Code allows the Lieutenant Governor in Council of the provinces to approve programs authorizing non-lawyers to appear where the accused faces a carceral term exceeding six months upon conviction, this is not universal. To date, there are only a handful of provinces that have enacted Orders in Council to enable non-lawyer representation.

Bill C-75 did not amend section 802.1. Since all summary conviction offences in the new Bill now have a maximum penalty of incarceration exceeding six months, absent provincial Orders

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9 See further commentary of the impact on immigration status that the change to section 787 will entail, as well as further commentary on the overburdening on lower courts, in our submissions, infra.
10 Criminal Code, supra note 4, s 787(1), as it appeared on 29 July 2019.
11 Bill C-75, supra note 2, s 316.
12 Criminal Code, supra note 4.
13 See, for example, By-Law 7.1, sections 2.1 (1) & (2) pursuant to the Law Society Act, RSO 1990, c-L8, online: <lawsocietontario.azureedge.net/media/lso/media/legacy/pdf/b/by-law-7.1-operational-obligations-01-25-18.pdf> [perma.cc/R534-C4V4].
14 At the time of writing, Ontario, Saskatchewan, and Alberta are the only provinces that have enacted such orders.
in Council, accused individuals will not be able to be represented by agents, including law students working under the supervision of a licensed lawyer. The absence of an amendment to section 802.1 will potentially end law student representation of persons facing criminal charges in many areas of Canada, ending decades of legal clinic/law student representation of people who do not qualify for any other legally aided representation against criminal charges.

II. OVERVIEW OF STUDENT LEGAL CLINICS AND CRIMINAL LAW REPRESENTATION IN CANADA

Student legal clinics play a unique role in the Canadian access to justice landscape. This is also true of their place in legal education more generally, as student legal clinics have historically been treated as useful co-curricular activities helpful in advancing a pro bono ethic but unworthy of meaningful curricular integration. It is very rare for Canadian student-run legal clinics to provide a national response to an issue, in part because of the diversity of student legal clinics across the country. This section outlines a broad overview of student legal clinics and criminal law representation in order to contextualize ACCLE as a national organization representing the interests of clinical legal educators in Canada.

The province of Ontario arguably has the most robust legal clinic system in Canada, with seventy-four community legal clinics in the province funded by Legal Aid Ontario. Each law school in Ontario has one affiliated “Student Legal Aid Services Societies” (SLASS) clinic funded by law schools and Legal Aid Ontario. Windsor Law and Osgoode Hall Law School each also support clinical programs wherein students work with community legal clinics and receive academic credits.

Legal clinics in other provinces tend to be less numerous, although the concept of students providing legal services under the supervision of a lawyer in collaboration with a law school is not uncommon. Many law schools also offer various experiential programs that are available through course work without the physical space of a clinic. Each province in Canada has unique student

16 At a provincial level, Ontario student clinic directors coordinate with one another, and Legal Aid Ontario-funded clinics have listervs and other points of connection.
18 Legal Aid Ontario, “Legal Clinics,” online: <legalaid.on.ca/en/getting/type_civil-clinics.asp> [perma.cc/2NWY-BBQR] and see also Abramowicz, supra note 17.
20 Legal Aid Ontario, “Student Legal Aid Services Societies,” online: <www.legalaid.on.ca/en/contact/contact.asp?type=lass> [perma.cc/4D6Z-TFJ5].
21 See Osgoode Hall Law School, “Experiential Education,” online: <www.osgoode.yorku.ca/programs/juris-doctor/experiential-education/> [perma.cc/NY6M-XGVC]; University of Windsor Faculty of Law, “Clinical and
representation rules that allow students and paralegals (where they exist) to represent clients in some criminal matters. However, some provinces also have Orders in Council that grant students-at-law or articling students representation rights. The proportion of criminal matters at legal clinics also varies across the country.\textsuperscript{22} Student legal clinics take on a variety of legal matters, predominantly (although not exclusively) matters that disproportionately impact community members with low incomes.

Although the types of law and scope of student legal clinic work have significantly expanded over the past ten years, the majority have criminal law practices that are impacted by the change to section 787(1) of the Code.\textsuperscript{23} Most, if not all, criminal law representation at student legal clinics occurs where the client does not qualify for state-funded assistance or legal aid programs but cannot afford to retain a lawyer. Typically, a person will be denied legal aid if there is no risk of jail time upon conviction and if they do not financially qualify.\textsuperscript{24} This means that marginalized people charged with criminal offences who are not facing jail time are routinely denied legal aid, including those living in poverty and on social assistance. Financial eligibility guidelines are often not in keeping with the reality of the cost of representation. In \textit{R v Moodie}, Justice Nordheimer succinctly described this problem in Ontario as follows:

> It should be obvious to any outside observer that the income thresholds being used by Legal Aid Ontario do not bear any reasonable relationship to what constitutes poverty in this country. As just one comparator, in a report issued last year, Statistics Canada calculated the low income cut-off, before tax, for a single person living in a metropolitan area (more than 500,000) for 2014 at $24,328, or more than twice the figure that Legal Aid Ontario uses.\textsuperscript{25}

The right to counsel in criminal law enshrined in section 10(b) of the \textit{Charter} does not include the right to state-funded counsel.\textsuperscript{26} Although fair trial rights under sections 11(d) and 7 of

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\textsuperscript{22} Unfortunately, there is no existing data on the numbers of clients served by student legal clinics across Canada. More research in this area is much needed.

\textsuperscript{23} See for example, Gemma Smyth & Samantha Hale, “Clinical and Experiential Learning in Canadian Law Schools,” online: \texttt{<uwindsor.ca/law/341/clinical-and-experiential-learning>} [perma.cc/ENR4-B2QN]; Peter A Allard School of Law, “Clinical and Externship Programs,” online \texttt{<allard.ubc.ca/student-resources/jd-academic-services/upper-year-opportunities/clinical-and-externship-programs>} [perma.cc/6X3K-BDMK]; University of Alberta Faculty of Law, “Experiential Learning,” online \texttt{<ualberta.ca/law/about/experiential-learning>} [perma.cc/SLSL7-ED6Z].

\textsuperscript{24} For examples of these criteria, see Legal Aid Services Society, “Criminal Charges,” online: \texttt{<www.lss.bc.ca/legal_aid/criminalLaw>} [perma.cc/R52H-5N47]; Legal Aid Ontario, “What is Legal Aid Ontario’s Certificate Program?,” online: \texttt{<www.legalaid.ab.ca/en/about/downloads/factsheets/What%20is%20Legal%20Aid%20Certificate%20program.pdf>} [perma.cc/T7WQ-LN9J]; Legal Aid Alberta, “Adult Criminal Law,” online: \texttt{<www.legalaid.ab.ca/help/Pages/Adult-Criminal-Law.aspx>} [perma.cc/JZ8Q-9YCV].


\textsuperscript{26} \textit{R v Rowbotham}, [1988] OJ No 271, 1988 CanLII 147 (ONCA) at para 156 [\textit{Rowbotham}].
the Charter may include state-funded counsel,27 access to this funding is only constitutionally required when the matter is considered sufficiently serious and complex.28 Unfortunately, those who face what are considered to be minor criminal charges are likely not able to qualify for funded counsel. Indeed, for many low-income Canadians, student representation is the last hope for obtaining legal assistance for a criminal trial. Thus, the importance of law student representation in filling a gap in legal representation in Canada cannot be overstated. Given the number of student legal clinics across Canada that represent low-income and marginalized clients in criminal law matters, ACCLE was compelled to respond to and challenge the changes to student representation presented by Bill C-75.

III. ACCLE

Formed in 2009, ACCLE—among its other duties—is an organization that exists to represent the voices of legal educators and clinicians working in clinical legal education. The membership of ACCLE includes clinicians and clinical legal educators from across Canada. ACCLE was formed to provide a forum for clinicians and professors to meet and share information and to promote clinical legal education and clinics more generally across the country.29 ACCLE was created in the aftermath of the Carnegie30 and Stuckey Reports,31 which galvanized Canadian and American legal educators to increase clinical and experiential education in law schools. Highlighting the importance of skills and values-based learning, rooted in practice experience, the reports inspired changes to law school curriculum. The promotion of experiential education as an essential component of legal education in North America has grown since this time.32 Since its inception and in furtherance of these objectives, ACCLE has hosted nine conferences bringing together scholars, lawyers, and clinicians. While ACCLE initially focused on bringing together clinicians and clinical legal educators to support ideas and practices of Canadian clinical legal education, the organization has matured to embrace a greater advocacy role. ACCLE’s collaborative and collective response to Bill C-75 is an ideal example of this advocacy.

IV. BACKGROUND TO THE SUBMISSION

27 Ibid. Rowbotham is the leading provincial appellate case on this issue and has been cited by other provincial courts with approval. See Jennifer Bond, “Failure to Fund: The Link between Canada’s Legal Aid Crisis & Unconstitutional Delay in the Provision of State-Funded Legal Counsel” (2015) 35 NJCL J Const L 1 at 26.
28 Rowbotham, supra note 26.
29 Association for Canadian Clinical Legal Education, “About,” online: <www.accle.ca/about/> [perma.cc/DB4E-Z7CV]. For a fuller discussion of ACCLE’s history see “ACCLE Presidents’ Interview,” this volume.
32 For an overview of the shift in legal education towards experiential education in the Canadian context, including the influence of the Carnegie and Stuckey reports, see Lorne Sossin, “Experience the Future of Legal Education” (2014) 51 Alta L Rev 849.
Shortly after the Bill was introduced, ACCLE members came together at the annual conference to create a national and coordinated response to the proposed changes.33 Debate at the conference reflected the changing role of ACCLE as discussed in the introduction to this volume. Two visions of ACCLE’s role arose. While all participants felt strongly that ACCLE should intervene both informally with politicians and formally to the Standing Committee, participants disagreed on the focus. Some thought ACCLE could focus solely on the Bill’s impact on student appearance rights, while others preferred broader advocacy on behalf of groups who would be disproportionately impacted by the Bill. Ultimately, the group preferred focusing both on students and clients, which gave rise to the submission’s more expansive focus. Interestingly, media coverage of ACCLE and legal clinic advocacy tended to focus on students.34 This focus also seemed more palatable to politicians.35

Because of the wide scope of the Bill, the limited permitted page length, and the arrayed impacts on several affected groups, it was impossible to capture the full range of justice issues in a single submission. Indeed, there are many useful submissions publicly available on the Standing Committee’s website.36 ACCLE attempted to focus on key justice issues that impact students as well as members of marginalized communities, including Indigenous, Black and racialized people, women, people with low incomes, and people suffering from mental health and/or addictions issues. The authors also spoke with many former legal clinic students who attested to the positive impact of their clinical experiences on their professional careers.

After the conference, the authors drafted written submissions that were reviewed by the ACCLE board, and then sent a delegate to present on those submissions at the Standing Committee on Justice and Human Rights on Parliament Hill. ACCLE also sent edited written submissions to the Senate Standing Committee on Legal and Constitutional Affairs. Board members conducted significant advocacy with individual Senators and decision-makers as the Bill proceeded through the House and Senate. The process of advocating for these changes is its own fascinating study in formal and informal advocacy; however, for the purposes of this piece the authors’ focus remains on ACCLE’s role and rationale for the specific arguments advanced in the submission.

V. IMPLICATIONS OF CHANGES TO THE DEFAULT MAXIMUM PENALTY IN SUMMARY CONVICTION OFFENCES

33 Gemma Smyth et al., “The Whole Lawyer 2.0” (delivered at the ACCLE/CALT conference, Faculty of Law, Queen’s University, Kingston ON, May 31-June 2, 2018) [unpublished].
35 For example, when Professor Rogin appeared at the Standing Committee on Justice and Human Rights on behalf of ACCLE, the focus of the questions she received was on the impact on law students and law student representation. See the transcripts of that proceeding, online: <openparliament.ca/committees/justice/42-1/105/?page=3> [perma.cc/7T94-HFSR].
As discussed earlier, ACCLE’s response to the legislative reforms focused both on the ramifications of ending law student representation, as well as impacts on clients. This choice, led by the ACCLE membership, acknowledges that student legal clinics do not solely exist to provide law students with experiential education opportunities. Indeed, student legal clinics do not support practising lawyering on poor people to prepare law students for future job opportunities. Rather, legal clinics in Canada have arisen out of deep concerns with the injustices faced by marginalized people and the ways that the law has been constructed to create and maintain marginalization. As detailed in our submission, the legal clinic movement in Canada has been driven by twin commitments to historically marginalized clients and experiential education.

Changes in law student representation is part of a much larger pattern that threads its way through the Bill; namely, the erosion of the rights of the accused under the rubric of court and administrative efficiencies. The change in the use of agents is one important aspect of the Bill that compounds many of the other threads of inequalities that will impact not just clinic clients who are facing criminal charges and will no longer be able to access representation, but also clients of poverty law clinics more generally. Legal clinics serve people living in poverty—disproportionately Indigenous people, racialized people, women, people living with mental health issues and disabilities, newcomers and refugees, and people who have been criminalized. Many clients accessing community legal clinics are or have been criminalized and subjected to the heavy hand of criminal legal system and/or immigration systems. The change in the maximum penalty will expose marginalized people to lengthier terms of incarceration—which can lead to deportation proceedings for accused persons with precarious immigration status—all while simultaneously impeding access to counsel.

VI. FURTHER ADVOCACY AND FUTURE RESPONSES

37 Discussed in more detail, infra, in our submission.
38 See, for example, Daniel Wilson & David McDonald, The Income Gap Between Aboriginal Peoples and the Rest of Canada (Ottawa: Canadian Centre for Policy Alternatives, 2010), online: <www.policyalternatives.ca/sites/default/files/uploads/publications/docs/Aboriginal%20Income%20Gap.pdf> [perma.cc/KWK5-QX6R].
39 For commentary and statistics on the racialization of poverty in Ontario, see “The Colour of Poverty – Colour of Change: Fact Sheets” (2019), online: <www.colourofpoverty.ca/fact-sheets/> [perma.cc/7KWL-D9ZK].
Ultimately, the interventions of ACCLE and many others who made submissions on Bill C-75 were not successful in changing the Bill itself. Many of the reforms contained in Bill C-75 have already come into force, including the change to section 787(1).44 In Ontario, the change to section 787(1) has been exacerbated by significant cuts to the funding of Legal Aid Ontario which have doubly impacted legal clinics and client representation in other criminal matters. In April of 2019, the Ontario government cut Legal Aid Ontario’s funding by 30 per cent for the 2019-2020 fiscal year. Legal clinics, including SLASS clinics providing criminal law student representation, have been devastatingly impacted by these cuts which will further erode access to justice for marginalized people. The cuts have also impacted criminal law service provision more generally. Concerns have been raised about cuts to services that will severely impact marginalized accused in the bail system45 as well as the immigration system.46 Additionally, the Ford government has introduced the “student choice initiative” at Ontario Universities which allows students to opt-out of any ancillary fees for University services that are not considered “essential services.47” The SLASS clinics in Ontario rely heavily on student levy funding and are experiencing drastic cuts to their budgets as a result of the newly introduced opt-out program. Collectively, these cuts will impact fair trial rights for those who are left without access to representation. Further advocacy on the impacts of the erasure of student representation in criminal courts is needed and should take multiple forms.

The issue of student representation in criminal matters leads directly to larger questions of fair trial rights, including the right to state-funded counsel. As such, litigation strategies should also be further considered, including constitutional challenges to the change in the default maximum penalty for summary conviction offences.48 The Supreme Court of Canada has never squarely adjudicated the constitutional right to state-funded counsel in the context of sections 7 and 11(d) fair trial rights for criminal accused.49 As per R v Rowbotham,50 provincial appellate courts have found that fair trial rights may be breached where an accused is unrepresented at trial due to lack of legal representation where the issues are serious and complex.51 However, the

44 See here for the various coming into force dates for Bill C-75, online: <www.lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C75E#a2-4> [perma.cc/MQ6U-FKPT]. The new version of s 787(1) came into force on 19 September 2019.
47 Although the Divisional Court recently granted an application for certiorari quashing the Student Choice Initiative, see Canadian Federation of Students v Ontario, 2019 ONSC 6658, it is possible that the Government of Ontario will appeal the decision. As well, the Initiative had severe impacts on SLASS clinics for the fall term of 2019.
48 For example, Windsor Law has created a supervised research course in response to the cuts to Legal Aid Ontario. Students enrolled in the course will be researching various litigation strategies including revisiting the Rowbotham regime for providing state-funded counsel to ensure fair trial rights per sections 7 and 11(d) of the Charter. This argument will include the impact of the change in the maximum penalty contained in section 787(1).
49 In the context of child apprehension proceedings, the Supreme Court of Canada has found that the state must provide state-funded counsel to a parent who is facing the apprehension of their child to meet its constitutional obligations vis-à-vis fair hearing rights under section 7 depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. See New Brunswick (Minister of Health and Community Services v G(J), [1999] 3 SCR 46.
50 Bond, supra, note 27.
51 Rowbotham, supra note 26.
constitutional landscape that underpins these frameworks has changed dramatically since these issues were initially adjudicated.\textsuperscript{52}

The Rowbotham regime is no longer an adequate measure for ensuring fair trial rights; it was initially intended to be utilized in exceptional circumstances when a person was denied access to state-funded counsel.\textsuperscript{53} Given that a lack of access to funded counsel is now becoming more the norm rather than the exception, it is time for Rowbotham to be re-visited. We conclude that there may be room to bring constitutional arguments with respect to clinic clients and the enactment of section 787(1) (and lack of corollary amendment to section 802.1), on the basis that the fair trial rights of the (unrepresented) accused, impacted by the lack of student representation in conjunction with eviscerated legal aid schemes, will be violated. This and many other constitutional arguments need to be further explored including the differential impact that lack of access to representation will have on various people pursuant to section 15 of the Charter.

VII. CONCLUSION

This introduction to the submissions that ACCLE made to the Standing Committee on Justice and Human Rights is intended to contextualize our submissions. ACCLE’s response, while meaningful and hopefully impactful, also demonstrates some of the challenges that legal clinics face on a day-to-day basis, which include achieving an approach that is collaborative, consultative, and includes the voices of those most impacted. Here we acknowledge that there were deficits in our collaboration in the response to Bill C-75.\textsuperscript{54} As with so many legal and political changes, action often needs to happen immediately, with little time for the real work that consultation and collaboration entails. This dynamic is in many ways how law, the legal system, and the political system impede possibilities for meaningful challenges to injustices. We acknowledge that this dynamic has meant that our intervention is limited in that it did not include the voices of clients and law students. However, we also learned a great deal about the process and feel that we are well-positioned to strengthen our ability to be inclusive should the opportunity to present in this manner arise again.

What follows are the written submissions that ACCLE submitted to the Standing Committee on Justice and Human Rights. Although ultimately unsuccessful, ACCLE’s role in responding to and challenging aspects of Bill C-75 was nonetheless a pivotal moment in ACCLE’s history as an organization. At the very least, this submission highlights the need and possible role for a national voice for student legal clinics.

\textsuperscript{52} Not only has legal aid funding been vastly decreased on a national scale, it could be argued that what might be considered “serious” and “complex” has also changed dramatically.

\textsuperscript{53} Bond, supra note 27 at 3.

\textsuperscript{54} As Jeff Carolin has pointed out, law reform efforts that are not generated by, and inclusive of, the voices of those most impacted can potentially re-entrench the powerlessness of already marginalized people, see Jeff Carolin, “When Law Reform is Not Enough: A Case Study on Social Change and the Role that Lawyers and Legal Clinics Ought to Play” (2014) 23 J L & Soc Pol’y 107 at 127.
Submission to the Standing Committee on Justice and Human Rights

Re: Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts

From: Association for Canadian Clinical Legal Education (ACCLE)

Prepared by: Jillian Rogin, Gemma Smyth, Johanna Dennie and Parmis Goudarzimalayeri

Date: August 21, 2018

Introduction

The Association for Canadian Clinical Legal Education (ACCLE) respectfully submits feedback on Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts. ACCLE is concerned with several aspects of the proposed Bill C-75. We have divided these concerns into two primary categories; impacts on legal clinics and clinical law students and impacts on clients. Throughout, we draw on data from Statistics Canada and other independent reports.

Impacts on Clinical Law Students

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

As it stands, Bill C-75 will prevent students in clinical law programs from representing accused persons in criminal proceedings, if the provinces do not have legislation or Orders in Council specifically allowing students to appear. The rationale for this change is not clear. There is no suggested amendment to s. 802.1, which could permit student representation under the supervision of a lawyer. It is difficult to project the exact numbers of people that will no longer be able to access clinic representation. In some provinces such as Saskatchewan (with only one legal clinic, CLASSIC (Community Legal Aid Service for Saskatoon Inner City), clients will have no other option.

For decades, law students at legal clinics across Canada have been assisting accused persons who cannot afford to pay a lawyer or who are not eligible for legally aided lawyers. Each law school clinic has its own history but in general terms, the legal clinic program in Canada was initiated by law students, eager to assist marginalized people navigating legal processes. Since the late 1960’s, law school education has provided opportunities for law students to work at legal clinics, including representing accused persons in criminal matters. In fact, law student clinics were created by law students and have become a foundational aspect of increasing access to

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representation for marginalized accused. Law school clinics provide quality services to marginalized people, foster and enhance legal education for law students, enhance commitments to access to justice, and prepare students for the practice of law.

There is vast scholarship spanning decades emphasizing the important role that legal clinics play in teaching students to be lawyers, deepening their commitment to social justice and pro bono work, enhancing representation for people with low income, and in promoting access to justice. It is not at all clear what interest Parliament is responding to by eradicating this important component of access to representation for clients facing criminal charges.

Impacts on Clients

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

Crown Discretion

The underlying goal of the proposed amendment to s.787(1) is that it would provide a greater range of discretion for Crown Attorneys who would have more latitude to try more serious cases in provincial court. The Bill would hybridize most indictable offences in the Criminal Code, creating the opportunity for the Crown to elect to proceed either summarily or by indictment. The Bill also raises maximum penalty for all summary conviction offences from 6 months to two years less a day. The purpose of this reclassification is to provide the Crown with a wider range of options as to forum for the trial, longer sentencing ranges upon conviction, and more ‘efficient’ use of court resources.

Currently, for all hybrid offences, where the Crown elects to proceed by indictment, the accused is put to his election (see s.536(2) of the Criminal Code) to be tried either in the Superior Court by judge alone or by judge and jury or can elect to be tried by judge alone in the provincial court (unless it is a s.469 offence in which case the Superior Court has exclusive jurisdiction). One factor that impacts the Crown decision to elect is the length of the potential jail time the accused may face if convicted. For example, if an accused is charged with the hybrid offence of theft under $5,000 contrary to s.343(b) of the Criminal Code, the Crown can elect to proceed by indictment, the maximum penalty being not more than two years of jail time, or if proceeded by way of summary conviction, the maximum penalty would be six months of incarceration. If the Crown Attorney wants more than six months of jail time to be served upon conviction, they are forced to proceed by indictment which means that the accused can elect to be tried by judge and jury or by judge alone in the Superior Court and includes the option to have a preliminary inquiry.

The proposed increase in maximum penalty for summary conviction offences means that the Crown can proceed summarily but can seek much longer sentences upon conviction than are
currently available. Where the Crown proceeds summarily, the accused has no option of forum and is not entitled to a preliminary inquiry or to a trial in a Superior Court. The proposed changes mean that the Crown can seek more jail time without the accused having the option of being tried by a jury or the option to proceed in the higher court.

Charter Rights

The preclusion of law student representation proposed in Bill C-75 implicates fair trial rights and could potentially violate ss.7, 11(d), and 15 of the Charter. Although the caselaw on the parameters of an accused’s rights to state funded counsel are relatively well settled, the common underlying thread of these decisions is the availability of state funded representation for accused people. As noted in *R v Rowbotham*, the reason that a proposal to include a section in the Charter guaranteeing state funded counsel was not enacted was premised on assurances that low-income accused persons would have access to legal aid:

In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within the provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.4

If Parliament makes sweeping changes precluding law students from representing low income clients, this combined with the evisceration of many legal aid programs across Canada,5 may mean that constitutional arguments regarding state funded counsel can be reinvigorated (ss.7 and 11(d) having regard to s.15 in terms of disproportionate impact on particular groups).

We are also of the opinion that insufficient attention has been paid to the interpretation of Charter rights with respect to those who will be most disproportionately impacted if Bill C-75 is passed into law. In its “Charter Statement”, the Department of Justice claims that,

Many of the issues that Bill C-75 seeks to address have disproportionate impacts on groups that are over-represented in Canada’s criminal justice system, in particular

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4 *R v Rowbotham*, 1998 CanLII 147 at para 156.
Indigenous persons and individuals from vulnerable populations including persons with mental illness and addictions.  

However, many of the proposed changes do not properly address the interests of people who are over-represented in the criminal justice system and will not alleviate this over-representation. It is imperative that constitutional considerations are contemplated in a manner that considers the interests of those most disproportionately impacted. Failure to properly address the interests of racialized and Indigenous accused could lead to conclusions that many aspects of the Bill are constitutionally infirm on the basis of s.15 of the Charter.

**Delay, Guilty Pleas**

*Delays and Self-Represented Litigants*

Curtailing law student representation will also result in further court delays and further burdens on the provincial courts. It is widely understood that unrepresented litigants cause court delays and that the legal system as a whole works more efficiently when people come to court with legal representation. As noted by The Honourable Beverly McLachlin, unrepresented litigants further compound issues of access to justice:

To add to this [the cost of legal representation], unrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case…The proceedings adjourn or stretch out, adding to the public cost of running the court. In some courts, more than 44 per cent of cases involve a self-represented litigant. Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be ‘unbundled’, allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is ‘absurd’, not unlike allowing a medical patient to administer their own anesthetic.

The available data supports Justice McLachlin’s comments. Research shows that self-represented litigants spend more court resources and time, face repeated barriers in understanding

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8 The Right Honourable Beverly McLachlin, “The Challenges We Face” (July 2008) 4.2 The High Court Quarterly Review 33 at page 35.
court procedures, make more mistakes and, as a 2002 study corroborated, sometimes plead guilty to minor offences just to get it over with. Self-represented litigants are not a small group. In the 2015/2016 Canada Statistics Adult Criminal Court Processing Times, it was reported that 24% of charges in the adult criminal provincial courts in Nova Scotia, New Brunswick, Quebec, Ontario, Saskatchewan and British Columbia were against an unrepresented accused. The Department of Justice Canada collected data from nine provincial court sites across Canada using individual case records, disposed cases in electronic format, and direct observation of proceedings. Taking the Scarborough region of Toronto as an example, the authors noted that a significant proportion of individuals did not have thorough understanding of the English language to navigate the court system. In fact, it was noted that “Legal Aid Ontario officials suggested that the average reading level of their clientele was Grade 3 or 4.”

These impacts are particularly egregious for already marginalized populations in Canada. For example, a 2017 study, “Guilty Pleas Among Indigenous People in Canada,” demonstrated that Indigenous accused disproportionately plead guilty when charged with an offence. The authors conclude that aspects of the criminal justice system incentivize guilty pleas, including the lack of access to affordable representation, the denial of bail, and the nature of bail conditions. Furthermore, they noted that Indigenous individuals are more likely to plead guilty because of their social vulnerabilities, such as lack of income, unfamiliarity with the justice system, and challenges with mental health and addiction stemming from colonialism.

Greater Numbers of Summary Offences

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

Many provincial courts are already experiencing crisis levels of cases passing through this level of court. As one poignant example, the Toronto Star recently reported on a letter that was sent by the Crown Attorneys of the College Park Courthouse in Toronto to the Ministry of the Attorney General. In the letter to MAG, signed by 17 Crown Attorneys, Crowns indicated that the volume of cases each is assigned is unmanageable and that, “This crisis is compromising our ability...
to prosecute our cases properly and it is also compromising our health.”

Court decisions have also recognized the realities of provincial courts as being busy and overburdened.

The rationale that more cases being heard in provincial courts will alleviate an overburdened criminal justice system simply does not accord with the realities of the lower courts.

According to recent statistics in Ontario, the Ontario Court of Justice heard 227,164 criminal cases between April 2017- May 2018. In 2016, the Ontario Superior Court of Justice has had a total of 186,186 (all areas of law, not just criminal) heard. Similar trends are present in British Columbia where, in 2016/2017, the provincial courts reportedly heard 144,100 criminal cases while the Superior Courts heard 1,400 criminal cases. A recent Statistics Canada report indicates that 99.6% of criminal cases in Canada are heard in the provincial courts while 0.4% are heard in the Superior Courts. Given these statistics, the logic that providing more options for proceeding in the provincial courts will reduce overall court delays is very difficult to understand.

Race, Indigeneity and Bill C-75

As noted above, Bill C-75 has the potential to exacerbate existing problems for racialized and Indigenous communities in Canada. In a 2010 Toronto Star report on arrests in Toronto, the authors collected data related to the total number of charges and the race of the individual(s) charged for each offence. For summary conviction related offences such as shoplifting (3,392), loitering (10,885), gun related offences (891), and general investigation (158,685), Black persons accounted for alarmingly disproportionate rates of arrest, carding, and police stops. Data collected by the Office of the Correctional Investigator depicts the troubling rise in incarceration for specific groups. As is quickly apparent, racialized (especially Black) and Indigenous people, women (especially young, racialized and Indigenous women and girls), people with lower rates of

17 See for example R v J(S), 2018 ONCA 489 at para 59 where Justice Fairburn noted the “…reality of extremely busy provincial courts, handling the vast majority of criminal matters”.
22 For example, for all FIR (Field Information Reports) contact cards handed out, 22% are to Black, 48% to white & 16% to Brown adults (Note that “Brown” is classified as South Asian, West Asian and Arab. “Other” is any visible minority other than Black or South Asian, West Asian or Arab). For comparison, we note that people who are Black comprise 8% of the Canadian population. For loitering specifically, 27% FIR contact cards are for people who are Black, 39% to people who are white and 21% to Brown adults. Obtained from: Toronto Star, “Toronto Star Analysis of Toronto Police Service Data - 2010 - Advance Findings”, online: <https://www.thestar.com/content/dam/thestar/static_images/advancedfindings2010.pdf>.
24 Ibid. As of 2017, the percentage of inmates by race are as follows: Caucasian (54%), Black (8.6%), Asian (4.8%), Indigenous (27%), Hispanic (1%) and Other (2%). The overall makeup of the Canadian population at this time is as follows: Blacks (3.5%), Aboriginal identity (4.9%), Caucasian or other (72.9%).
education and income, people with addictions, people with mental health challenges, and people with a history of sexual abuse all are disproportionately represented in Canada’s prisons.  

Unfortunately, most data cannot be directly correlated to specific offences, but some of the most prevalent forms of summary conviction offences do coincide with certain vulnerability groups. For example, Statistics Canada released an report titled “Women in Canada: A Gender-based Statistical Report, Women in the Justice System” which tracked data from 2014-2015 and again in 2017. The aggregate reports show that while men statistically commit more summary conviction offences as theft under $5,000, fraud, and other Criminal Code violations - women, particularly in relation to non-violent Criminal Code offences, represent 37% of individuals accused of theft under $5,000, and 33% of individuals accused of fraud. In fact, women commit the largest number of property crimes, followed by other Criminal Code violations.  

When looking at the distribution of women committing such crimes (i.e. theft under $5000) young women are more typically charged, especially young women ages 12-17, followed by women aged 18 to 25. We are concerned that the Bill will further exacerbate the number of women, especially racialized and Indigenous women, facing carceral sanctions.  

Although Bill C-75 proposes to enact provisions that specifically call for restraint in judicial interim release decisions, the amendments are not responsive to the current bail crisis which disproportionately impacts Indigenous and racialized people. Lawyers, legal scholars, and justice system participants have variously described the bail system in Canada as broken, in crisis, and failing. In fact, the proposed changes leave police and judicial discretion intact while adding procedural complexity with the inclusion of the possibility of referral hearing at the bail stage. Additionally, less access to student representation may lead to less access to challenging unfair bail terms imposed by police and increased guilty pleas to administrative breach charges. Increased police and judicial discretion have not historically lead to a decrease in the over-representation of Indigenous people in custody; quite the opposite. Since the 1972 reforms to the Criminal Code, which broadened police discretion to release accused persons on bail and attempted to minimize cash bails, over-incarceration rates of Indigenous people have dramatically increased police and judicial discretion have not historically lead to a decrease in the over-representation of Indigenous people in custody; quite the opposite. Since the 1972 reforms to the Criminal Code, which broadened police discretion to release accused persons on bail and attempted to minimize cash bails, over-incarceration rates of Indigenous people have dramatically increased.
increased. Instead of heading calls to overhaul the bail system for example by placing a moratorium on onerous conditions of bail, or by abolishing the use of surety bails, Parliament is proposing to maintain the status quo.

**Immigration Status and Bill C-75**

The proposed amendment to the maximum penalty for summary conviction offences will also have serious impacts on the inadmissibility of individuals who hold permanent resident or foreign national status. Under the *Immigration and Refugee Protection Act*, foreign nationals (those without permanent immigration status in Canada) and permanent residents of Canada may be inadmissible on the grounds of “serious criminality”. Serious criminality is defined as “having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.” Therefore, under the existing sentencing provisions, a permanent resident or foreign national convicted of a summary conviction offence is not at risk of becoming inadmissible on the grounds of serious criminality. However, under Bill C-75, all non-citizens of Canada will be at risk of a finding of inadmissibility regardless of whether they are convicted a summary or indictable offence. A non-citizen is at risk of this finding even for minor criminal offences; a person can be deported for stealing a chocolate bar (theft under contrary to s. 334 of the *Criminal Code*) if convicted.

The consequences of inadmissibility are devastating to those seeking to enter or remain in Canada. Foreign nationals who are inadmissible on the grounds of serious criminality may find their applications to visit Canada or for permanent residence in Canada refused, while current permanent residents of Canada, including long-term residents, may lose their permanent resident status and face deportation to their country of citizenship. As discussed elsewhere in this paper, these consequences are likely to have a disproportionate impact on racialized and low-income populations.

The imposition of a sentence greater than six months also impacts a permanent resident’s ability to appeal the loss of their status in Canada, and any subsequent removal order. The Immigration Appeal Division (“IAD”) of the Immigration and Refugee Board of Canada (“IRB”) is barred from considering an appeal from a permanent resident who has been sentenced to jail time of six months or more.

The loss of a right of appeal in the context of an inadmissibility finding is significant. The Immigration Division (“ID”) of the IRB, which makes admissibility findings and issues removal orders, cannot consider humanitarian and compassionate factors when deciding whether a permanent resident or a foreign national is inadmissible to Canada and should therefore be removed. For example, factors such as the length of residence in Canada, lack of ties to the country of citizenship, Canadian-born children, family and community in Canada, and extenuating circumstances surrounding the conviction may only be considered by the IAD on appeal. Those who are unable to appeal an inadmissibility finding and removal order due to receiving a sentence

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of six months or more may never have an opportunity to present their circumstances for humanitarian and compassionate consideration and will likely be removed from Canada. Raising the maximum sentence for summary conviction offences over six months will increase the number of people charged with criminal offences who may be found inadmissible to Canada as a result, with no right of appeal.

Implications & Recommendations

The impact that Bill C-75 can potentially have on already disadvantaged groups is a fundamental access to justice issue. The passage of this Bill, in its current form, will mean that relatively minor offences which previously held 6-month incarceration terms, can increase to 24 months. With this increase of jail time, there will also be a decrease of access to representation. Paralegals, law students, and articling students will be barred from representing vulnerable individuals who will be disproportionately impacted, and whom already disproportionately populate our criminal justice system. Bill C-75 has the potential to cause undue hardship on provinces, clinics, and clients who do not have the means to afford the representation of a licenced lawyer.

Why Not a Provincial-Level Response?

In response to questions about the proposed changes with respect to law student representation, a spokesperson on behalf of the Federal Minister of Justice indicated that the provinces could permit representation by approving programs by order in council as per s.802.1 of the Code. There are least two major problems with this approach. First, the provinces may or may not act to do so. They may decide to reallocate the funds to provide different programs for legal aid. They may not take any action. Secondly, even if the provinces do respond, it is unlikely that they will respond in time to prevent a gap in representation for those accessing legal clinics and law student representation. Bill C-75 will also mean that provinces will be left to deal with the administrative burdens of providing more, or reallocating resources to legal aid schemes – if they so choose to do so.

Recommendations

Given the above context, ACCLE recommends the following:

1. **Reconsider the proposed amendment to s. 787 of the Criminal Code; do not raise the maximum penalty for summary conviction criminal offences.** Raising the maximum penalty for summary conviction offences will: result in longer prison sentences and will contribute to over-incarceration, particularly of racialized and Indigenous people; will preclude law student representation in criminal courts; and will negatively impact people who are not Canadian citizens including increased risk in loss of status, deportation, and the loss of appeal rights. It will also result in further delays as more matters will be tried in already overburdened provincial courts where accused people will now find themselves with less access to legal representation.

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2. **Amend s. 802.1 of the Criminal Code** to ensure that law students can continue to represent accused persons charged with summary Criminal Code offences. This option does nothing to alleviate the dire consequences that raising the maximum penalty will have particularly for racialized and Indigenous accused. However, if Parliament proceeds with amending s.787, it must consider amending s.802.1 for the reasons stated above.

3. **Undertake a more thorough Charter analysis** of the proposed amendments having regard to gender, race, and Indigeneity. This includes finding measures to reduce court delays that do not disproportionately impact women, racialized people, and Indigenous people. One example of a means of reducing court delays with regard to race and Indigeneity is to repeal all mandatory minimum sentences which disproportionately impact African Canadian and Indigenous accused persons. Deep consideration of the recommendations made by the Truth and Reconciliation Commission, including Call to Action 32, which calls for judicial discretion to depart from mandatory minimum sentences, should also be undertaken to ensure that Bill C-75 aligns with a sincere attempt to reduce Indigenous over-incarceration.

4. **Undertake a consultation process** to ensure that any proposed amendments to the Criminal Code are made in consultation with those most impacted including: those accused of criminal offences and the communities they derive from; criminal defence lawyers; clinic law students and legal clinics; practitioners; and law schools. There has not been a consultation process that is informing the changes that are being proposed. The very people who are most impacted have not had a voice in these sweeping changes many of which may have significant consequences.

**About ACCLE**

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