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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good afternoon, ladies and gentlemen. It is a pleasure to welcome our panel of witnesses on our study of Bill C-51 and to bring this meeting of the Standing Committee on Justice and Human Rights to order.

It's a pleasure to welcome Mr. Kmiec to one of his first justice committee meetings. He's been to a couple before, but it's nice to have him here. He always contributes very well when he's here.

It's a pleasure to welcome Mr. MacGregor back to our committee.

Today we welcome our first panel of witnesses: as an individual, Mr. Steve Coughlan, a professor at the Schulich school of law at Dalhousie University; the Canadian Council of Churches, represented by Peter Noteboom, the acting general secretary, and Mike Hogeterp, the executive committee member responsible for the commission on justice and peace; and from the Evangelical Fellowship of Canada, Mr. Bruce Clemenger, president, and Ms. Julia Beazley, director of public policy.

Welcome. We'll go in the order in which your names appear on the agenda, so we'll start with Mr. Coughlan.

Mr. Coughlan, the floor is yours.

Prof. Steve Coughlan (Professor, Schulich School of Law, Dalhousie University, As an Individual): Thank you for the invitation to address the committee with regard to Bill C-51. In particular, I'm going to be speaking to the provisions that are intended to remove various provisions from the Criminal Code, as well as various reverse onus portions of them.

I am in favour of this bill, but I'd like to explain that support by situating this bill within the broader endeavour of which it should be seen as only a small part.

I'd like to begin with a quote from a minister of justice:

> I believe that the time has come to undertake a fundamental review of the Criminal Code. The code has become unwieldy, very difficult to follow and outdated in many of its provisions.

That's not a quote from the current Minister of Justice. That's a quote from Senator Jacques Flynn when he was the minister of justice in 1979. It's nearly 40 years since it was recognized that our code has been fundamentally flawed for a long time. Piecemeal reform since then has made the situation worse.

That's why I want to urge the committee to have a broader vision than just the proposals in this bill. Obviously this is the matter that's before you, and these are in themselves worthwhile, but to look at the task as only this is to ignore fundamental problems which have existed for decades. The last time there was a fundamental review of our Criminal Code was before I was born.

Let me make a statement that's going to sound like hyperbole, but it isn't. Canada doesn't have a criminal code. A code is a statute that sets out all the relevant law on a particular topic, and our Criminal Code, since it was first created in 1892, has never even pretended to do that.

Given the limits of time, I'm going to focus on only one particular issue there. There are many, in fact, but I'm going to focus just on one. It is that a code ought to tell us the elements that the crown needs to prove in order to prove someone guilty of an offence. Looked at another way, it ought to clearly tell people what behaviour is against the law, so that they are able to not break the law.

Our code doesn't do that. It has never tried to do that. In fact, the way it is currently drafted makes it more difficult, not less, to determine the elements of many offences. This is the direct cause of ambiguity, which is inconsistent with the rule of law.

Because of the limits on time, I'm going to focus only on one particular issue, the lack of what is referred to as a general part in our Criminal Code. Now, a general part is a common feature of criminal codes around the world. Among other things, it sets out the mental states that are required before a person can be found guilty of a crime. The notion that crime requires a guilty act and a guilty mind is very well known. As a general practice, our Criminal Code doesn't tell us what the guilty mind requirements of offences are. It doesn't have anything similar, for example, to section 15 of the German criminal code, which says that unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability. The failure of our code to take this basic and obvious step has very real consequences.

I'm going to take section 176 as an example, simply because it's the section that other people are here to talk about. From my perspective, it is a random section which is not particularly worse or better than any other. It is simply illustrative of the kinds of issues that arise.

Here's a very basic question. It's about offences related to clergymen in the language of the section. For an accused to be guilty of one of those offences, does the crown have to prove the accused knew that her actions were directed toward a clergyman? In paragraph 176(1)(b), the answer is clearly yes. That subsection says, “knowing that a clergyman”, so it tells us that knowledge is required. On the other hand, paragraph 176(1)(a) just refers to obstructing a clergyman, without talking about whether knowledge is required or not.

Is it sufficient that the person obstructed was in fact a clergyman, or does the crown have to prove that the accused knew that? On the one hand, we might say that one section talks about knowledge and the other doesn't, so that's an obvious difference between the two. The trouble is that the Supreme Court of Canada has told us to assume that every section of the Criminal Code requires knowledge, so that leads to the conclusion that both of them require knowledge. But if both of them require knowledge, then why did one of them bother to say that knowledge was required when we were going to assume that knowledge was required even if it hadn't said that?

No matter how the section is looked at, there's going to be some inconsistency there, making it impossible to be sure in advance what the section means. Exacerbating the problem that most of the time the code doesn't tell us mental states is that sometimes it does, but when it does, it uses inconsistent and contradictory language to do so.

Another part of section 176 talks about “wilfully” disturbing religious worship. As someone who has closely studied the Criminal Code for 30 years, I say with confidence I have no idea what that means. Sometimes when the Criminal Code uses the word “wilfully”, it means that the person's act was intentional. Sometimes it means that it wasn't the act that was intentional, but the consequence of that act that was intentional. Sometimes it means that whether the act was intentional or not, or whether the consequence was intentional or not, the accused was reckless with regard to that, and then sometimes the word “wilfully” means that the accused didn't think about something when it would have been appropriate to think about something.

The code itself uses exactly the same word to mean at least five different things, depending on which section of the code you're looking at, and that, from my perspective, illustrates the insidious nature of the problem. If you simply read section 176, on the face of it there's nothing wrong with it. This problem isn't obvious in looking at section 176; it's a problem that becomes apparent only when you look at the code as a whole and see the inconsistencies in the way in which things are done.

Now, as I say, I picked section 176 largely at random. It's an obscure provision and obviously doesn't have a huge impact on the day-to-day workings of the criminal justice system, but this problem and similar problems arise virtually throughout the code, and they arise for such routine and common offences as assault and theft, which, between the two of them, make up about 20% of the business of the criminal justice system. These problems have a very real impact.

Here's another example of problems caused by the absence of a general part. Let's say a person is asked to help smuggle cigarettes into the country without paying duty, which is a relatively minor offence, but in fact unknowingly assists in smuggling cocaine into the country, which is a much more serious offence. Which one should that person be guilty of? The offence they actually committed, or the less serious offence that they thought they were committing?

Well, again, whether you think it should be the more serious or the less serious offence, it would at least be nice to know what the law in Canada is. Now, the German Criminal Code, in subsection 16(2), says the person is only guilty of the less serious offence. In Canada...? Well, in 1965 the Yukon Territory's Court of Appeal seemed to suggest that the person would be guilty of the more serious one. In 1971, the British Columbia Court of Appeal seemed to suggest that the person would be guilty of only the less serious one.

In 1976, the Supreme Court of Canada had a chance to settle the issue, but actually didn't settle the issue, so we just don't know. There is no answer to that question in Canadian law. It comes up, and you just have to guess.

The Supreme Court of Canada has said:

> If an accused must wait “until a court decides what the contours and parameters of the offence are then the accused is being treated unfairly and contrary to the principles of fundamental justice”....

The fact is, however, that most of the time the Criminal Code does not set out the contours and parameters of the offences and we have to wait for a court to do it. This is just a blind spot; we just all struggle along, pretending that this isn't true.

This is why I say that a much larger task than simply removing some particular sections from the code is necessary. The major systemic problems we face cannot be solved by tinkering.

Yes, it's worth removing these sections, but doing that is going to have only a minor impact on bringing our code up to date. It is now literally impossible to add any new provision to this code in a way that does not contradict and create inconsistencies with some other part of the Criminal Code.

● (1535)

Only a large-scale review, including the inclusion of a general part, can solve that problem.

Thank you.

The Chair: Thank you very much, Mr. Coughlan.

We will move to the Canadian Council of Churches.

Mr. Peter Noteboom (Acting General Secretary, Canadian Council of Churches): Thank you.

I'll be using prepared remarks that were circulated with the Canadian Council of Churches at the top, and speaking especially to clause 14 and the removal of section 176.

[*Translation*]

Thank you for the invitation to appear as a witness in this committee. We appreciate your outreach, and applaud the committee for connecting with representative organizations whose membership is affected by this legislation.

[*English*]

We would like to begin by acknowledging that the land on which we gather today is the traditional unceded territory of the Algonquin people. Further, nearly each and every community in Canada is home to communities of the Christian faith who belong to a member denomination of the Canadian Council of Churches, so we also acknowledge that the Canadian Council of Churches and its members live, work, and worship on the territories of first nations, Métis, and Inuit peoples of the land.

● (1540)

[*Translation*]

The Canadian Council of Churches (CCC) is the broadest and most inclusive ecumenical body in the world, now representing 25 denominations of Anglican; Evangelical; Free Church; Eastern Orthodox and Oriental Orthodox; Protestant; and Catholic traditions. Together the CCC is comprised of 85% of the Christians in Canada who profess adherence to a church.

The Canadian Council of Churches was founded in 1944.

[*English*]

The Canadian Council of Churches also participates in the Canadian Interfaith Conversation, whose charter vision states that "deep in the life of Canada and Canadians is the identity and practice of religion" and so "represents the desire to advocate for religion in a pluralistic society and in Canadian public life." Together, its members "want to promote harmony and religious insight among religions and religious communities in Canada, strengthen our society's moral foundations, and work for greater realization of the fundamental freedom of conscience and religion for the sake of the common good and an engaged citizenship."

That's the introduction. Now I will speak a bit on the context and relevance.

[*Translation*]

Tomorrow is Reformation Day. It will be 500 years since Martin Luther disrupted the Christian church in Europe, was obstructed and prevented from celebrating divine service, and was arrested on his way to or from the performance of his duties. This year, the Roman Catholic and Lutheran churches are making history celebrating services under the theme "Conflict to Communion".

In more recent years, Martin Luther King embodied and led a civil rights movement that was rooted in his and his community's religious practices. He and his community—an assemblage of persons meeting for a moral, social and benevolent purpose—was repeatedly disturbed and interrupted.

[*English*]

Here in Turtle Island, Canada, Dan Cranmer held a potlatch on the coast of British Columbia at the village of 'Mimkwamlis, during Christmas of 1921, and was arrested. Colonialism is an obstruction to religious freedom. For the period 2010 to 2013, StatsCan reports an average of 67 incidents per year of mischief motivated by hate in relation to religious property, as reported by police.

Religious expression is a central part of the identity and values of all people of faith in Canada. In faith traditions around the world, the religious leader is indispensable to the celebration or performance of religious ceremonies or rites. When they are unlawfully prevented or obstructed from serving or performing any other function in connection to their calling, then a whole religious community experiences harm. Given this ongoing significance of faith and religious leadership in the lives of a significant number of people in Canada, we respectfully submit that section 176 of the Criminal Code is not redundant or obsolete.

Mr. Mike Hogeterp (Executive Committee Member, Commission on Justice and Peace, Canadian Council of Churches): Mr. Chair and committee members, here are our recommendations.

The members of the Canadian Council of Churches are not of one mind regarding whether or not to retain section 176 of the Criminal Code. Frankly, many of our members had not been alerted in a timely fashion to the relevance and impending actions contained in the bill before you today.

However, members of the Canadian Council of Churches are of one mind regarding both the duty of the Government of Canada to respect and protect the fundamental freedom of conscience and religion, thought, belief, opinion and expression, and also, to ensure that there is no preference in the Criminal Code for a specific religion, but instead to favour a recognition of open and robust pluralism in Canadian society.

Should the Government of Canada retain section 176 of the Criminal Code, then we recommend that the reference to "clergyman or minister" be updated to be inclusive of all religious traditions, either via an inserted definition that refers to religious and spiritual officials from all religious traditions, including indigenous spiritualities, or to replace "clergyman or minister" with the phrase "religious or spiritual officials or leaders". We further recommend consultation with religious leaders, including indigenous spiritual leaders, on how best to define an inclusive understanding of religious and spiritual leaders or officials in the law. Second, the gender-specific masculine language should be changed to refer to men or women religious or spiritual officials or to be gender non-specific.

In addition, we would like to reiterate our long-standing encouragement to the Government of Canada to establish regular working relationships with religious leaders in Canada either through the establishment of a religious leaders round table or a working relationship with representative bodies like the Canadian Interfaith Conversation, the Canadian Council of Churches, the Evangelical Fellowship of Canada, and other representative bodies. Of course, in an era of reconciliation, such dialogue must certainly include indigenous elders and spiritual leaders. Faith that is focused on the good of all is an important element of public dialogue in the diverse reality of contemporary Canada.

To conclude, the key overriding concern of the Canadian Council of Churches is the right to freedom of religion and the freedom of worship of religious communities, including gatherings for a moral, social, or benevolent purpose. This is not about privileging Christianity, but ensuring peaceful coexistence in a pluralistic society.

We are not advocating for a position of privilege or dominance for religious communities or leaders, but instead we want to ensure the freedom of everyone to gather for their religious celebrations.

Thank you. *Merci. Meegwetch*.

● (1545)

The Chair: Thank you very much.

We'll move to the Evangelical Fellowship of Canada.

Mr. Bruce Clemenger (President, Evangelical Fellowship of Canada): Good afternoon. The Evangelical Fellowship of Canada welcomes this opportunity to address this committee on Bill C-51.

Established in 1964, the EFC provides a national forum for the leaders and institutions of Canada's four million evangelicals and a constructive voice for biblical principles in life and society.

Religious freedom, expression, and collaboration have been hallmarks of our work for decades. We work together with interfaith partners on issues of common concern, sharing in conversations about the role of religion in a pluralistic society.

We have addressed religious discrimination and supported religious freedom in more than 20 court interventions over the years, including in support of non-evangelicals.

Our concern is with clause 14 of Bill C-51, which would remove section 176 of the Criminal Code of Canada. It is being argued that section 175 and other general prohibitions on assault make section 176 redundant. With respect, we disagree.

Ms. Julia Beazley (Director, Public Policy, Evangelical Fellowship of Canada): Section 176 is not redundant. The existing case law pertaining to this section shows us that the nature of the disruption matters. Paragraph 175(1)(a), on causing a disturbance, for example, requires loud or offensive noises, screaming, shouting, swearing, or obscene language, but not all disruptions of religious gatherings will engage section 175. There are disruptions that are profoundly disturbing, upsetting, and even frightening to worshippers that don't involve physical contact or loud or offensive noise, and in these cases, subsections 176(2) and 176(3) offer needed protection and reassurance.

We see this illustrated in the B.C. court decisions regarding Joseph Reed, who has many times disrupted services of Jehovah's Witnesses. Initially, Mr. Reed used a megaphone when he disrupted the gatherings. He was charged and convicted in those instances under section 175. He went on to deliberately disturb and interrupt meetings of Jehovah's Witnesses several more times but without making excessive noise.

He's been charged with other offensives, such as assault, because his disruptions have included a range of behaviours and tactics, but he has also been charged and convicted of disrupting a worship service. The charges laid under section 176 reflect both the nature of the disturbance, and, importantly, the intent of his actions, which were calculated in each instance to willfully disrupt the worship services.

A 1985 decision of the B.C. Court of Appeal said:

> There is no allegation that Mr. Reed was shouting or screaming or causing an undue amount of noise. However, that is not a condition precedent to the operation of s. 172(2). It is an offence simply to disturb or interrupt an assemblage of persons met for religious worship, regardless of the motive.

In a 1994 B.C. Court of Appeal decision, Madam Justice Proudfoot stated:

> Section 175(1)(a) makes it an offence to cause a disturbance in or near a public place. Section 176 makes it an offence to wilfully disturb or interrupt an assemblage of persons met for religious worship, or to wilfully do anything that disturbs the order or solemnity of such a meeting. In my view, the sections are quite different. Section 176 specifically targets interference with religious services or worship, but s. 175 deals with a variety of problems.

It is our submission that subsections 176(2) and 176(3) provide unique and specific protection for religious gatherings from disruption that is not offered by other sections of the Criminal Code, and should therefore be retained.

Section 176 also gives unique protection for religious services in public places. Subsections 176(2) and 176(3) provide unique protection for things like a religious procession on a street, a Jewish ritual enclosure in a public place, or a service in a park, particularly in cases where the criteria in paragraph 175(1)(a) are not met. To remove this section would unnecessarily strip away explicit protection for religious gatherings and officials and would undermine the assurance of religious practitioners that they may gather safely.

Second, removal of section 176 will diminish protection for religious freedom. In her statements before this committee, the Minister of Justice said that removal of this provision would in no way affect people's religious freedom. While we respect that this may not be the intention, we do believe the removal of this provision will have this effect.

As the B.C. Court of Appeal found in 1994, “Section 176(3) protects the freedom of religion of persons 'met for religious worship'”.

An earlier B.C. Court of Appeal decision stated, “Such things as freedom of assembly and freedom of association, which are also in the Charter, could be meaningless without some such protection as s. 172(2).” This is now subsection 176(2).

Further, this move seems inconsistent with other government efforts to increase protection for religious communities and address hatred and discrimination, such as Bill C-305 and motion M-103. To remove the specific protection for religious officials and gatherings from the Criminal Code then sends a confusing and contradictory message to faith communities in Canada, many of whom feel particularly and increasingly vulnerable.

The meetings of religious communities are a fundamental expression of belief and practice and an outworking of religious freedom. Section 176 specifically protects the rights of individuals to freely practise this essential element of their religious belief and practice together.

● (1550)

Mr. Bruce Clemenger: Finally, and significantly for many faith communities in Canada, the removal of section 176 would communicate a lack of understanding and appreciation for the value and uniqueness of religious gatherings. Religious gatherings are distinct in character and purpose. They're not just like any other public gatherings or assemblies of persons, and an attack on a religious official or religious gathering is also distinct in nature and purpose.

We submit therefore that it's not only valid but an important objective for Parliament and the Criminal Code to continue to treat them as such. As the “Rapporteur's Digest on the Freedom of Religion and Belief” notes, “members of religious communities or communities of belief, whenever they find themselves in places of worship, are in a situation of special vulnerability given the nature of their activity.”

An offence against people at worship reverberates through the community and touches every member. An offence against one faith at worship has an impact on all religious adherents. The Special Rapporteur on Freedom of Religion and Belief also notes “attacks or other forms of restriction on places of worship or other religious sites and shrines in many cases violate the right not only of a single individual, but the rights of a group of individuals forming the community that is attached to the place in question.” Our faith and every other faith expresses a specific vision of how life should be lived. For many, it is the ultimate commitment to a divine being or force that provides personal and communal direction to life. For many believers, part of living out that faith includes gathering corporately with like-minded believers for reflection, contemplation, communion, teaching, and worship. This matters.

The specific protection offered by section 176 recognizes that there is something different, distinct, and valuable about religious practice. It recognizes that there is a good that is worthy of specific and explicit protection. To remove this protection would erode that recognition and undermine the value and place of religious belief and practice in Canada. The minister has expressed concern that the language of subsection 176(1) is specific to the Christian faith or Christian clergy. We believe it should be made clear that this protection is extended to all faith communities. We have two recommendations to the committee.

The first is that Bill C-51 be amended to retain section 176, and the second is that the language of paragraphs 176(1)(a) and 176(1)(b) be amended to make it clear that this specific protection is extended to leaders of all faith communities. Hence, the words “clergyman or minister” could be replaced with a term such as religious official or religious leader.

Section 176 is not redundant. It provides unique protection and a unique form of expression. We urge you to amend Bill C-51, to fulfill the charter's guarantee of religious freedom, and to maintain the protection of the integrity and security of religious worship in Canada.

Thank you.

● (1555)

The Chair: Thank you very much for all of your testimony.

We'll now go to questions, starting with the Conservative side.

Mr. Nicholson, go ahead, please.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much.

Thank you very much to our witnesses.

Just for the record, I'd like to thank you, Evangelical Fellowship of Canada. With regard to the last point that you made, that is the interpretation of the Government of Canada. When it refers to clergy or ministers, it is referring to all religious officials. I was at the Department of Justice, and there was certainly no interpretation that did not also include rabbis and other religious officials.

Indeed with respect to the masculine terminology, I remember back in the 1980s that the Government of Canada did make an effort to try to neutralize many sections of federal laws. Obviously there's still a way to go, but it is interpreted as one or the other.

I'll start with you, Mr. Coughlan. One of the things that I always heard about the common law, even as it is applied to legislation, was about how that ability to interpret it over the years actually made it more effective. The Criminal Code has been in place for the last 125 years, but your study is saying that the German system is much more successful. Their criminal code has been much more successful than has the Canadian one. Is that basically your position?

Mr. Steve Coughlan: I'm trying to suggest that the basic rules around criminal liability ought to be in our Criminal Code. They are implicit in section 9 of the Criminal Code, which abolishes common-law crime. It is implicit within the charter, which guarantees the rule of law and the principle of legality, which is that the law has to be knowable in advance. When for essentially half of criminal law, you don't tell people what the rules are, it's not knowable in advance.

Hon. Rob Nicholson: I can tell you, having been justice minister and having gone around the world to Commonwealth meetings, I almost always got praise for the Canadian system of putting the criminal law together in one book, albeit a thick book. You said we perhaps should be studying the German system as an improvement to that?

Mr. Steve Coughlan: Well, no, I think the praise you're getting is for the notion that we have moved along the way towards codification. I'm just encouraging us to move further in that direction.

I don't think we could ever get rid of all matters of interpretation. It's certainly true that there will be scope for deciding what a particular word means and what Parliament had in mind. To use your illustration, clearly, “clergyman” would have to be interpreted as first of all not a reference to the male gender, and secondly not about a Judeo-Christian religion. Sure, we'll always have interpretation, but my concern is much deeper than that. It's not that it's interpretation but that we actually put obstacles in the path of allowing courts to interpret by setting up three or four contradictory rules, all of which govern exactly the same situation. That's what I'm trying to avoid.

Hon. Rob Nicholson: Okay. Thank you very much.

To the Canadian Council of Churches, you were taken a little bit by surprise, I take it, by the removal in Bill C-51 of section 176; I can tell you that I was myself. To be fair, I watched very clearly, and in the press releases, the scrums, etc., there was no reference whatsoever to the fact that the protection of religious ceremonies was being taken out of the Criminal Code. I had to find it for myself, quite frankly.

A number of your members were taken by surprise, but basically, you still support the idea that disrupting a religious service and threatening those who conduct religious services is a serious matter that should be protected within our Criminal Code?

Mr. Peter Noteboom: Yes, absolutely. Whether or not other sections of the Criminal Code cover it sufficiently or not, we're not really in a position...because, as you mentioned, it wasn't clear in the presentation of the bill and it wasn't widely circulated in advance. Many member denominations of the council really heard about it for the first time after I phoned them up last week and said we should talk about this.

Hon. Rob Nicholson: I appreciate that.

To the Evangelical Fellowship, you would be aware, and I think you pointed out, that in fact there are provisions of the Criminal Code—mischief provisions, for instance, or public disturbances. But if I understand the point you're making, even though there could be other sections of the Criminal Code, it is a serious matter if somebody's religious service is being disrupted. They have a right to practice their religion and a right to do that undisturbed. It is serious enough to require a separate section of the Criminal Code. Is that basically your position?

● (1600)

Mr. Bruce Clemenger: Yes, it is. We believe there are elements of section 176 that are not replicated in other parts of the Criminal Code. Secondly, it would be symbolic: religion is unique in Canada, its expression is unique, and it therefore is deserving of unique and specific protection.

Hon. Rob Nicholson: So this would send out the wrong message if this was just completely deleted and the public was told to rely on the mischief sections or other sections of the Criminal Code.

Mr. Bruce Clemenger: Yes.

Hon. Rob Nicholson: Thank you very much.

The Chair: Thank you very much, Mr. Nicholson.

Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Chair.

Professor Coughlan, understanding that most of what you talk about is not within our scope, could you give me an idea of the scale of effort it would take to totally renovate the Criminal Code the way you suggest?

Mr. Steve Coughlan: Yes. It's a matter I've given some thought to.

On the one hand, it can look like a huge task, no question. In part, it's been undertaken. Many of these rules, though, are not rules that are really in dispute. The Supreme Court of Canada, most recently in the A.D.H. case, has said here are the rules that ought to govern us. In this bill, for example, the Department of Justice has gone through particular sections simply trying to rephrase them to be quite consistent on technicalities. To assist in reading the bill, for example, the part saying “it is an offence” will always come at the beginning rather than at the end.

To a very great extent, much of this could be accomplished by putting in some statements like “knowledge is required for all circumstances unless the code says otherwise” or “intent is required unless the code says otherwise”. Say that early on, and then simply go through the code and remove words. Take out “wilfully” where it's not adding anything. Take out “corruptly”. Take out “intentionally”. Take out “knowingly” where it's already covered by that.

Most of it is not actually rethinking these provisions but just rewriting them in a consistent way. It's a big task, but it's not an unmanageable task.

Mr. Ron McKinnon: I see. It seems to me a little bit onerous. As well, of course, you'd have to map the old provisions into the new to make sure they all had a home there. You'd have a whole host of new language that hadn't been tested before the courts. I think it would be a big job, but I appreciate your input.

To the Council of Churches, I didn't see in your presentation an argument for why we should keep section 176. I've heard some pretty persuasive arguments for why. Do you agree with those arguments, or do you have anything to add to them?

Mr. Peter Noteboom: The Canadian Council of Churches is a full consensus organization, so that means when the Canadian Council of Churches makes a public statement it needs to be agreed to by all the members of the council. Given the time available we weren't able to come to a conclusion or a consensus on where that would be. In the time that we did, it wasn't clear that folks went one way or the other.

There are definitely strong arguments among members of the council that would be broadly shared with the Evangelical Fellowship of Canada, and there are others who are wondering whether it would be good to do the research to see whether or not other provisions of the Criminal Code would cover what's already there, but not with sufficient time to do it.

That's why we didn't make a recommendation one way or the other, but should the government retain them, then there are a couple of recommendations for action.

Mr. Ron McKinnon: That's fair enough.

The Evangelical Fellowship, you have made a very strong case for keeping section 176. I'm going to argue the other side. Elsewhere in the criminal law we have provisions for assault and all kinds of things. Where motivation by hatred or religious bigotry and so forth are aggravating conditions, the penalties for them are potentially much more severe than are offered by this provision.

Would you not suggest that this might be a legitimate alternative to this provision?

Mr. Bruce Clemenger: A number of thoughts come to mind. Another witness will soon be before you—I just read their submission—and they would also point out that you referred to Criminal Code sanctions against assault, but there are also subcategories of different types of assault, which give different weights of punishment.

It's the same thing with disturbance. We think it's still appropriate to maintain separate provisions regarding disturbing either a religious official in the conducting of a religious service, or the religious services themselves. So it should be and it has been, and it's been found constitutional, and it's been used many times in the last 20 or 30 years. We think it should still be retained as it is understanding the unique nature of religion and religious services and what goes on in the religious context, unlike a hockey game or a meeting at a library, etc.

It's symbolic, but also giving precision and specific protection to what's going on, so we think that's where section 175 and other parts of the Criminal Code don't quite raise the threshold of section 176.

● (1605)

Mr. Ron McKinnon: Those other meetings you speak of would not have these aggravating conditions applied to them, so the penalties might conceivably be less.

You mentioned that these are different from other meetings. Continuing in a devil's advocate role here, consider a wedding. A wedding officiated by a minister would be covered under this and presumably someone who disrupts that wedding would be charged under this provision. What about a wedding officiated by a justice of the peace? Should that not also have the same kind of protection?

Ms. Julia Beazley: Again, I think this gets back to the question of wilfully, but if the motivation is based....

I don't know that we would consider that a religious service per se. Sometimes in a church setting it's a very sacred thing and someone coming in there and disrupting a service in a church, this would apply under those circumstances.

If a wedding were happening somewhere with a justice of the peace, if it were religiously motivated, I don't know whether there would be an aggravating factor in those circumstances.

Mr. Ron McKinnon: I think with a justice of the peace—

The Chair: Sorry, you're well past your six minutes. We'll come back for some more questions afterwards.

Mr. MacGregor.

Mr. Alistair MacGregor (Cowichan—Malahat—Langford, NDP): Thank you, Chair.

I'd like to start off my line of questioning with the Evangelical Fellowship.

I have to admit that when this bill was introduced, section 176 was just a little line item saying it's being repealed. In the great scope of the bill, it's something that is overlooked quite easily. My office, and I'm sure many MPs in the House of Commons, started receiving a lot of correspondence from people who are concerned with it. I am still wrestling with section 176.

I have a great respect for our Constitution and the Charter of Rights, and I understand that the fundamental freedoms, the freedom of belief and so on, are very important to protect everything we do. But what is not often talked about in this context is section 15of the charter, the equality rights. That's where it says that every Canadian is free from discrimination “based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

Not every Canadian is religious or spiritual, but many identify very strongly with these groups, probably as much as someone who's religious. They are a part of their community. It may be a race-based community. This is an area where they find comfort, people they can identify with. We know that people with different sexual orientations sometimes need these communities as a safe haven. But there is no specific section in the Criminal Code that deals with someone disrupting one of their meetings.

We're talking about equality rights and the fact that many of these offences are covered in other areas of the Criminal Code. A judge is free, for example, to hand down stiffer sentences if something is based on hatred. I would like to have your comment on section 15, equality rights, and on how we make the Criminal Code apply equally based on all of those different factors.

Mr. Bruce Clemenger: Let me go back to thought, belief, conscience, and so on. One could make the argument, I guess, that religious freedom could be protected under freedom of conscience, freedom of belief, assembly, and so on. But it's not. Religion was distinctively added, recognizing UN declarations and the charter.

We're saying that just as religion is distinctively identified as a guaranteed freedom it is also appropriate to have distinctive protection for religious worship, the expression of religious freedom in the Criminal Code.

To your second point about equality rights, consider subsections 176(2) and 176(3): “Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose”. It's the same thing with subsection 176(3), which actually broadens it. If you have a meeting that is race-based or focused on a specific distinctive race, of whatever category, it may well be included in this. Rather than taking away from the protection of religious freedom, the onus would be on including more explicit protection, if it's not already here. But I think it's probably already here.

It's the same with Bill C-305, which created an initial offence for mischief against religious institutions and schools but also had institutions for benevolent, social, or moral purposes. The same thing is actually captured there.

● (1610)

Mr. Alistair MacGregor: Does the Canadian Council of Churches have any comment on the same line of questioning?

Mr. Mike Hogeterp: I would just say that specific protection of religion has merit, given the reality that communities of faith have been under threat pretty significantly in recent years. The Quebec mosque attack is one example among many. The other reality is that the celebration of religious rights tends to be done in a disposition of vulnerability. One expects a sense of safety. A person in a posture of prayer is expecting a sense of peace and an ability to express it, doing so in a way that is a full expression of their identity.

Protection of that through the Criminal Code in section 176 is an important means of recognizing the deep identity questions with respect to faith. Those same questions are certainly relevant to the kinds of communities you've pointed to. I think Mr. Clemenger's words are relevant in that respect.

Mr. Alistair MacGregor: I know that hate-based crimes of a religious nature are on the rise for certain groups across Canada, and that's something we are all very concerned with. I'm just wondering if that is a problem that legislation by itself is going to solve. If the judge has section 176 at his or her disposal, or these other sections of the Criminal Code, the sentence is still going to end up being the same if someone is guilty of the crime.

Is the general public in the religious community aware of section 176, or are they just aware of the fact that a crime has been committed and something in the Criminal Code will take care of it? Or is this more of a societal problem that we need to educate people on, to produce a more harmonious society? Leaving it in or taking it away, is that really going to have a huge difference? I don't think the average Canadian is very aware of the wording in the Criminal Code. I have a copy, and it's really thick, so it's quite a voluminous document to go through.

Do you have any comments on that?

Mr. Mike Hogeterp: I think you're correct in assuming that the awareness of the public with respect to section 176 is very weak. We'd argue with our colleagues at the Canadian Interfaith Conversation—which includes the Evangelical Fellowship—that robust religious dialogue in public is an important means to create that sense of safety that we've all been alluding to.

It was interesting that very soon after the Quebec City mosque incident, Premier Couillard came out very forcefully, publicly, and said that our "words matter".

Respectful public discourse on faith and diversity is a really critical element of respect, freedom, and the protection for a multiplicity of religious and other identities. That kind of dialogue is something that's sorely lacking as xenophobia rears its ugly head. Public dialogue that's fully cognizant of religious and other identities, and respect of those identities, is a really critical thing.

● (1615)

The Chair: Please be very brief, Ms. Beazley.

Ms. Julia Beazley: Very briefly, I think it's both, and I agree with everything Mike has said. The awareness has been varied among religious communities, but I can tell you that I have been dialoguing and working with a large number of faith groups across Canada. The awareness is there now, if it wasn't before, so I think to remove this protection would send a detrimental message at this point.

The Chair: Thank you so much.

Go ahead, Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, Mr. Chair.

Thank you all so much for your attendance and for your presentations.

Professor Coughlan, I will start with you. Most of the discussion here today is about section 176, although I appreciate your more holistic view of the Criminal Code. I'd like to hear from you if you think section 176 is redundant and covered by other sections in the Criminal Code, or if it is special and adds certain protections that wouldn't necessarily be covered in the code.

Mr. Steve Coughlan: Sure.

I note that it's not 100% correct to say that religion is given special protection. Actually, section 2(a) of the charter guarantees freedom of conscience and religion, so as Mr. MacGregor points out, conscience is there just as much as religion.

I know the argument is that there are things captured by this that are not captured by other sections. As I understood the argument, it was only that there might be things that didn't meet the definition of "disturbance" in causing a disturbance, but meet the definition here. Again, this is an illustration of my point about the fact that our code just doesn't keep up to date. Actually, the Supreme Court of Canada, in 1985, in a case called Skoke-Graham v. the Queen, as I read it, seemed to say that you needed the same standard of behaviour for being a disturbance, whether it's causing a disturbance or disturbing a religious assembly. That one narrow gap that might have been there isn't there, in my reading, but it's not a topic I've devoted a lot of time to.

Even if that narrow gap were there, it strikes me that the question the committee ought to be asking itself is not if it can find some way not to remove this, but rather what must be there in a proper approach to a Criminal Code. What's serious enough that we can't do without it, that causes such harm that it ought to be in the Criminal Code, and that cannot be solved by any method other than criminalization?

I think that's actually the orientation to take—not just toward section 176, and not just toward the other provisions that are being removed by this bill, but to the entire thing. What things do you have to have? Those are the things you should keep. That's the way to ask the question.

Mr. Colin Fraser: Paragraph 176(1)(a), in the first line, mentions "unlawfully obstructs": "by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent a clergyman" and so on. The "unlawfully obstructs" strikes me as kind of unusual. It seems that it's adding something extra. There already has to be an unlawful act to get to the point where you are actually committing a different type of offence. Would you agree with that?

Mr. Steve Coughlan: No. I would agree that this is one of at least three things that it might mean. I was contemplating picking on "unlawfully" in that section as another illustration of the inconsistent way in which the code is drafted, which makes it difficult to know what it's saying.

There are sections in the Criminal Code where "unlawfully" means exactly what you are saying, like section 269, "unlawfully causing bodily harm". In that sense, it does add that there must have been some other offence committed. In some sections, "unlawfully" seems to mean something like "without lawful excuse". The trouble is that the code uses the phrase "without lawful excuse" dozens of times, so it's not as though the drafters didn't know that the phrase "without lawful excuse" is a good way to capture the meaning "without lawful excuse". If that's what it means, why say "unlawfully"?

There are some sections of the Criminal Code where words like "unlawfully", "corruptly", or "dishonestly" actually just seem to be some kind of expression of opinion or disapprobation. There is the offence of a justice official "corruptly" accepting a bribe. As far as I can tell, the word "corruptly" actually isn't doing any work. What's the non-corrupt way to accept a bribe?

These are the kinds of things that have been just sort of randomly scattered in the code as a means of tripping us up and preventing us from being sure of what it means. Yes, "unlawfully" might mean what you said, but there are at least two other things it might mean as well.

● (1620)

Mr. Colin Fraser: Thanks very much.

I'll now turn to the Evangelical Fellowship of Canada. I appreciated your presentations and your thoughtful comments about the extra protection granted by section 176, from your perspective. In my understanding of section 176, this is actually not a charge that is laid very often in Canada. I know there are examples—in fact, one here in Ottawa, where it was laid not that long ago, although I believe the person wasn't convicted of that.

In your estimation, is there a reason why this type of charge would not be laid more often? If there is, is it because there are other protections in the code already that are maybe easier to prove?

Mr. Bruce Clemenger: It could be a bit of both. It could be that not everyone is aware of section 176. Many of our churches had the same process as the Canadian Council of Churches. They became aware of section 176 through their conversations and dialogues. More and more have studied it, and, again, you begin getting letters. It could be that for those instances where section 176 could have been applied, maybe section 175 or other did satisfy.

We talk to faith leaders about it, and what we are finding is that there is a level of comfort. If they were not aware of section 176, when they come across it and see it in text, it actually gives additional comfort, because of the increase of hostility, as was mentioned before—the increase of hate-motivated crimes against people of faith.

The question is, in this environment, why are we now removing explicit protection rather than affirming and perhaps amending, where needed, to guarantee that explicit protection?

Mr. Colin Fraser: Do I have more time?

The Chair: You've exceeded your time.

Mr. Colin Fraser: That's fine.

The Chair: We have some time for smaller questions for members of the panel.

We have Mr. Kmiec and then Mr. Boissonnault.

Mr. Tom Kmiec: Thank you, Mr. Chair.

It's 500 years from the great Reformation tomorrow, and here we are talking about religious dissent and religious rights. I just feel like it's perfect timing for all of this.

Section 176 has been a big issue in my riding. I have an e-petition, which has over 2,600 signatures on it. In my area, people have come to me to talk about it, and I've gone to others to talk about it. I'm not an expert. I'm not a lawyer. That wasn't my profession before I got into politics. I am an expert on Yiddish proverbs, though, as the chair knows, "To every answer you can find a new question." I'm hoping I don't keep going with new questions on this.

The Chair: I won't let you.

Mr. Tom Kmiec: You won't let me? Thank you.

Voices: Oh, oh!

Mr. Tom Kmiec: One of the things I often hear is that this section is not used very often. What I've been told by churches is that they don't want to be embroiled in a lawsuit or a legal case because it's a poor reflection on the services they provide. When I went to a gurdwara to speak to an assembly there, and to the president about this, they said the same thing. They said that they don't want to be embroiled in it, but that they do have problems.

For both of you, how often do you hear this from the different churches that are members of your associations? When the cops are called and show up, do they say that they don't want to proceed with it, that they just don't want to get involved in the criminal justice system? How often does this under-reporting and unwillingness to participate in the judicial system happen?

Mr. Peter Noteboom: You can go first, Bruce and Julia.

Ms. Julia Beazley: I can't answer that with any official.... My sense is that in all likelihood it is very under-reported within the evangelical community, and we've talked about this a bit in terms of hate crimes reporting generally. Bruce was just saying that we turn the other cheek. This is what we do. The idea is that if someone comes in and they are disturbed and are causing a disturbance, you're probably right that the instinct is often to not go that route and—

Mr. Tom Kmiec: This is Canada, after all, and most people are pretty reasonable. They practice self-restraint. I think that instinctively a lot of people know that it's wrong to go into a gurdwara, say, and interrupt the music and the service or into a Catholic church and interrupt the mass. That's my observation, at least; most people are pretty reasonable and they won't do it. These cases are exceedingly rare where someone would have to be punished with the full force of the law and a Criminal Code conviction.

● (1625)

Mr. Bruce Clemenger: Maybe we could put it this way. Many of the religious leaders I know would be very reluctant to move as far as the Criminal Code and prosecution; they would rather see if the issue could be resolved in a way that did not require criminal sanctions. Their effort would be to try to mediate: to try to understand the rationale behind the disturbance and to try to mediate through that process before wanting to invoke a Criminal Code.

There also could be reluctance to call the police because they would rather deal with it, and not necessarily because they're afraid of publicity, but because they're saying, “Here's someone who is angry enough, for whatever reason, to disturb a worship service, and why?”

Have we done something to offend them? Is there something that causes them to do this? How do we resolve that? How do we understand that within a religious community before turning to Criminal Code sanctions? I think there may be a reluctance to report in the sense of just trying to see if there are other ways to resolve the issue.

The Chair: Did you want to add something?

Mr. Peter Noteboom: Yes, just briefly. I think it depends also on the religious tradition or the severity of the concern. If you talk with the Coptic Orthodox community, for example, who have been targets especially in their home country on a variety of issues like that, they are quite alert, aware, and ready to take action when it's necessary, even though they, too, of course, would prefer to stay under the radar.

It also depends on the severity of the situation. We're not a religious community. We're an organization. If someone came with a disturbance to the floor where our offices are, we might try to work that out, but when we got a call that was a death threat, then of course we took it much more seriously and made the call to the police.

The Chair: Thank you.

Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you very much. I appreciate everybody's testimony today.

I grew up in Morinville, Alberta, and at the time the Catholic church was the big dominant presence. I was an altar boy and I even played the organ up in the top of the church because the organ I had at home only had one pedal, one octave of pedals, not two. I had a distinguished member of the clergy come and see me about section 176 this summer. It started our doing some research. I don't come at this from a legal perspective. I come at this from the perspective of the task set before us, which is to clean up the Criminal Code.

My overarching question for all of you is, what is lost? How does this actually affect clergy women and men and all people practising faith, leading their congregation, if we remove section 176? From my reading of the code, this is covered. The acts in section 176 are covered not just by section 2(a) in the charter, which gives broad interpretation to justices about any issues it might bring forward. If we take a look at the code, we see that section 175, disturbances; all forms of assault, sections 265 to 268; uttering threats, section 264.1; and Canada's hate crimes further prohibit conduct that incites hatred against identifiable groups, including those distinguished by religion, which are sections 318 and 319. Then there's also mischief provisions which you alluded to earlier.

I'm a fan of the data. We asked the Library of Parliament to look at the data. They pulled all the available data on section 176 from 2001 to 2014-15. There were 30 court cases in the whole country involving section 176. In 25 of those cases, the charges were staid or withdrawn. Only three led to a conviction. The most recent one here in Ottawa will likely not go forward because the person who was to be charged had a mental illness, and the priest at Saint Patrick said, “That's not fair. We're not going to go there”.

What would put your people at risk if section 176 is removed, given all the broad protection you have in the Criminal Code and in the charter?

The Chair: I really believe that we need to be a little shorter. Try to make the answers not too long because I have to get a question in for Mr. MacGregor as well.

Let's start with the Evangelical Fellowship and then the Council of Churches. I think these are questions for these two groups and not really for the professor.

Mr. Bruce Clemenger: Again, we sought to explain through our analysis of the legal decisions previously, at least in B.C. and the courts, and actually in a concurring minority opinion. Chief Justice Wilson talked about this section saying “in substance it is an enactment to prevent breaches of the public peace and to enable citizens to conduct services of worship without fear of disturbance”.

I take from that again that there's something unique and distinctive that takes place in a religious service particularly when you're dealing with issues of a sacred space, sacred implements of rights. It's unique to any other public gathering. I think the legislation, in effect, and I think the spirit of section 176 takes that seriously and tries to provide additional explicit protection.

● (1630)

The Chair: Thank you.

Council of Churches.

Mr. Peter Noteboom: Thank you so much for the question. That's almost precisely the question we asked ourselves on the video conference call on Friday to prepare for this meeting.

The most convincing response was that there is something distinctive about the religious experience. The world of religious leaders in many communities is an indispensable role. When harm is conducted in the performance of certain kinds of rights, that's a harm that affects the whole community. There's something distinctive and different about religious leaders and religious ceremonies that deserve special protection.

The Chair: Thank you.

Mr. MacGregor.

Mr. Alistair MacGregor: Thanks, Chair.

Professor Coughlan, I have a quick question for you.

It's obvious that there is a segment of Canadian society for which section 176 does mean a great deal. I certainly know that from the correspondence I've received. As a professor of law, when a crime occurs where someone does obstruct a clergyman, can you provide some insight into how crown counsel would deal with such a case and how they ultimately decide which section of the Criminal Code to use?

We know that section 176 is not used that often. Is crown counsel more likely to use other sections of the law because they may have harsher punishments? Is leaving section 176 in there as is going to do much harm for them, or is there a way we can reword it to make crown counsel's job easier? Just provide some of your thoughts on that.

Mr. Steve Coughlan: Sure. Realistically, that mostly doesn't go specifically to section 176, and this varies from province to province.

In seven provinces and, I believe, all three territories, the charging decision isn't made by a crown prosecutor at all; it's made by a police officer. A police officer decides which charge to lay. Indeed, one of the things the Supreme Court of Canada has frequently said is that we don't want criminal law to be within the discretion of the police as to whether something is against the law or not. When you leave wide discretion, you create disparity in how the law is enforced, which is why we want the laws to be as clear as possible. It's only in three out of 10 provinces that it's actually the crown prosecutor who would be deciding.

If I remember the Statistics Canada figures correctly on this, about 70% of all charges that are laid are really for just 10 related offences, such as assault or assault causing bodily harm. There are 10 families of them that account for 70% of it. It's rare that a police officer is trying to decide, “Gee, what charge am I going to lay here?” Most of the time they already know. It's one of the familiar ones.

When they have to look around—that's the rare case—they actually just flip through the code, trying to work out what it is. One of the provisions that's being removed in this bill is pretending to practise witchcraft. It probably hadn't been prosecuted for 30 or 40 years, and about six months ago, some police officer in Toronto laid that charge. At some level, there's an element of randomness as to when the lesser-known offences come up. It's somebody looking at the index, doing a search online, and trying to find it. It's possible that the crown can then look at it and say, “You know what? That's the wrong one.”

Our theory is that crown prosecutors ought to be doing that after police have made the initial decisions. Mostly it does happen, but it depends on crown to crown.

Mr. Alistair MacGregor: Thank you.

The Chair: Thank you.

I have one short, last question before we go to the next panel. I'm going to direct it to the Evangelical Fellowship of Canada.

I just want to make sure that I have your testimony generally straight. As I understand it, there are two arguments. One of them is that there's a gap if we remove section 176. I would refer back to subparagraph 176(1)(b)(ii), where a clergyman on the way to perform a function cannot be arrested under the pretence of executing a civil process. I don't think that is found anywhere else in the Criminal Code. Presumably that would be a gap. You're also arguing that 176 is potentially a lesser threshold than 175, with respect to creating a disturbance. That may be an issue, and we'll review that.

You're also saying—and I think this is important—that symbolically, 176 is important because within 176 is the only place in the Criminal Code that you see mention of religious worship. You recognize yourselves and your members, whether or not the section is regularly used, and draw comfort from the fact that that recognition is there in the Criminal Code.

Would I be correct in expressing that?

● (1635)

Ms. Julia Beazley: Yes.

Mr. Bruce Clemenger: Yes.

The Chair: I want to thank you all for testifying. You were all very helpful.

I would like to ask the members of the next panel to come on up. We'll briefly recess as we change panels.

● (1635)

(Pause)

● (1640)

The Chair: We are reconvening this meeting of the Standing Committee on Justice and Human Rights to welcome our second group of witnesses who are testifying today.

It's a pleasure to welcome, as an individual, Janet Epp Buckingham, professor at Laurentian Leadership Centre, Trinity Western University. Welcome, Ms. Buckingham.

From the Canadian Conference of Catholic Bishops we welcome Cardinal Thomas Collins, Archbishop of Toronto, who is joining us by video conference. Welcome, Your Eminence.

[*Translation*]

We also welcome Bishop Lionel Gendron, president of the Canadian Conference of Catholic Bishops.

Welcome, Bishop Gendron.

H.E. Lionel Gendron (President, Canadian Conference of Catholic Bishops): Thank you.

[*English*]

The Chair: We also have Mr. Bruce F. Simpson, a specialized partner in criminal law at Barnes Sammon LLP. Welcome, Mr. Simpson.

Mr. Bruce Simpson (Specialized Partener in Criminal Law, Barnes Sammon LLP, Barnes Sammon LLP): Thank you.

The Chair: From the Canadian Secular Alliance we have Mr. Greg Oliver, who is the president. Welcome, Mr. Oliver.

We will go in the order that's on the agenda, so Professor Buckingham will start.

Dr. Janet Buckingham (Professor, Laurentian Leadership Centre, Trinity Western University, As an Individual): First of all, thank you very much to the committee for inviting me. I think this is a very important topic, and I'm very pleased to participate.

I'm a university professor with a research specialization in religious freedom. I have to admit that when I first saw clause 14 of Bill C-51, I thought it made sense and that section 176 isn't really needed that much in Canadian society. However, I just came from a meeting at the other end of the hall, with the heritage committee, where they're considering private member's motion M-103. That resulted from six men being murdered after Friday prayers at a mosque in Quebec City in January of this year. This incident provoked widespread shock and concern, particularly because it was at a religious service.

This section of the Criminal Code was not used in that particular case, because obviously the crime was much more egregious than disrupting a religious service. The point is, down the hall, a committee is considering what recommendations to make for a national strategy to combat systemic racism and religious discrimination, while this committee is considering dismantling a part of the Canadian law that might be a part of that strategy.

When someone wants to target religion, he or she does not spray-paint anti-Jewish comments on a bridge but on a synagogue. This happened in the city of Ottawa just last year. A mosque and a United Church were also targeted. The church was particularly targeted because its pastor is black, so it was an issue of racism in that case. If someone wants to target a religious group, it is the house of worship, be it a synagogue, a mosque, a church, or a temple.

Let me be clear. The freedom to worship is protected by section 2 (a) of the charter, guarantee for religious freedom, and it is important to protect sacred spaces. If there are people or groups who seek to protest a religious group, they will demonstrate or protest near a house of worship, potentially disrupting a religious service. Do worshippers and sacred spaces not deserve protection?

We have seen a rise in hate crimes on the basis of religion in Canada. The most recently reported hate crimes on the basis of religion are from 2015. Those against Muslims increased by 60%, an increase from 99 to 159. Catholics also experienced an almost 60% increase, from 25 to 55. However, the number of police-reported hate crimes motivated by religion remains highest for Jews in Canada. With close to 500 reported hate crimes on the basis of religion, why would Parliament remove protection for religious services? It does not make sense.

I also note the new legislation in Quebec, Bill 62, that bans Muslim religious practice. Women who wear a niqab, a face veil, will not be able to access public services, including riding on public transit. In the face of government intolerance toward a particular religion, it is particularly incumbent on this government to maintain protection for religious services.

I note that this section of the Criminal Code faced a charter challenge in a case decided in 1985. The challenge was on the basis that this section violates freedom of expression and freedom of religion. Joseph Reed disrupted a Jehovah's Witness service and was charged under this section. He claimed a violation of his freedom of conscience and religion and freedom of expression. The British Columbia Court of Appeal said, " In my opinion, recognizing as it does the competing nature of the demands for religious freedom, freedom of conscience and freedom of expression, s. 172(2)"—as it was then; it's been renumbered since—"meets those competing interests in a balanced way and I am not persuaded that it is unconstitutional or that it should not apply to Mr. Reed in the circumstances of this case."

The Minister of Justice appeared before this committee a couple of weeks ago and argued that this section is outdated because it refers to Christians. I do not see any reference to Christianity or churches in this section, and I further humbly suggest that it is within the power of Parliament to amend outdated wording. There is no need to remove the section in its entirety because the language is antiquated. There are many sections of legislation that use outdated language. It is a worthwhile project to amend these sections, but I urge you not to repeal all legislative provisions that use outdated, non-inclusive language.

● (1645)

The courts seem to have been able to broaden Christian language without difficulty. In 1993, the Supreme Court of Canada addressed an issue that involved what was called priest-penitent privilege. The Supreme Court used the terminology "religious communication" throughout the ruling. The court had no difficulty in adapting rules developed for the Roman Catholic confessional to a different religious context.

In its IT bulletin regarding the clergy residence deduction, the Canada Revenue Agency includes priests, pastors, ministers, rabbis, imams, and others formally recognized for religious leadership in its definition of clergy.

This section has not been struck down by the courts as offending the charter. It is still in use. There are reported cases from 1999 and 2005, and you've already heard about the current charge in Ottawa earlier this year. It is still relevant. It is still needed. I would urge you to consider an amendment to this legislation to remove clause 14. I also have some recommended language should you choose to recommend that section 176 of the Criminal Code be amended.

Thank you.

● (1650)

The Chair: Thank you very much.

We will now move to the Canadian Conference of Catholic Bishops, please.

The floor is yours.

His Eminence Thomas Collins (Archbishop of Toronto, Canadian Conference of Catholic Bishops): Thank you very much. Good afternoon.

I am pleased to be with you. I serve as the Archbishop of Toronto. Toronto is home to 225 Catholic churches and two million Catholics, and mass is celebrated weekly in more than 35 languages. Toronto is also home to hundreds of churches, mosques, temples, and synagogues.

I appear today with Bishop Gendron, the president of the Canadian Conference of Catholic Bishops, to convey our grave concerns that Parliament is suggesting that section 176 of the Criminal Code is no longer required. I would respectfully submit the opposite. More than ever, we need to legislate protection for religious communities and the services conducted every day across Canada.

This is the only section of the Criminal Code that explicitly references protection of religious communities. Some have suggested that the definition of clergyman may be too restrictive, perhaps implying that only Christian communities would be protected. We submit that the term "clergyman" is wide enough to include all faith leaders.

In a specific way, section 176, especially subsections 176(2) and 176(3), captures conduct that is not otherwise clearly reflected in the Criminal Code. We must recognize that there are ways to willfully disturb a religious service without screaming and shouting. A silent protest, unfurling a banner, blocking a procession, etc., can all prevent communal prayer and worship from taking place.

Section 176, especially subsections 176(2) and 176(3), adds clear and direct protection to the integrity of religious worship services. Section 176 is a unique part of the code, and removing it would leave religious communities vulnerable.

We accept the right of people to peacefully demonstrate and protest in public spaces. However, Parliament has drawn the line at conduct that willfully—not recklessly or accidentally, but intentionally—disturbs the solemnity of a religious service. Congregations across the country have a right to gather without being impeded in their assembly and their worship.

This section has been referenced in court cases in the past where judges have recognized that freedom of assembly and freedom of association, rights protected by the charter, could be rendered meaningless without the protection of section 176, especially subsections 176(2) and 176(3).

Places of worship should be sanctuaries of peace, prayer, and community. The bishops of Canada gathered just a few weeks ago in Ottawa to celebrate the 150th anniversary of Confederation, among other milestones. The service at the cathedral was disrupted by a protest, something we see happening with greater regularity. Anytime our churches are targets of protest, we see an arrest as a last resort. We always endeavour to de-escalate the situation. However, to foster a safe environment for the faithful, those who disrupt services should be subject to the Criminal Code if they refuse to cease and desist.

Moreover, the removal of such protection would send a disturbing message from Parliament to faith communities. Divine worship services of all denominations, as well as the important contributions of faith communities, should hold a special place in our heritage and our laws.

Canada's faith communities make vital contributions to strengthening our nation. We don't expect or demand that every Canadian practise a particular religion. However, we do expect that our religious celebrations will be protected, now and always.

Thank you.

[*Translation*]

The Chair: Mr. Gendron, the floor is yours.

H.E. Lionel Gendron: Good afternoon.

The Catholic Bishops are troubled by clause 14 of Bill C-51, which proposes to repeal section 176 of the Criminal Code. What gives rise to this concern? As mentioned in our submission, we believe attacks on religion are not like other attacks against public safety. They are not only more grave but threaten the essence of democracy itself.

This is because religious freedom is the cornerstone of human rights. We all ask questions about the meaning and purpose of life. Sometimes this includes questions about God or the divine. In all cases, we want to know the truth and, when we believe we have found it, we want to hold on to it and even to speak about it. The human person understood as a seeker of truth is the basis, thus, for religious freedom, for freedom of conscience, and indeed for freedom of speech. Where religious freedom abounds, democracy flourishes.

While religious freedom has special protection in Canada thanks to the Canadian Charter of Rights and Freedoms, section 176 of the Criminal Code is a deterrent and educator concerning particular threats with which faith communities can be faced. If the recent rise of hate crimes and prejudice against religious believers in Canada is any indication of the dangers that lie ahead, the removal of this clear and unequivocal section of the Criminal Code will make it harder to protect millions of Canadians who are active members of their faith communities.

Section 176 emphasizes and reinforces our shared belief in and respect for the freedom of religion and maintains an indispensable link between the Criminal Code and the protection of fundamental human rights.

Are other sections of the Criminal Code capable of providing the protections that section 176 extends? I would answer no. Even section 175, which prohibits causing a disturbance in a public place, fails to do so adequately. The very specific items named in that section actually exclude a whole range of conceivable acts that could constitute the disruption of a religious service.

Furthermore, as regards ministers of religion, to protect them from being obstructed in the performance of their duties or from assault is not to protect some ostensible elite status; it is to protect the community of faith by ensuring that the exercise of religious freedom is not impeded by acts of violence or threats that are directed against its faith leaders.

In Canada, people of many different faiths can live together and gather for worship without threat, hindrance, or intimidation. In order to preserve this kind of society, the Canadian Conference of Catholic Bishops urges Parliament to amend Bill C-51 so as to retain section 176 of the Criminal Code.

I am not a lawyer, but Bruce Simpson is here with me today, and he is a criminal lawyer who can shed a lot of light on all those points.

Thank you.

● (1655)

The Chair: Thank you very much.

[*English*]

We're going to move now to the Canadian Secular Alliance.

Mr. Oliver.

Mr. Greg Oliver (President, Canadian Secular Alliance): My name is Greg Oliver and I'm here on behalf of the Canadian Secular Alliance. Thank you so much for the opportunity to speak today.

The Canadian Secular Alliance is a non-partisan and registered not-for-profit organization whose objective is to promote the separation of religion and state in Canada. We strongly believe that to maintain equality between citizens in a pluralistic society like ours requires government neutrality in matters of religion, not favouring one religion over another, or religion over no religion, or vice versa. This is one of the core principles of all liberal democracies. Fortunately, Canada has done a much better job of this than most countries in the world, but there's still room for improvement.

In June of last year, I initiated the now-certified petition E-382, calling on the government to repeal section 296, prohibiting blasphemous libel, from the Criminal Code. There are several reasons why we feel this is necessary.

First of all, freedom of speech is a core principle of every liberal democracy and a cherished right here in Canada. All ideas should be subject to debate, criticism, or even ridicule. Exempting religious ideas substantially erodes this principle.

Also, section 296 is no longer relevant to Canadian society. Its repeal would have strong support across the Canadian political spectrum. It hasn't resulted in a successful prosecution in over 80 years, and no charges have been laid in over 35 years. Though I'm no legal expert, it is widely believed that it would be ruled unconstitutional under the charter. If a law has not been used in decades or is most likely unconstitutional, it ought to be repealed in our opinion.

Another consideration is global affairs. Blasphemy is still illegal in 71 countries and punishable by death in at least six. Blasphemy laws are disproportionately used to persecute religious minorities and government critics. There have been a variety of high-profile blasphemy cases recently: Asia Bibi in Pakistan; in Indonesia, former Jakarta governor Ahok; Nahed Hattar in Jordan; Pussy Riot and others in Russia; Raif Badawi in Saudi Arabia, and countless others who have not received international press coverage.

Each of these cases constitutes grave human rights violations by liberal democratic standards. There may come a time when the elected representatives of this country wish to condemn cases like these. As long as we have blasphemy laws of our own, it significantly erodes our moral credibility when doing so. Our passive blasphemy law adds credibility to active and sometimes lethal blasphemy laws worldwide.

We also support the proposal to repeal section 176. Subsection 176(1) prohibits obstructing or violence to or arrest of clergymen. The wording here, as has been noted, appears to apply only to male Christian officiants. This privileges men over women, and Christians over those from other religions or the non-religious community. Also, harassment and assault laws already exist. To our knowledge, Canada is not burdened with a unique set of circumstances in which male or Christian officiants require additional protection from harm.

Subsections 176(2) and 176(3) are concerned with disruptions to meetings for religious worship, or for a moral, social, or benevolent purpose. Some types of meetings, such as weddings or funerals, can plausibly be interpreted in a religiously neutral manner, but we remain concerned about a chilling effect on freedom of expression at meetings for religious worship.

There have been several cases invoking these subsections since the 1980s. One of the cases that caught our eye was Skoke-Graham v. The Queen, from 1985. In this case, a Nova Scotia Catholic church changed how congregants were expected to take communion. Instead of kneeling, they would now stand to receive it. Six congregants dissented from this decision and continued to kneel when it came time to receive communion. Eventually, when presented with an ultimatum to stand, they refused to take communion and returned to their seats. They were convicted under section 176 and it was upheld twice on appeal, but the charges were overturned at the Supreme Court.

● (1700)

In this case, the short and passive nature of the protest exonerated the accused, albeit in the highest court in the country, but it highlights our concern that section 176 protects religious dogma or orthodoxy from criticism or civil protest. There are a myriad of religious ideas or practices that some may find objectionable. This is relevant within religious communities as well as outside of them. We remain unconvinced that these meetings are always an inappropriate venue for expressing differences that arouse controversy and therefore require more protection under the law.

Having said that, of course we acknowledge the benefit to society of protecting against certain disruptive acts at these meetings, but as the minister and several others have already articulated, the Criminal Code already criminalizes causing a disturbance, uttering threats, intimidation, and incitement of hatred toward identifiable groups. Sentencing is typically more severe when the offence is motivated by hate toward religious communities, and hate crime laws are potentially applicable as well. In our view, these protections make section 176 unnecessary.

Thank you.

● (1705)

The Chair: Thank you very much to all three groups for your testimony.

We'll now go to questions.

Mr. Nicholson.

Hon. Rob Nicholson: Thank you very much for your testimony here today.

Mr. Oliver, you said that your understanding of this section 176 is that it's for the protection of Christian males. You may be aware or maybe you're not aware that the interpretation by the courts and the government, Revenue Canada, National Defence, and everything, is that it includes all religious officials, regardless of their sex or their religion.

Were you aware of that?

Mr. Greg Oliver: No, but that's a good argument for cleaning up the wording, if it were to be retained in any way, shape, or form. I would add, and perhaps you could answer this question for me, does it apply to secular humanist officiants as well?

Hon. Rob Nicholson: I'm asking the questions here today, Mr. Oliver.

Voices: Oh, oh!

Mr. Greg Oliver: Oh, okay.

Hon. Rob Nicholson: As far as I know, but thank you for that. I'll take that under consideration.

Mr. Greg Oliver: My primary concern, of course, is that it is religiously neutral.

Hon. Rob Nicholson: Yes.

Mr. Greg Oliver: Under the current wording, it's certainly plausible that you would interpret it in a different way.

Hon. Rob Nicholson: It could be.

Thank you, Professor Buckingham. Your explanation of this was very well put together and your rationale actually coincides with my own thoughts on this.

One of the interesting things—and we've heard this before—is that if something hasn't been used very often, it should therefore be taken out of the Criminal Code. I was saying to some of my colleagues that I remember at law school we were talking about the treason sections of the Criminal Code, and some were saying they were not used very often. I hope that nobody would then make the conclusion that we'd better get rid of treason from the Criminal Code just because Canadians don't commit some of these offences. But thank you for that.

Your Excellency, to you and both our bishops who are here today, and Mr. Simpson, it's important to get the word out as to what's actually taking place. We've heard testimony, in fact just earlier today that you may have heard or seen, that this took a lot of people by surprise. Quite frankly, there wasn't much publicity for this. It just got dropped out in the summer. What can be done, what are you going to do to get this message out before this bill actually comes down to third reading here? Are you distributing it to parishes, letting them know? That seems to be an essential part of this, I think, to make sure everybody knows exactly what's going on.

Cardinal Collins.

H.Em. Thomas Collins: I think this may very well be important. The very publication of this meeting makes people more aware of that. I think there may well be some plans on behalf of the Canadian Conference of Catholic Bishops. Bishop Gendron might have some insights into that, which covers this for the whole country.

[*Translation*]

H.E. Lionel Gendron: I was not personally very aware of that. The staff of the Conference became aware of it. We have been working on this issue since May and we have prepared the brief. How can people in parishes become informed? I think the media will talk about our appearance here today, which will help them better understand what is going on.

Professor Buckingham said that hate crimes are on the rise in Canada for various reasons. By repealing section 176, what message would Parliament be sending to the public? There is surely an interest that I would describe as pedagogical in maintaining this section in the Criminal Code.

● (1710)

[*English*]

Hon. Rob Nicholson: Thank you very much.

Mr. Simpson, in your role as a solicitor for the Conference of Catholic Bishops and your work in the legal profession, would you agree that it's not only hatred that might motivate somebody to disrupt a religious service? There are those who may think it is some sort of comical effort, but it would be completely included in this.

Would you agree as well that the worry is that somehow the old wording of this is only restricted to male members of the Christian faith? Is it your experience with the law that generally the courts look at a larger context and expand the definitions?

Mr. Bruce F. Simpson: I'll start with the second part first, if you don't mind.

I don't see how you can really interpret “clergyman” as meaning anything other than a religious leader, regardless of their gender and regardless of their religion. It's important to note that the courts have said over and over again that when interpreting legislation, you should try.... You can't bend the words all out of shape, but if there is a reasonable interpretation consistent with the charter, that's the interpretation to go with.

If “clergyman” only means “a male Christian”, this can't stand constitutional muster, but the Supreme Court of Canada and the British Columbia Court of Appeal have said that it does. Now, admittedly, they weren't dealing with that particular issue, but it would have hit them in the.... Anybody can read it, so I really think that's the thing.

The other point here that I think is important about hate crimes is that you can disrupt a religious service motivated by what isn't really hate. I think my friend Mr. Oliver makes a good point in one way. There is a difference between expressing strong feelings against, say, a religious doctrine, and strong feelings against members of the congregation. My understanding is that one is legal and probably should be, and the other is not and shouldn't be.

But it doesn't matter what the motivation is. If you're disrupting a religious service, you're causing a great deal of emotional turmoil to a large number of people. I don't think it matters why they're doing it. They're doing it.

Somebody made the point that a lot of these cases get diverted. That's because, when there is mental illness, often courts decide to divert if the person will get the treatment they need, and the crown is involved in that, but without the charge being laid, there is often no mechanism for that. The same is true for things like restorative justice, which a lot of churches are very much onside with, but often you need the charge to get that process in motion.

I would point out, if you look at subsections 176(2) and 176(3), they're not covered by section 175. There are lots of ways to disrupt a religious service without violating section 175.

The Chair: Thank you very much.

Mr. Ehsassi.

Mr. Ali Ehsassi (Willowdale, Lib.): Thank you, Mr. Chair.

I'll ask Mr. Oliver a few questions.

Thank you ever so much for appearing before this committee, Mr. Oliver.

As you know, freedom of expression is closely derived from other freedoms, such as freedom of assembly and freedom of conscience. In your opinion, will the repeal of "blasphemous libel" strengthen and fortify those other freedoms?

Mr. Greg Oliver: Well, of course. Freedom of speech is essentially the best corrective we possess as a species for making progress in whatever realm it may be, technological, scientific, ethical, or philosophical. Some of the issues that religion tackles are some of the most important philosophical questions that face mankind. Where do we come from? Why are we here? What's the meaning of life?

The idea that certain ideas, because of the fact that they invoke the supernatural, would be off limits could potentially impede that progress.

Mr. Ali Ehsassi: Thank you for that.

I know you've been very active on the issue of section 296. Are you aware of any group that has any objections to the removal of section 296?

Mr. Greg Oliver: I originally intended to speak mostly about section 296, but then I noticed that I couldn't find a single objection. That wasn't the case with section 176, so I decided to address that a little bit more. For section 296, as best I can tell, at least within the House of Commons, there appears to be unanimous support.

● (1715)

Mr. Ali Ehsassi: No, but you haven't heard it from any other stakeholders?

Mr. Greg Oliver: No, not religious groups or anything I could find with my research.

Mr. Ali Ehsassi: We've heard from other people here today their misgivings about the repeal of section 176. My colleague Mr. MacGregor spoke about how section 176 could undermine section 15, the equality rights of the charter.

What is your opinion on that specific issue?

Mr. Greg Oliver: That's interesting. Essentially, equality rights are the mandate of our organization. We want to seek equal rights for all religious groups and non-religious people as well.

So yes, as I outlined in my opening remarks, subsection 176(1) is worded in a way that implies there's a bias toward one side, and the point I mentioned about the potential chill on free speech with subsections 176(2) and 176(3) are unequal because, granted, it is limited in scope, but you're providing protection to religious dogma or orthodoxy in certain situations. So, by definition, that is a violation of equality rights.

Mr. Ali Ehsassi: Mr. Simpson, could you also talk about the intersection of section 176 and section 15 of the charter?

Mr. Bruce F. Simpson: Section 15 of the charter is an equality section. Section 176 does not, in my view, in any way violate anybody's equality, and I don't see how it affects freedom of speech. We're talking about religious services. Churches and synagogues and all the other kinds of religious places of worship are usually open. They want everybody to come. A lot of meetings are safe. They're inside buildings and so on.

Not being allowed to disrupt the service doesn't mean you're not allowed to express opinions about the religion. It's just where and when you do it. Imagine, for example, if the religious service happens to be someone's funeral or wedding. People are gathered there. It might just be Christmas midnight mass, but that has a lot of special meaning for a lot of people. There are times and places for everything, and the place for protest is not inside a place of worship when people are there to attend service. I just think that's wrong, and I think that's why we need subsections 176(2) and 176(3) particularly. It doesn't take away anybody's equality. Nobody's trying to prevent anybody from expressing opinions, just not disrupting the religious services.

Mr. Ali Ehsassi: Bishop Gendron, I understand you'd like to comment.

[*Translation*]

H.E. Lionel Gendron: In my presentation, I insisted that those in charge of communities are not any different from other people. This is for the good of the community that wants to come together in prayer.

It goes even further. We talk about a moral, social and benevolent purpose. It is important to ensure that all groups that are pursuing a goal are not disrupted. It is not that clergy members are different from anyone else. It's really for the good of the faith community.

[*English*]

Mr. Ali Ehsassi: Thank you.

The Chair: Thank you.

Mr. MacGregor.

Mr. Alistair MacGregor: Thank you, Chair.

Mr. Oliver, I want to continue with the subject that Mr. Ehsassi brought up from the previous round of witnesses we had, concerning section 15, the equality rights of the charter.

I was making the point to the witnesses that for people who aren't religious but may belong to an identifiable group, if they are going to a meeting and the person who is the leader of that meeting is obstructed from attending, are they not suffering the same amount of harm, and are they being excluded, because section 176 for the most part makes specific reference only to religion, but not to other groups?

Their reply to me was that it's saved by subsection 176(2). It says, “Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence...”.

In your opinion, is this entire section saved by subsection 176(2), given that it does make an effort to cover other groups?

● (1720)

Mr. Greg Oliver: With respect to equality, it definitely is better, as I mentioned in my opening remarks. Weddings and funerals, for example.... Obviously, a non-religious funeral should get the same protection as a religious funeral and presumably both fall under that category. With the religious worship, I guess it is a little trickier because you are arguably prioritizing sincerely held views simply because there's an invocation of the supernatural.

Mr. Alistair MacGregor: Mr. Gendron, in your remarks you made reference to the fact that section 176 of the Criminal Code is a deterrent. I don't think many Canadians were well aware that this section even existed before this bill came forward. I would like you to expand on your remarks. Do you really think that specific sections of the Criminal Code are a deterrent by themselves or is it more a matter of how the law is applied through case law and so on? In your opinion, what acts as more of a deterrent and what would be more effective?

[*Translation*]

H.E. Lionel Gendron: I hope I have understood the question.

You are probably familiar with Dr. Viktor Frankl, who wrote the book *Man's Search for Meaning*.

Meaning is very different for every person. For some, there's meaning in faith, while for others, there is none. Those people have the right to say that it is their truth, to safeguard it and to share it. That is why I think social morality is important. Our meetings may be about religious freedom, but also about freedom of conscience and of belief. It is important to protect it.

There is probably a way to do things differently, but section 176 stresses the importance of that freedom. In the current context of increased hate crimes, this section makes sense. That's why we really need to keep it. Others are saying the same thing.

I have been given a note. In a few days, the Conference will be signing a letter. It is an ecumenical and interreligious letter that will be signed by Jews, Muslims and Christians, asking that section 176 be retained.

Have I answered your question?

[*English*]

Mr. Alistair MacGregor: Mr. Simpson, as you're the legal counsel, I want to ask you this question.

Bishop Gendron argued that the other sections of the Criminal Code are incapable of providing the same level of protections. I'm going over the specific section because, as you know, at the latter end of the Criminal Code, section 718.2, under the sentencing principles, judges are given a lot of leeway to either increase or decrease a sentence, if the offence was motivated by bias, prejudice, or hate, based on a variety of factors. Since we can't look at the Criminal Code just as it's written, but we also have to look at how it's been interpreted in use in case law, why in your opinion, do those sections not work as well as section 176? I just want to hear your legal opinion on that.

● (1725)

Mr. Bruce F. Simpson: I think there are a couple of reasons. The main section you would use is section 175, causing a disturbance, but if you read it.... One thing you could do is to make subsections 176(2) and 176(3) part of section 175. But section 176 is about creating a disturbance in a public place, and you have to do it by doing certain things. It is entirely possible to seriously disrupt a religious service or one of these meetings without creating a disturbance as it's defined in section 176.

For a long time, perhaps we didn't have a lot of charges laid under this section. I grew up in Canada, and people had differences of opinion on religion, but religious intolerance just seemed almost to not exist. I think we went through several decades where arguably Canada was the most tolerant place in the world for different religious opinions. Unfortunately things sometimes change, and although I think the overwhelming majority of Canadians are religiously tolerant, we've had a lot of hate lately. Muslims, of course, are the primary objects of late, but as the professor pointed out, Catholics and of course Jewish people remain targets of hatred. I don't pretend to understand why, but it's so.

I think it's important to say that we view as important the right of people to go to their place of worship and to be free from being interfered with while they're there. I don't think you'll find anybody who actually thinks you ought to disrupt these things, but I don't think the protections are there.

With regard to the assaults, there are ways to deal with those; there's no question. It's less significant, although we have a section.... For example, if a policeman is assaulted because he's at a hockey game and he gets into an argument or something, he's not treated any differently from a plumber. But if he's in the course of his duties, he is, and I think there's good reason for that. I think there's a lot of good reason to protect clerics when they're in the course of their duties, because they can be, and I think of late they appear to be, special targets, so there's something to be said. Just because people don't know about the particular section.... I do think most people know that it's illegal to disrupt a religious service, and if you take it out, maybe people will find out it's not.

The Chair: Thank you very much.

We'll go to Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair.

Thank you, lady and gentlemen, for your testimony today. It's greatly appreciated.

We've heard, specifically with respect to section 176, varying opinions about what the role of the Criminal Code is, whether this section is applicable in this day and age or not, and whether similar protections are offered in other sections of the code.

One argument I find to be quite fascinating—and I'd like to get your opinion on this, Ms. Buckingham and Mr. Simpson—is that the Criminal Code's objective is to deter members of the community from carrying out certain acts that are disruptive, unlawful, and so on. We hear that this section needs to stay in the Criminal Code because we don't want to send a wrong message. We've also heard that there are other sections in the Criminal Code that would apply.

I'm kind of grappling with this concept. The Criminal Code's objective is to deter, to prevent, and to keep the peace within our society, but does it also carry a value of policy, of proactive deterrence, by having such a section in here, to let people know that even though there have been only 30 charges under this section, that this is not acceptable?

Ms. Buckingham, would you like to go first?

● (1730)

Dr. Janet Buckingham: Thank you.

First of all, I think it's important to recognize that section 2(a) of the charter protects religious freedom, and I would wonder how Parliament would be protecting the freedom to worship without this section there.

Second, it may be that the general public isn't aware of this section, but churches are aware of this section, and I am aware of churches that have been able to stop people from causing a disturbance or to limit what they can do by saying, you know, it is against the criminal law of Canada for you to come in and disturb this worship. You may stand outside; you may have a sign; you can't use a bullhorn; you can do this and this, but you can't do that and that. So churches have used it, short of calling the police, in order to deter people from disturbing a service of worship.

Ms. Iqra Khalid: Mr. Simpson.

Mr. Bruce F. Simpson: The professor has put it quite well, and this also enables the police to come. Even if a charge isn't laid, the police can at least come and tell them they're committing a crime and they have to get out of there right now. This has real value.

I would add that part of the purpose of the Criminal Code is to correct, and that's why even though charges may not be laid, if some kind of restorative justice is done, if the person gets the psychiatric assistance he needs, that may also be of benefit, because part of the Criminal Code is to correct when there has been a breach.

Ms. Iqra Khalid: Thank you.

Ms. Buckingham, you said in your remarks that you had some recommendations with respect to section 176. Would you like briefly to talk about them?

Dr. Janet Buckingham: Certainly, and it really is just changing the term “clergyman” or “minister” to “religious official”, which is the terminology the Supreme Court of Canada has used in these situations. I think “religious” is a little more inclusive than “divine service”. We could also change “him” to “him or her” because we know there are female religious leaders, so it is better to have inclusive language there as well. It's not really a large change, but it may send a good inclusive and diverse message.

Ms. Iqra Khalid: Thank you.

I want to share that a few months ago I was having an interfaith dialogue with a group of clergymen, the broader definition of that term, and we were interrupted by a number of people who wanted to express themselves. They barged in and called them a bunch of dirty so-and-sos, and I wonder now if this section would have applied in that instance. No charges were laid.

Those are all the questions I have.

Thank you.

The Chair: Thank you very much, Ms. Khalid.

Colleagues, we're already past the end time for this panel. Does anybody have any short important questions they want to ask?

If not, I want to welcome Mr. Falk back to our committee. It has not been the same without you, and we're thrilled to have you back.

Mr. Ted Falk (Provencher, CPC): Thank you.

The Chair: Let me thank all of the witnesses from this panel. You were very helpful. Your testimony was very thought-provoking and I want to thank each and every one of you for your evidence.

Now we're going to take a short break and move to our next panel.

● (1735)

(Pause)

● (1740)

The Chair: We are reconvening with our third panel of the day. I would like to thank the witnesses for coming forward.

Before we begin, I want to advise members of the committee of our deadlines for amendments for Bill C-51. I see that Mr. Nicholson is not here, so I will speak to him privately. The deadline for amendments will be Friday, November 3, at noon. Everybody will receive the amendments on Monday, and we'll do our clause-by-clause consideration next Wednesday.

I want everyone to know the deadlines. I'll repeat them at the end of the meeting. It's Friday by noon for amendments, distribution on Monday, and clause-by-clause study next Wednesday.

On the third panel of the day, I am very pleased to welcome, from B'nai Brith Canada, Mr. Brian Herman, the director of government relations; and Mr. David Matas, senior legal counsel.

We also have with us the Association for Reformed Political Action, represented by Mr. André Schutten, legal counsel and director of law and policy; and Ms. Tabitha Ewert, who is an articling fellow. Welcome.

By video conference we have the Canadian Civil Liberties Association, represented by Ms. Cara Zwibel, the acting general counsel; and Ms. Victoria Cichalewska.

Finally, we have the Church Council on Justice and Corrections, represented by Rebecca Bromwich, president; and Melanie Younger, coordinator. Welcome.

We're going to go in the order of the agenda, starting with B'nai Brith Canada.

Mr. Herman and Mr. Matas, the floor is yours.

Mr. Brian Herman (Director, Government Relations, B'nai Brith Canada): Mr. Chairman, we thank the committee for inviting us to appear. My colleague David Matas, our senior legal counsel, will elaborate on some of our key points, particularly on the legal issues.

B'nai Brith Canada is this country's oldest national Jewish organization, founded in 1875, with a proud history of defending the human rights of Canadian Jews and all Canadians across the country. We advocate for the interests of the grassroots Jewish community in Canada, and for their rights, such as freedom of conscience and freedom of religion.

I want to provide some context. On October 18, we testified before the Standing Committee on Canadian Heritage in its study of Motion M-103 on systemic racism and religious discrimination. We noted that since 1982, B'nai Brith Canada has published the "Annual Audit of Antisemitic Incidents" in Canada, copies of which I understand are available to the committee.

Over a five-year period, anti-Semitism has been on the rise. Statistics Canada has reported that in 2015, the most recent year with complete figures, Jews were the most targeted group in this country for hate crimes, a serious trend that has been ongoing for nine years. Our hope is that the committee will continue to bear in mind that Canada's most targeted religious minority in terms of hate speech and hate crimes is the Jewish community.

We have followed closely the government's initiative to modernize the Criminal Code, including its plans to deal with provisions that are considered out of date or redundant. Our focus has been, as you've heard this afternoon from other groups, on the intention to repeal section 176. We have received approaches from Jewish community members about this, and we seek to represent them. They have raised questions about this intended repeal of section 176 and whether it represents a weakening of provisions in the Criminal Code that protect faith leaders, religious gatherings, and places of worship.

Section 176, although not perfect in language, provides clear penalties for those who threaten or interfere with faith leaders during religious ceremonies, or who interrupt or disrupt religious gatherings. We have concerns over repeal of section 176, in the context of the signal that such a step would convey in today's environment where anti-Semitism remains a serious challenge, and where Canadians have been witness to acts of intimidation directed at religious institutions and leaders, and not just those from the Jewish community.

We've had very productive exchanges with officials who have been working on Bill C-51's provisions. We have welcomed their assurances that there is no intention to decriminalize the behaviour set forth in section 176 of the Criminal Code. It has been explained to us carefully that there are other Criminal Code sections that would apply with equal penalties, and we have noted the assurances expressed carefully by the Minister of Justice on this point. We acknowledge these assurances, but believe that, in today's context, we must exercise great care in taking actions that can be misinterpreted, however well intentioned. In short, we believe it is in the interests of Canadians that there be no vacuum.

We believe that the protections and the penalties for actions captured in section 176 must remain clear and unequivocal, such that they meet the requirements of contemporary Canadian society. One option we believe could be considered is to retain section 176 with modernized language. There could also be examination of strengthening and amplifying the applicable sentencing guidelines. I believe Mr. MacGregor raised this in the last section.

My colleague David Matas will elaborate on our position, but I want to thank you, Mr. Chairman.

B'nai Brith Canada assures the committee members that we wish to contribute constructively as your work proceeds. Thank you.

● (1745)

The Chair: Thank you.

Mr. David Matas (Senior Legal Counsel, B'nai Brith Canada): Thank you very much.

Freedom of belief and assembly are essential to democracy. Intolerance attacks these freedoms by attempting to disrupt meetings of those who have come together to share and express their beliefs and to plan their realization. Right now there is a provision in the Criminal Code which defends Canadian democracy from this form of intolerance. The government now proposes to repeal this protection. Why it intends to do so is difficult to understand, both superficially and on closer examination.

When the Minister of Justice appeared before this committee she gave nine different justifications for the repeal of the provision, and I will address as many of them as I can within the time that's left.

First, she talked about the sentencing guidelines, but I point out that the relevant sentencing guideline deals with motivation. It does not deal with acts. Section 176 of the code deals with specific acts, which may or may not have the relevant motivation.

She referred to the Canadian Charter of Right and Freedoms, but the charter prevents certain behaviour by governments. It doesn't regulate the behaviour of the private sector.

She referred to gender neutrality, but the provision could be amended to allow for gender neutrality.

She referred to religious neutrality, but as we heard from a previous presenter, the language could be amended to allow for religious neutrality. Indeed, subsection 176(2) and subsection 176(3) are religiously neutral, and even neutral between the religious and the secular. Subsection 176(1) could be amended to also be neutral between the religious and the secular.

She said that the law should be removed because of its flaws, but the law could be changed to remove the flaws.

She referred to redundancy, but the claim of redundancy is not obvious. I can give an example. At the time of the second Gaza war in 2014, protesters in Europe made repeated attempts to disrupt synagogue services. Police did not lay charges. The incidents, if committed in Canada, would have been, in my view, plainly prosecutable under Criminal Code section 176, but once that provision is gone, would such incidents be prosecuted under more general provisions? We're not so sure.

The minister referred to the fact that this section has not been used frequently, but that doesn't mean it has been ineffective. On the contrary, infrequency of use may indicate effectiveness, and it does have, as we've heard, the value of allowing institutions to give warnings.

She said she doesn't expect an increase in incidents as a result of repeal of the law, but I would suggest that the specifics of her purpose, even when they are encompassed within generalities, focus our intention on what is wrongful behaviour and tell us specifically, without any doubt, to not do that. The public is better instructed—if you'll forgive my metaphor—with chapter and verse. Specifics give status. There's good reason to single out the wrong and disrupting either religious or secular meetings with a public-interest purpose. The Supreme Court of Canada itself has said about this section that it serves a value because disrupting this sort of meeting is injurious to the public interest.

Last, the minister talked about the opinion of experts, but the law is not only an instrument for academics, prosecutors, officials, and judges. It's the voice of the public and speaks to the public. The public tells us through the Criminal Code what is considered wrong. The Criminal Code tells all of us what should not be done.

Let me say a word about recommendations. As a community, we have an interest that religious services and public interest meetings can go ahead unimpeded by those who disagree. The ability of members of the public to meet for the public interest or religious purposes without interruption from those who disagree, has a value worth asserting separately. It should not be buried under a pile of generalities.

There are two alternative ways of achieving this result. One is to amend the present provision to remove its sexist, denominational, and even its religious focus to make the language gender and spiritually neutral. The other is to amplify the sentencing guidelines. If Section 176 were to disappear entirely on the basis of redundancy, then the substance of its content should be included in the sentencing guidelines. The behaviour identified in Section 176 is serious enough that, if not specifically penalized, it should be considered an aggravating circumstance justifying an increased sentence when the general offence under which it falls is committed. We so recommend.

Thank you very much.

● (1750)

The Chair: Thank you very much.

We will move to the Association for Reformed Political Action.

Mr. André Schutten (Legal Counsel and Director of Law and Policy, Association for Reformed Political Action Canada): Good evening, everyone. Thank you so much for having us.

My name is André Schutten. I'm the director of law and policy with ARPA Canada. With me is Tabitha Ewert, my articling student.

It's a pleasure and a privilege to be able to speak to you this afternoon. I want to thank you, honourable members of the committee, for the hard work you do. It's very much appreciated by the community I represent.

Our concern lies with section 176 in clause 14 of Bill C-51. Perhaps there is a bit of ignorance here, and I don't mean that in a derogatory sense; I mean it simply in the sense that there is a lack of familiarity with what happens in a religious service. Perhaps that's what's motivating the recommendation to remove this section from the Criminal Code.

What actually happens in a religious service, I submit, is that it's an encounter with the divine at a time of vulnerability, which sets it apart as being different in kind from any other public encounter or event, such as a university lecture, a rally in a public park, or, dare I say, even a hockey game here in Canada. A reading from Torah in the synagogue, a prayer service in a mosque, a song in a Sikh temple, or a worship service in a church—all are communal events that involve an encounter with the transcendent that sets these kinds of events as apart, as being different in kind from university lectures and so on.

Some have suggested that causing a disturbance is already covered by the Criminal Code. Section 175 has been brought up a few times already today. That causes me some concern. Surely the members of this honourable committee are familiar enough with the protests happening at university lectures across this country where a lecturer is shouted down because people disagree with the opinions he or she might be sharing in this lecture. Police or security will happily sit back and watch that protest disrupt the university lecturer for 10, 15, or 20 minutes, or perhaps for an hour or more. We submit that if that were to happen in a religious service, that would be a massive blow to religious freedom in this country. Certainly it would be a huge harm to religious worship across the board.

Perhaps it would be helpful to give you an analogy. It's not a perfect analogy, but it's one that I have found helpful. Imagine somebody came to this committee and said, “You know, we really do have to simplify the Criminal Code. It is a bit cumbersome. It's pretty long. Why don't we get rid of all of those other types of assaults in the Criminal Code? We already have assaults prohibited in section 265. Let's get rid of sexual assault law as prohibited in sections 271, 272, and 273. We don't need it. It's already covered under assault. Sexual assault is a type of assault. No biggie. Let's just clean up the code.”

Obviously, I think everyone here would right away agree with me that, no, there's something different in kind with sexual assault. Sexual assault is different in kind from assault simpliciter, and therefore we need both provisions to be in the Criminal Code. We're deterring two different things here.

It's not a perfect analogy, but I think it is analogous to what we're talking about here with section 176. Religious services are different in kind from a university lecture or a rally in a public park.

We've been talking with other faith communities across the board here in Canada. We've talked with Muslim leaders, Jewish leaders, Buddhist leaders, and Coptic, Catholic, and Protestant. We worked on drafting an open letter to the justice minister sharing our concerns. I respectfully request that we be able to table that letter with this committee, once we have sent it to the justice minister, if the committee would be willing to consider it as well.

We'll try to get it to you before noon on Friday, Mr. Chair, if that's okay. I can certainly forward that as soon as it's available.

I have two other points. One is that in the written submission we provided earlier to the clerk of the committee, we made some line-by-line recommendations for amending section 176 to address some of the concerns the justice minister raised when she was interviewed by this committee. I think the section can be cleaned up. We recommend cleaning it up and not keeping it as is. I'd be happy to entertain any questions from the members on our recommendations.

Finally, I want to address the question that came up today about equality in section 15 of the charter. The charter protects equality, obviously, but it does not mean that the law, that Parliament, needs to treat everybody exactly the same all of the time. That would be called “formal” equality, and that doctrine was rejected by the Supreme Court under a section 15 jurisprudence. Instead, section 15 protects something called “substantive” equality.

● (1755)

We have a case in our case law going back to the 1960s or 1970s in which a woman was denied unemployment benefits because she was pregnant. The Supreme Court at that time said, “Well, you're not being discriminated against; you got yourself pregnant and the law is actually even. As long as you're not pregnant you get the unemployment benefits.” The Supreme Court actually ruled against the pregnant woman. Post section 15 being implemented in 1985—actually, it was implemented a few years after the charter was passed in 1982—the Supreme Court rejected that idea. It said we need substantive equality, which is different from this formal equality.

If some people in Canada do not identify as religious, if they do not encounter the divine in religious celebrations and services, that's fine. But that does not mean that we have to delete section 176 so that they feel equal to the rest of us who do encounter the divine in religious worship. Instead, what we do is still protect those who have religious experiences in community through religious worship, and for those who don't use it, that's fine. If they don't need that kind of protection, then it's there for those who need it.

Subject to any questions from the committee, those are my submissions.

Thank you, Mr. Chair.

The Chair: Thank you very much, Mr. Schutten.

We will now move to the Canadian Civil Liberties Association.

The floor is yours, Ms. Zwibel.

Ms. Cara Zwibel (Acting General Counsel, Canadian Civil Liberties Association): Good afternoon, Mr. Chair and members of the committee.

My name is Cara Zwibel, and I'm the acting general counsel of the Canadian Civil Liberties Association. My colleague Victoria Cichalewska is with me. She's our articling fellow.

On behalf of the CCLA, I would like to thank the committee for the opportunity to appear before you in relation to your study of Bill C-51, a bill with a number of important ramifications for our justice system and in particular on rights and freedoms that are protected by the charter.

CCLA has recently put in written submissions to the committee, which will set out our position on a number of aspects of the bill, some of which I will not have the opportunity to address in detail today. I intend to focus the few minutes I have on two of the proposed changes to the sexual assault provisions of the Criminal Code and on the proposed change to the Department of Justice Act.

Before doing so, I want to acknowledge that CCLA is very supportive of the government's efforts to bring the Criminal Code up to date and to get rid of laws that are obsolete and archaic, particularly those that violate the rights and freedoms of Canadians and that have been struck down by our courts.

On this point, CCLA supports the bill's repeal of the blasphemous libel offence that submits that seditious libel and defamatory libel also give rise to significant freedom of expression concerns. Defamatory libel, in particular, has frequently been used to silence critics of police officers, correctional officers, judges, and lawyers. In our view, those offences should be added to the list of repealed provisions included in Bill C-51.

Moving on to the sexual assault provisions, CCLA shares the government's concern for the treatment of sexual assault complainants and victims, and we understand that the purpose of these provisions, according to the government, is to ensure that victims of sexual assault and gender-based violence are treated with the utmost compassion and respect.

However, it is not at all clear, in our view, that amendments to the Criminal Code are the best way to achieve this goal. Indeed, there are limits on what the criminal law can be expected to do. In a criminal trial, it is the accused that faces a loss of liberty at the hands of the state, and the accused who must have the benefit of the presumption of innocence and the right to make full answer and defence. We cannot dilute those protections in the hopes of showing victims more compassion.

I first want to deal briefly with clause 21 of the bill, which would amend section 276 of the code, commonly known as the rape shield provisions, by expanding the definition of "sexual activity" to include "communication made for a sexual purpose or whose content is of a sexual nature."

While we appreciate the rationale underlying this proposed expansion, we have some concerns about the breadth of the language and how a broad interpretation might infringe the accused's right to make full answer and defence, as well as require the accused to disclose significant pieces of the defence case and strategy in advance of the trial. That's addressed more fully in our written submission, but we propose that one helpful amendment would be to clarify that communications between the accused and the complainant regarding the sexual activity at issue in the case should be explicitly excluded from the rape shield provisions.

I want to deal with clause 25 of the bill in a bit more detail. This clause creates a new provision, proposed section 278.92, which would require the accused to apply to the court to adduce certain records relating to the complainant or a witness where those records are already in the accused's possession. This is an expansion of the existing third party records regime, which seeks to balance the accused's right to make full answer and defence with the rights of complainants and witnesses to privacy, personal security, and equality. In our view, the addition of records in the accused's own possession to this special evidentiary regime tips the balance too far and unreasonably limits the constitutionally entrenched rights of the accused.

This amendment clearly places disclosure obligations on the accused, a novel departure in the Criminal Code and one of which we should be very wary. The disclosure will have to be made in advance, before the defendant has heard the crown's case against him or her. In recognition of the right to silence, the presumption of innocence, and the fact that the crown bears the burden of proof in a criminal prosecution, there has never been reciprocal disclosure obligations on the accused in this way.

● (1800)

The government has suggested that this change would be upheld by our courts on the same basis as the third party records regime in R. v. Mills . In our view, this argument is fundamentally flawed. First, there's no seizure involved under section 8 when the records are already in the accused's possession. This is something that was considered significant in the Mills case. Second, the concern about using the third party regime to go on a fishing expedition into the private life of the complainant or witness does not arise.

The definition of records is broad, particularly as applied to both complainants and witnesses, and is likely to give rise to significant litigation. In our view, this addition to the evidentiary rules at play in sexual assault cases violates the accused's constitutional rights to silence and to make full answer and defence, in a manner that cannot be justified.

In our view, the government should be focusing on other ways of protecting and respecting complainants rather than amending what is already a progressive and protective law. The flaw may be in the application rather than in the text itself.

Finally, I would like to address clause 73 of the bill, which amends the Department of Justice Act. The CCLA has been involved in advocacy related to section 4.1 of the Department of Justice Act for several years, including through our intervention in the case of Edgar Schmidt v. The Attorney General of Canada at both the Federal Court and the Federal Court of Appeal.

We also undertook a substantial project to consider what new checks and balances could be introduced into our federal legislative process to raise the standard of charter compliance of bills tabled and passed in Parliament. In our written submissions, I've included a link to our full "Charter First" report, which sets out our recommendations in detail.

At present, section 4.1 of the Department of Justice Act requires the minister of justice to report to Parliament when he or she finds government legislation to be inconsistent with the charter. However, the current interpretation of that provision is that the minister need only report when there is no credible argument to support a bill's constitutionality. In practice, this has meant that not a single report relaying concerns about charter compliance has ever been made to Parliament.

Significantly, the government has sometimes used the provision as a shield during the legislative process, suggesting that the absence of a report by the minister indicates that a bill is charter compliant.

The proposal contained in Bill C-51 is that a new section 4.2 would be added to the act, requiring the minister to issue a charter statement in relation to all government bills tabled in Parliament. The statement would identify any charter rights and freedoms that might be engaged by a bill, briefly explain the nature of the engagement, and identify any potential justifications for any limits a bill may impose on charter rights and freedoms.

The CCLA has recommended that charter statements be tabled in Parliament. However, we've called for a much more detailed statement than is contemplated in this bill. In our view, the statement should set out the government's principled position that each new bill proposed is, on a balance of probabilities, in compliance with the purposes and provisions of the charter. The statement should include a discussion of the legal tests, factors, and reasonable alternatives that were considered to reach the conclusions drawn, and should include references to any relevant or contradictory precedents and norms.

Absent this kind of requirement, charter statements will amount to little more than public relations exercises for the government. While we appreciate that the current Minister of Justice has issued charter statements in relation to a number of recent bills, with respect, these statements have lacked the rigour, detail, and depth of analysis required by members of Parliament and the public in order to meaningfully consider the constitutional implications of proposed legislation.

I will refer the committee to our “Charter First” report to see our other, more wide-reaching recommendations, including items that would touch on private members' bills and Senate public bills in addition to government bills. We continue to believe that significant reform on this issue is needed, and we would welcome the opportunity to continue to engage with the government and this committee on this issue.

While we do not believe that proposed section 4.2 is sufficient, it would be substantially improved if it were amended to ensure that charter statements are much more detailed, in order to truly assist Parliament and the public in assessing the constitutional implications of proposed legislation.

I look forward to answering your questions. Thank you again for the opportunity to appear.

● (1805)

The Chair: Thank you very much, Ms. Zwibel.

We'll now move to the Church Council on Justice and Corrections.

Dr. Rebecca Bromwich (President, Church Council on Justice and Corrections): My name is Rebecca Bromwich. I am appearing on behalf of the CCJC, the Church Council on Justice and Corrections. My colleague Melanie Younger is here with me.

I'd like to thank the honourable members of this committee for providing us the opportunity to appear this afternoon.

We have provided a written submission, which I will touch on in overview form, but I will not get to all aspects of it. Primarily, we are here to strongly support the changes to sexual assault law proposed by Bill C-51.

We are an organization founded in 1972 by 11 Christian denominations, and we operate independently from any one of our bodies. We welcome multi-faith and secular-minded participation, and we are an ecumenical organization. It is our mandate to shine a light on restorative justice. It is our understanding that the job of justice is a community responsibility, and members of the community, including complainants, are important to be considered in the context of any criminal proceeding.

It is in this thematic trend that we strongly support changes that are put forth in Bill C-51 to amend the Criminal Code to clarify and codify what was rendered in the J.A. decision of the Supreme Court in 2011, that an unconscious person is incapable of consenting to sexual relations, and to clarify that the defence of mistaken belief in consent is unavailable in instances of mistake of law, and again, this properly codifies aspects of the Supreme Court's decision in Ewanchuk, decided in 1999. The expansion of rape shield provisions is something we also support. We also support the expanded rights to legal representation for the complainant in sexual assault proceedings.

Again, we feel it is of crucial importance that compassion for all members of Canadian society and community, including complainants, whether they be children, men, or women, is of value, and their interests and views need to be brought to the attention of the court. We contend or submit that this legislative proposal strikes the appropriate balance with the rights protection for accused persons who continue to have the presumption of innocence and the right to full answer in defence. We would submit that this is minimal impairment upon those rights that is very much justified in a free and democratic society under section 1 of the charter in the interests of fairness and compassion to complainants.

On the other provisions put forth in Bill C-51, we also support and are in agreement with the justice minister that the articulated provisions are redundant or obsolete, including specifically—as I've heard mention in an earlier panel this afternoon—section 296, with respect to publishing blasphemous libel. We certainly support the removal of that provision.

In addition, and this is a position we take to some degree in dissent from some faith-based commentators who have spoken as witnesses this afternoon, we are in support of the removal of section 176 from the Criminal Code for essentially three reasons. Section 176 provides relief that is otherwise covered in the Criminal Code by section 175, which prohibits public mischief; sections 265 through 268, which are the assault provisions; and sections 318 and 319, which deal with hate speech.

It is a concern that, second, section 176 potentially criminalizes forms of dissent that fall short of mischief. I would submit that it would have, for example, criminalized the conduct of Martin Luther when he nailed his 95 theses to the wall 500 years ago tomorrow. So it is problematic that we continue to have a criminal prohibition that would criminalize forms of dissent within a religious context. Dissent is not necessarily anathema to religious practice.

Third, section 2(a) of the charter requires that the Christian paradigm not necessarily be the template for our protection of freedom of religion. For example, my colleague Melanie and I were discussing it in the context of other forms of faith-based practice, for example, indigenous celebrations or Wiccan celebrations or other forms of celebrations. Even among Quakers, for example, there isn't necessarily an officially designated officiant who has that ongoing job or role, so the protection in subsection 176(2) of an officiant is not necessarily applicable across the board.

● (1810)

Rather than amend a seriously flawed provision, we would submit that it is appropriate to protect religious communities and their services. An entirely new provision or, as has been submitted by Mr. Matas on behalf of B'nai Brith, provisions with respect to sentencing would be appropriate in this context. However, we do not believe that a provision so seriously flawed should be retained, and we agree with the justice minister that it is appropriate for that provision to be removed.

Finally, we applaud the provision in C-51 that would amend the Department of Justice Act to require the justice minister to table a charter statement. We would like to go beyond that. We would like the scrutiny that has been undertaken with respect to the Criminal Code in this bill to be formalized and regular rather than ad hoc. We submit that it would be appropriate to reinstitute a law reform commission in some form so that this process will continue.

I will have to amend my textbook when the provisions with respect to blasphemous libel and crime comics are taken out, but I'm happy to do that work. I would rather have our Criminal Code be right than to criticize it.

Thank you.

The Chair: Thank you very much.

Colleagues, I am going to hold you to six minutes because we have the vote tonight. I want to make sure we get there on time.

On the Conservative side, is it Mr. Kmiec who is asking the questions?

Mr. Tom Kmiec: Mr. Chair, I'm going to split my time with Mr. Falk, so just interrupt me once my time is done.

The Chair: Okay, go ahead.

Mr. Tom Kmiec: Tomorrow is the anniversary of Martin Luther nailing his theses to the door and kicking off the great Reformation. I don't think section 176 would apply to him anyway, because he just wrote a document and nailed it to the door. He didn't interrupt a Catholic mass. To the best of my knowledge, he didn't proceed to go inside and yell at people or stop people from entering the church.

I have a few questions for ARPA. I read your seven-page document, and I thought I understood some of the implications of getting rid of section 176, keeping it, or amending it. Those are the three options on the table. You talk on page six about borderline instances. You ask how the removal of section 176 would impact borderline instances. Can you explain what you mean by borderline instances?

Mr. André Schutten: We're referring to the ones that are not clearly outside of section 176 and would be covered by other things. For example, we wanted to know how this would apply if a religious official was assaulted with a weapon and a higher more serious assault provision kicked in, or if there was something under section 175 such as a disturbance down the street in a park. We want to know how to deal with, say, a disgruntled individual yelling as a religious service starts, or painted signs outside a mosque.

What we're getting at is that you have to consider context, what's happening, the intentions of the person disturbing religious worship. Is it motivated by hate? In that case, hate speech laws might kick in, but that's a different section altogether. We've had religious officials contact our office in the last couple of years with concerns about political demonstrations. A pastor I know presented to a municipal council meeting where they were discussing some amendments to bylaws. It was a particularly contentious meeting, and he was concerned that there might be political demonstrations at his church on Sunday—not motivated by hate but by politics. I think those kinds of borderline instances are where section 176 applies.

● (1815)

Ms. Tabitha Ewert (Articling Fellow): To add to that, the term "disturbance" is defined in the case law as a factual, specific analysis. Every time a judge considers whether something makes a disturbance, in section 175 or 176, they're going to take into account everything that goes on. With respect to the borderline instances, pointing to the fact that religious services are different is instructive in the court process, at the police level and the judicial level as well.

Mr. Tom Kmiec: Mr. Matas, you referred to the refutation of the nine reasons the Minister of Justice gave for dropping section 176. You went into some detail.

I want to ask you an interpretation question. Section 176(2) says, "Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose...".

In your opinion, what can be counted into that? What is counted as a "moral, social or benevolent purpose"? There were some witnesses who spoke before about this. I have a B.C. Humanist Association blog here, and I used it in some of my arguments during the debate in the House I had with Mr. Mendicino on this bill. They said it could potentially protect humanist associations and their benevolent meetings. The Kiwanis Club came to me and asked if this would protect them as well.

The Chair: I'm sorry, but I have to interrupt you. You have had four minutes and you want Mr. Falk to get a question in.

Mr. Matas.

Mr. David Matas: Briefly, this is kind of older language, but it would be a charitable purpose, anything encompassed within that. It's definitely secular, because it's opposed to religious....

The Chair: Mr. Falk.

Mr. Ted Falk: Thank you, Mr. Chairman.

I'll start with Ms. Bromwich.

Would you support an expanded version of section 176?

Dr. Rebecca Bromwich: Yes, I would. We would support an expanded version provided the expansion was significant and not just a cosmetic change to language, but rather a change to protect sacred ceremony using language that is not exclusionary and does not make exception or give priority to any particular dominant religion.

Mr. Ted Falk: I agree with my colleague Mr. Kmiec that your analogy of what Martin Luther did is not compatible at all to what section 176 of the Criminal Code is talking about. There was no assault. There was no disturbance other than the posting of his 95-page thesis on the chapel door that he chose.

Dr. Rebecca Bromwich: If I may respond to that, Martin Luther, of course, did that one thing on that one day on October 31. However, there was a period of several years during which he was engaged in lively debate within the context of sacred spaces. I would argue that there were certainly times during his life when he was in hiding when he was very much disruptive. It may be that—

Mr. Ted Falk: Not of an actual service. Regardless, I would like to move on.

This is an issue that my constituents have spoken really clearly to me about. It comes broadly from across my constituency. I've received a lot of correspondence from outside of my constituency as well on this issue. Folks are just not happy with repealing this particular section of the Criminal Code. They believe it's the one explicit protection that all faiths have under our Criminal Code, that all clergyman or ministers of a faith have.

I would just like to ask Mr. Schutten something briefly.

I know you support section 176. You would like to see it excluded from Bill C-51 moving forward. Are there any amendments you would suggest?

● (1820)

Mr. André Schutten: Yes. We recommend a number of amendments in a line-by-line red line in the document that we provided to the committee.

I think we can drop language like “clergyman” and “minister“ and replace that with “religious official”. I think that subsections (2) and (3) cover some of the concerns about faiths like the Wiccan faith that does not have a religious official. They are covered under subsection (2) and subsection (3). I think it's still inclusive of those faiths as well.

Again, subsection (1), I think, can also be amended to make it gender neutral. Instead of “his”, “his” and “him”, we could put in “their”, “their” and “them”, and so on.

I think we can take out subparagraph (b)(ii), “arrests him on the civil process, or under the pretense of executing a civil process”. I think that can be removed as well.

I would disagree ever so slightly with B'nai Brith about broadening it for moral, social, and benevolent purposes. I'd entertain removing that section and making it more focused on religious service. Again, as I said in my comments, it's the religious service that is different in kind from, for example, a cookie fundraiser to raise money for the local whatever, food bank. It's different in kind than an actual religious service. I would tighten it up that way.

The Chair: Thank you very much.

Mr. Boissonnault.

Mr. Randy Boissonnault: Thanks very much, Mr. Chair.

Mr. Matas, you mentioned in your remarks a reference to chapter and verse. I want to make sure that we don't risk fire and brimstone if we don't get this right.

Mr. David Matas: Oh, okay.

Mr. Randy Boissonnault: Having heard from the Church Council on Justice and Corrections on all the other sections in the Criminal Code that provide protection, and given the fact that section 2(a) of the charter protects religious freedom, what specifically would put Jewish religious leaders or Jewish communities at risk if section 176, as it is now, were repealed as is proposed in Bill C-51?

Mr. David Matas: Of course, that depends on the assumption that it's redundant. We've heard from my colleagues beside me that it's not redundant because it penalizes some forms of protest.

Let's assume it is redundant, that you can get anything in the Criminal Code in some other way. I think there is a value in specifics, saying a general statement means specifically this. It's a warning. It's information. It's advice. It's guides behaviour.

As we heard before, religious services have used it as specific warning. You can't do this. There's always room for debate with generalities by repealing the provision. What you do is, you give an argument to the defence that the law has changed, which may be defeated in the end, but why give them the argument in the first place?

I would say that would be lost.

Mr. Randy Boissonnault: Thank you.

Dr. Bromwich, I have two questions. The first is away from section 176, and then I'll come back.

Why particularly is your organization so strongly supportive of codifying “unconscious”? Is it a response to R. v. J.A. or are there other reasons for that convocation that you strongly support?

Dr. Rebecca Bromwich: Certainly our focus on compassion for every person as a human being as a member of the community leads us to a particular focus on the fact that a person must freely and fully give consent, and the notion of autonomy being codified and a positive obligation to seek consent are things that we'd strongly support in light of that foundational principle.

Mr. Randy Boissonnault: Thank you.

You had a very clear briefing note, and you indicated in your testimony all the sections that your organization believes covers off section 176, should it be repealed. I'm interested in how your organization came to the conclusion that, with all the other provisions you mentioned, it's okay for Bill C-51 to take section 176 out of the Criminal Code.

Dr. Rebecca Bromwich: In our submission it's in a list of provisions. It's not alone. It's been the focus of a lot more discussion than some of these other provisions. But in all the provisions in which section 176 is included, there's an effort being made in this bill to rationalize the Criminal Code and to remove repetitive provisions. Section 176 has been drawn out in discussion, but it's largely consistent with the other efforts being made here to remove things like blasphemous libel under section 296, like challenging someone to a duel under section 71, like advertising a reward for the return of stolen property under section 143.

It is not our position or we don't agree that the removal of section 176 puts anybody under a significant threat, because section 175 and the other provisions I mentioned cover the ground. It is in the interests of Canada to have a succinct and rational Criminal Code.

● (1825)

Mr. Randy Boissonnault: How did you conduct this analysis? Did you reach out to your member organizations? How did you come to this list and this determination on section 176?

Dr. Rebecca Bromwich: We consulted with our board, and we asked for input in advance of this presentation. We received no objection to the suggestion, which, yes, I did make, that section 176 should be included in this list.

Mr. Randy Boissonnault: Okay, thank you very much.

I have a question for ARPA.

What specifically are you hoping to hold onto in section 176 that either protects or enhances faith-based communities or religious officiants that, with clear testimony from other intervenors today, indicate is covered by the Criminal Code? How is it that your organization see this differently?

Mr. André Schutten: I think a good comparison would be where we see the removal of section 176 would equate religious services to be no different from a university lecture. I think it's common knowledge that in universities across the country today, there have been many examples of lectures or public demonstrations or big public speeches where people are shouted down because they disagree with the opinions being expressed. If we remove section 176, I submit that religious services will be treated the same way, where people who disagree with what's happening in that religious service are allowed to shout down what's happening there. We've seen that happen multiple times, particularly in the Roman Catholic faith, which I'm not a member of, but I've seen that happen in many cathedrals, where people disagree with the position of the church on political or equality grounds perhaps, or whatever, and so they feel they're entitled to disturb that religious worship. Without section 176 that would increase; it wouldn't decrease.

Mr. Randy Boissonnault: Thank you very much.

Thank you, Mr. Chair.

The Chair: Thank you very much, Mr. Boissonnault.

Mr. MacGregor.

Mr. Alistair MacGregor: Thank you, Chair.

Mr. Schutten, you made a comment that you wanted to tighten up section 176 by removing subsection (2). Did I hear you correctly on that?

Mr. André Schutten: No, just one phrase from subsection 176(2).

Mr. Alistair MacGregor: Which phrase was that?

Mr. André Schutten: That's the phrase “or for moral, social or benevolent purpose”.

Mr. Alistair MacGregor: In my previous line of questioning with previous witnesses, the answer was given that people who are not religious but may belong to certain identifiable groups, if the person who's organizing them is prevented from officiating the meeting, that's their safe place and it may hold as much personal value to them as religion does to a religious person. Some witnesses made the arguments that the equality clause under section 15 of the charter is encompassed in subsection (2), so if we are removing the language “moral, social or benevolent purpose”, does that not make the argument for keeping section 176 a bit weaker? Is it not better to keep that language as is?

Mr. André Schutten: If it would make you keep section 176 and vote in that direction, I'm happy for you to keep it in. It's a suggestion, because I do think that subsection 176(1) is about religious officials and subsections 176(2) and 176(3) are about religious worship. I think that where we add that extra phrase about “moral, social or benevolent purpose”, it makes it so broad as to no longer be that special protection for religious worship.

I'm not tied to that at all. If this committee deems that they want to keep that in there, by all means, and I certainly don't think it changes the thrust of this section enough for me to strenuously object, that's for sure.

Mr. Alistair MacGregor: With respect, I do want to challenge you on your assertion that if we were to remove this it would bring a religious service down to the level of “a university lecture”. Do you honestly think that if we were to remove section 176 and an offence was committed in a place of worship, a judge presiding over that case would view that on the same level as a disturbance at a university lecture?

We have to look not just at the way the law is written but at how it's interpreted, and I think any judge in his or her right mind would place the two occurrences on vastly different planes as to what the outcome was and what the offence was for the people who were involved.

● (1830)

Mr. André Schutten: You're at the tail end of the criminal justice system, right? Criminal justice starts where the disturbance happens and we engage the police. The police are of course concerned about things like freedom of expression. They don't want to infringe on people's ability to object, to dissent, and to share opinions that are different from those of other people.

If the House of Commons sends a signal by saying, look, we're going to remove section 176 because religious worship doesn't deserve this special protection, then I submit that it certainly signals to police and so on that they're going to have to tolerate dissent within religious services, whether that's loud and boisterous shouting and chanting or a silent protest in the middle of a worship service with posters or flags or what have you. They're going to have to sit by and allow some time to lapse, like they do with the university lectures. It's not that long ago that I was in university myself, where I've seen that kind of thing happen.

Mr. Alistair MacGregor: While section 176 may not be used that frequently in our criminal justice system, I got the sense from witnesses before now and currently that it's the symbol of removing it and the message that it sends, more than actually keeping it in the Criminal Code, because I think that before this bill came about, not many people were aware of it. If Parliament were to remove it, would you agree that it's the signal it sends that is more problematic?

Mr. André Schutten: I'd say it's both/and. I would submit that most Canadians don't know what's in most of the Criminal Code. We're not going to toss out most of the Criminal Code just because people don't know about it.

I have been advising pastors who have called me about this. It doesn't happen often, but just in the last year I've had probably two or three call with concerns about people protesting their worship service, and I've pointed them to section 176. Even though they don't know the Criminal Code, there are lawyers who do, and they can assist in that way.

Certainly, I think this hearing on Bill C-51 has raised awareness about the reality of section 176, so now the question is, because so many people and so many religious leaders do know about it, what is the signal going to be if this committee deems not to amend section 176?

Mr. Alistair MacGregor: Thank you, Chair.

The Chair: Thank you very much.

Mr. Fraser.

Mr. Colin Fraser: Thank you, Mr. Chair. I'll be sharing my time with Mr. McKinnon.

I have one quick question for the Canadian Civil Liberties Association. Most of the discussion today is about section 176 of the Criminal Code, but of course I'd appreciate your comments with regard to other provisions in Bill C-51, including the sexual assault provisions and changing the process for a records hearing.

I want to challenge you on something, though. You said that the obligation on the accused would now require disclosure made in advance of actually hearing the crown's case. I don't know where you get that from. I've heard similar arguments from other witnesses who were before this committee.

As far as I can tell, proposed subsection 278.93(4), where it deals with that section, indicates that there would need to be seven days advance notice or a “shorter interval” if the judge deems it necessary, but in no way would that cause the accused to not be able to hear the crown's case before being able to decide to make such an application.

Maybe you can help me understand why you have indicated that.

Ms. Cara Zwibel: I'm just looking at my version of the bill to see if I can pinpoint that.

Can you repeat the subsection that you referred to?

Mr. Colin Fraser: Yes. It's subsection 278.93(4).

Ms. Cara Zwibel: I believe that subsection is talking about the holding of the hearing, not when the application has to be made. I'm not sure if it's just in relation to section 276. There was one provision that expanded the period of time before which...and that might be section 276.

Mr. Colin Fraser: Right.

I had challenged other witnesses on this, so perhaps you can think about it and in the interests of time, submit an answer following this that we can consider. Subsection 278.3(5) talks about a 60-day notice period, but that has to do with an application for production of records. Those are records that are not in the possession of the accused. That's completely different from subsection 278.93(4), which deals with the specific hearing, where if the accused has documents in his possession, that he would have to make an application. It doesn't prevent him from waiting until after the crown's case.

Anyway, I just throw that out there because I'd heard that misstated by other witnesses that we'd had before our committee and I think it's an important point.

● (1835)

Ms. Cara Zwibel: I will take you up on the opportunity to take a look and clarify that after.

I will say that, even if that 60-day requirement is not what we're talking about here, with the records in the accused's own possession, in the ebb and flow of a criminal trial, there may actually be, even with this shorter period, a requirement that the seven days may have to occur before the crown has completed its case.

Mr. Colin Fraser: It doesn't say that anywhere. I guess that's the point. I'd like to hear your thoughts on that if you can take a closer look.

Ms. Cara Zwibel: If the goal is to ensure that an accused does not have to engage in this process until the crown has completed its case, I certainly think that a clarifying amendment could and should be made.

Mr. Colin Fraser: Thanks.

I'll turn it over to Mr. McKinnon.

The Chair: Mr. McKinnon, you have two and a half minutes.

Mr. Ron McKinnon: Thank you, Chair.

I'll start with Ms. Bromwich. One of the things that's provided by subsection 176(1) is the protection of religious leaders on their way to or in performing various functions related to their role. It's not just about meetings. Subsections 176(2) and 176(3) are more about assemblies and meetings. For example, consider a priest on his way to perform last rites in a hospital. If you were to prevent him from doing that, it would be a violation of this. Would you see that as protected elsewhere in the Criminal Code?

Dr. Rebecca Bromwich: Yes, I would see that as protected elsewhere, as for example, in the provisions between 265 and 268, which deal with assault. It would depend on the manner in which an individual is seeking to prevent the priest from administering those rights. If it's a physical blocking of the path or if there is any unwanted touching, that would be an assault. If there is a disruptive event that happens in a hospital hallway, that would be dealt with under section 175 of the Criminal Code. There are numerous provisions in the Criminal Code that would afford and offer that protection to an individual seeking to provide last rites.

If an individual was seeking to engage in some sort of sacred ceremony and they're not determined to be somebody who's an officiant under this provision, then they are not protected. One of the concerns is that the provision is simply under-inclusive. As was suggested, we would not be opposed to a provision that protects people engaged in religious acts and religious practices, but to protect specific individuals forces the court into a fact-finding expedition that requires minority religious practices to endlessly engage in an exercise of determining whether or not they count. What I would suggest that would be appropriate is a provision that allows for the fact that they already count.

Mr. Ron McKinnon: There's also subparagraph 176(1)(b)(ii), that protects a clergyperson from arrest on a civil process when that person is on his or her way to perform a religious function. Do you think that is an appropriate thing to retain or can we get rid of that?

Dr. Rebecca Bromwich: Again, that is a provision that we have suggested is no longer required under the Criminal Code. It's partly with respect to the history of our country that we have to acknowledge, in terms of the unfortunate complicity and participation of people who were engaged—and had authority in some sort of religious capacity—with very real criminal acts. That's certainly something we've seen with respect to the Truth and Reconciliation Commission. But with respect, there is no particular reason that people who have some sort of authority conferred on them by a religious or secular body should have impunity with respect to genuine reasons for arrest.

● (1840)

The Chair: Thank you very much.

Unfortunately, we've reached the time when we have to leave for votes.

I want to thank all of the witnesses who testified today. Your testimony was very helpful.

Ms. Zwibel, we'll wait to hear back from you. If you could email us your response to Mr. Fraser's question, that would be very helpful.

Ms. Cara Zwibel: Would you like that through the clerk?

The Chair: You can send it through the clerk, and feel free to copy me and Mr. Fraser and everybody else—whatever you'd like.

Ms. Cara Zwibel: Thank you.

The Chair: Thank you so much.

Thank you again to all the witnesses. Have a wonderful rest of the day.

The meeting is adjourned.