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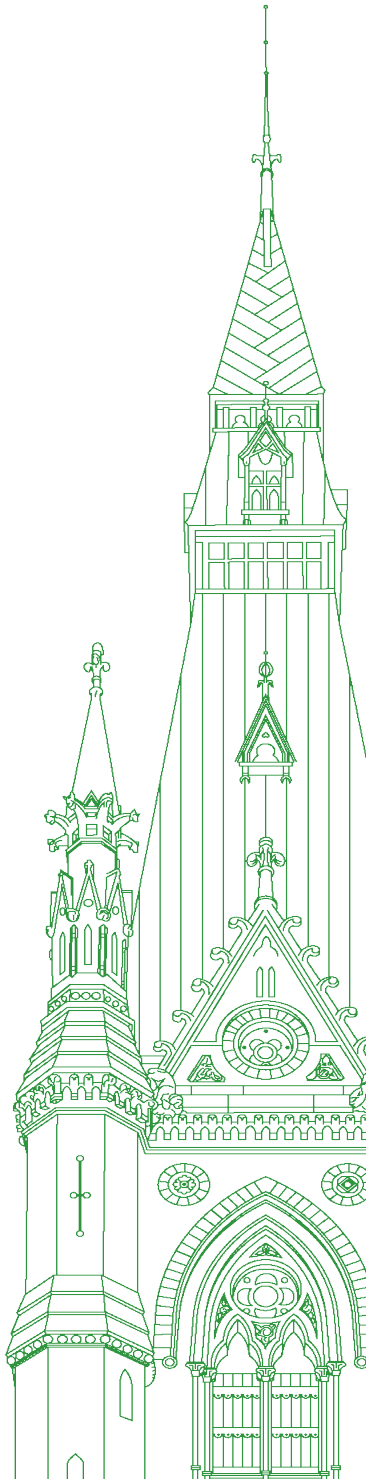

Chair: Ms. Iqra Khalid

# Standing Committee on Justice and Human Rights

**Thursday, April 29, 2021**

● (1100)

[*English*]

**The Chair (Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.)):** I call this meeting to order. Welcome to meeting number 31 of the House of Commons Standing Committee on Justice and Human Rights.

Today, we have MP Pam Damoff replacing Mike Kelloway.

Welcome back, Pam. It's so great to have you back.

To ensure an orderly meeting, I'd like to outline a few rules to follow.

As our witnesses know, there are interpretation services available. You have a choice at the bottom of your Zoom screen. Select the language that you would like to listen to. You can speak in any language you like. When you are not speaking, you should be on mute.

Please do wait for me to recognize you by name before you start speaking. I will remind everyone that all comments by witnesses and members should be addressed through the chair. With respect to a speaking list, the clerk and I will do our best to maintain one and make sure that everybody is accommodated.

Now, before we get to our witnesses today and start the hearing, I'd like to get the committee's approval for the operational budget that was distributed to members yesterday. The budget is in the amount of $1,775. It will serve to pay our expenses for the current study. Do I have the members' approval with a thumbs-up?

Okay. That's carried. Thank you very much.

Now I would like to welcome our witnesses. We have, appearing as an individual, Mr. Todd McCarthy, who is a barrister and solicitor. We also have with us the Professional Transcriptionists and Court Reporters Association of Ontario, represented by Joanne Hardie, who is the president.

To the witnesses—and for members—you will have five minutes to make your opening remarks. I have a one-minute time card and a 30-second time card to help you keep track so that we can keep our meeting on track.

With that, we'll start our panel with Mr. Todd McCarthy for five minutes.

**Mr. Todd McCarthy (Barrister and Solicitor, As an Individual):** Thank you very much, Madam Chair. Good morning to you and members of the committee.

It's an honour and privilege to be asked to appear before you today to address the committee on the specific issue of the impact of the COVID-19 pandemic on the judicial system in Canada, especially on any delays or impacts on trials in the criminal justice system.

Let me first address the challenge. A year ago the courts across the country were virtually shut down because they were not set up for remote practices to any great extent. For almost three months, from mid-March into late June or early July, criminal, family, civil and child protection cases could not be adjudicated or dealt with. That led to the creation of a large backlog. It also had the effect of often shutting down negotiations with respect to those cases. Without the access to adjudication or the threat of adjudication, parties often aren't motivated to resolve their matters.

Now we are in a similar position. We've adopted remote practices in our trial courts in Ontario, that being the Ontario Superior Court of Justice in this province. Across the country it's called the Court of Queen's Bench in many provinces, and the Superior Court of Quebec in that province. All of those are trial courts; they're section 96 courts. The judges of those courts, while subject to the administration of justice jurisdiction of the provincial governments, where they sit under section 92 of the Constitution Act, are section 96 appointees by the federal cabinet on the advice of the federal Minister of Justice. They are judges of general jurisdiction, dedicated, hard-working judges working with counsel and pivoting to remote practices in this pandemic—very successfully, I might add.

More recently, because of the stay-at-home orders in Ontario, among other provinces, court staff can't get into the courthouses. Therefore, the Zoom technology can't be dealt with at home by those dedicated court staff. Consequently, the judges are adjourning or cancelling many hearings in all of these areas of the law.

What's the impact of that? Of course, as a general jurisdiction, the section 96 courts across the country and the judges of those courts decide cases in the matters of criminal law, family law, child protection and civil justice. They could be hearing a civil pretrial in the morning, dealing with a child protection midday and an urgent bail hearing in a criminal matter at the end of the day. They are very hard-working, and very diverse aspects of the law come before those judges.

What happens when you have this kind of challenge? You have a growing backlog, and it's very difficult to deal with that presently, and it's only going to worse. That is the problem.

The problem is compounded by a policy choice made by our Supreme Court of Canada in the case of Jordan and Her Majesty the Queen in 2016. The Supreme Court of Canada decided that the right to trial within a reasonable time, the section 11(b) charter right under our supreme law of the land, was such that it would be specifically time limited with a ceiling of 30 months for a trial in the superior courts of the country after a preliminary inquiry. That's 30 months. In the case of Jordan, the latter was was charged with multiple narcotics and trafficking offences, and after the 44 months it took to try him in a superior court, his charge was stayed by the Supreme Court of Canada. He was allowed to walk free. The prosecution of that case was not successful just because of the delay due to that charter breach.

I am proposing that the committee seriously study a solution, however temporary it might be. It's called the notwithstanding clause. It's also part of our supreme law of the land and part of what policy choices are possible. It preserves parliamentary supremacy. I can answer more questions about it.

The courts are not always right. To quote the late Professor Hogg, “it is wrong to assume that a judicial decision on a rights issue closes the debate on that issue. On the contrary, citizens and their elected representatives Parliament will inevitably want to continue the debate, and in some cases there will be a strong sentiment in favour of reversing the decision of the Court.”

That is what the notwithstanding or override clause does. It is a legitimate constitutional instrument, uniquely Canadian, and endorsed by the late Professor Hogg as a useful instrument.

● (1105)

I ask this committee, subject to questions you may have, to consider how this can be thoughtfully invoked for five years—because it does expire after five years if not renewed—to deal with this crisis in our trial courts. It affects criminal, civil, family and child protection cases.

Thank you.

**The Chair:** Thank you very much, Mr. McCarthy. You are right on time. I really appreciate that.

We'll now go to Ms. Hardie. You will have five minutes. Take your time, speak slowly and clearly, and we'll get through this.

Thank you. Please go ahead.

● (1110)

**Ms. Joanne Hardie (President, Professional Transcriptionists and Court Reporters Association of Ontario):** Good morning.

I hope everyone can hear me properly because I don't have the proper headset.

Thank you, members of the committee for inviting me here today to represent the Professional Transcriptionists and Court Reporters Association of Ontario for a discussion of the impact of COVID-19 on the judicial system.

I'll read my statement in order to stay within the five-minute time allotment. It's just a very brief intro.

PTCRAO is a not-for-profit business association with membership spanning across the province of Ontario. Through 55 years of operation, we have adapted and evolved to meet many challenges. Our mandate has never changed. We are committed to ensuring that the profession of court reporting and transcription services are provided to the highest professional standard. Now we face our biggest challenge.

In Ontario, from the onset of the pandemic, the justice system went into immediate action. Lockdowns and restrictions because of COVID accelerated the rapid modernization of the courts and gained immediate and positive response. The path to modernization went straight to Zoom and teleconference calls as a way to exist in a virtual world that COVID created.

I'll just make reference to Zoom because it's more efficient, but all these comments apply to teleconference as well. To zoom directly to the point, as a reaction to COVID, in the understandable rush to ensure the courts remained functional, stakeholders and decision makers overlooked the most important foundation of the justice system, which is the official court recording. They replaced it with a one-channel Zoom solution. Without a stable, eight-channel audio recording that is properly preserved and securely stored, a verbatim-certified transcript is almost impossible to produce. The voice of a victim or a witness to a crime can no longer be heard if words are lost on a one-channel recording. This is our main concern and focus, and the reason we appear before you today.

By regulation in Ontario, a transcriptionist must be authorized by the Ministry of the Attorney General to certify court transcripts, herein referred to as ACTs.

Here are some examples of the problems with Zoom. On one channel, you cannot separate speakers if they talk over one another. On one channel, if there is nothing to identify same-gender speakers, they are simply noted as “unidentified”. On one channel, dogs barking, babies crying, doors slamming and dishes being washed in the background are just a few examples of interference. At times, Wi-Fi connections fail, audio becomes unstable, sound becomes distorted and words are lost or become garbled and warbled. The audio cuts in and out. There have been bail hearings where lawyers are sitting in their cars on cell phones. Sometimes participants phone in, often from custodial institutions. Sometimes they appear via Zoom, but the most a transcript can reflect is that they are all participating from multiple unknown locations.

Ultimately, transcripts must reflect the truth and deficiencies created by lost audio must be noted. Justice is not served if a transcript cannot be certified to verbatim accuracy. We support whatever makes courts run smoother and quicker, but by doing so and by making those things priorities, we have sacrificed the most important element that keeps the justice system safe.

The Liberty digital software system, which was implemented across Ontario in 2010 by the original MAG and court reporting services team, was almost flawless. We had moved from four channel analog tapes to state-of-the-art digital recording and transcribing equipment across eight channels. Speakers could be identified, voices separated and volumes controlled. This push to modernize the courts during COVID has stripped away any progress, effort and time that went into developing this state-of-the-art digital recording technology. It has pushed the fundamental importance of the checks and balances in the court system to near non-existence.

We read the article in the National Post that references comments that Supreme Court Justice Mona Lynch made before you. I quote:

> "A colleague of mine was conducting a family hearing by phone, and one of the parties said, 'Oh, just a minute,'" Lynch said. "There was silence. And then she heard: 'Can I have a medium double-double?'" She called the incident amusing and "quintessentially Canadian," but said it also reveals "the lack of respect and attention participants pay when the court proceedings are not in-person, in the courtroom with a judge."

We agree with Justice Lynch on that and we are here to answer any questions the committee has.

Thank you.

● (1115)

**The Chair:** Thank you very much for that, Ms. Hardie.

We'll now go to our first round of questions.

Ms. Findlay, please go ahead, for six minutes.

**Hon. Kerry-Lynne Findlay (South Surrey—White Rock, CPC):** Thank you very much, Madam Chair, and thank you to the witnesses for being here. We really appreciate your expertise, and perhaps the expression of some frustration.

To Todd McCarthy, I know you're an accomplished litigator, so I do thank you for sharing some of your thoughts with us here today.

At our last meeting, we heard from a witness representing the Canadian Bar Association about some of the challenges involved in virtual hearings, including a lack of formality—we're hearing that from Ms. Hardie, as well—when separated from the trappings of a courtroom. The CBA's report submitted that credibility assessments can be difficult when conducted remotely.

From your experience, could you speak about some of the difficulties Zoom hearings pose for counsel, witnesses and the courts in terms of assessment of credibility?

**Mr. Todd McCarthy:** That's an excellent question.

To Ms. Hardie's point and her reference to Justice Lynch, a lack of decorum is a serious problem, and so is the ability to assess credibility fairly, where credibility is often the essence of how any case, criminal, civil, family or child protection, is adjudicated.

The remote process, the Zoom hearing, the teleconference, has a place, and will continue to have a place. We've embraced it, and the pandemic has expedited that. However, to say that should be the default position, especially where credibility is so crucial.... We cannot dispense with in-person hearings, of course, and we need to get back to them.

On both decorum and the issue of credibility, the sense of being heard in a courtroom is all about respect for the rule of law, for the judicial decision-making process, and for having been fairly heard. All of these things affect the participants in the process, and their view of whether or not fairness and justice have occurred in a proper forum.

The reason our forebears built such grand courthouses across the country, many of which are still with us, is to salute the rule of law. We are deferring to the rule of law, and where the rule of law is applied, and that decorum is very important.

We always say about judges that they write for the loser, right? You have to explain why the loser lost, and you're writing for the public, as well. The credibility determination is always a part of those reasons.

**Hon. Kerry-Lynne Findlay:** When you're prepping witnesses, for instance, do you pay attention to things like lighting and camera angles when you're dealing with a virtual setting? Do you think these elements, that are unique to virtual hearings, could end up affecting the outcome or fairness of a trial?

**Mr. Todd McCarthy:** Absolutely. Not everybody is equipped with a grand computer room and multiple screens. Some are calling in from their phones, and that depends on the kind of phone they have. This creates an inequity.

We would never want a witness to be more likely to be believed just because they have better technology any more than we'd want them to be more believed if they are wearing fancier clothes. That should not be the measure of credibility.

**Hon. Kerry-Lynne Findlay:** One issue we're all rightly concerned about is access to justice.

Justice Canada has estimated that 50% to 80% of litigants in civil and family courts are self-represented—numbers that could continue to grow under the pandemic stress. Former Chief Justice McLachlin has called this a crisis.

Do cases involving self-represented litigants take longer, and thereby contribute to the backlog? In your opinion, what can be done to improve access to justice for these litigants?

**Mr. Todd McCarthy:** Self-represented litigants, as much as it is their right to proceed without counsel.... That raises issues of the cost of legal services, which is another matter. We can talk about a duty counsel, and so on. It is a serious problem. In fact, right now, it is leading to great backlogs, because many self-represented litigants don't have access to the technology, even if the court does.

In fairness to the judges presiding, even at a pretrial conference, where nothing is being specifically decided with a self-represented litigant, they want the proceedings to be recorded. Normally, they are done in an open court with a court reporter present. The problem is that we have judges saying, "I cannot and will not fairly hear this self-rep case in family law or any another matter, because I have to be able to have it recorded." It's part of doing the job thoroughly.

This is a serious problem. The self-represented issue requires in-person attendants to return, or it at least requires our court staff to come to court, and utilize Zoom technology properly.

● (1120)

**Hon. Kerry-Lynne Findlay:** Mr. McCarthy, we only have a short time left, so I would just like to give you the floor to talk a little bit more about what you think the federal government can do to address the backlog. You mentioned the notwithstanding clause, an interesting idea.

We have about 30 seconds left. It's not much, but can you just speak to that briefly?

**Mr. Todd McCarthy:** I'm proposing a conversation between different branches of government. The courts are not always right. The Jordan decision was well-intentioned, but it's adding huge problems because courts of general jurisdiction, or trial courts, have to then give priority to criminal cases.

Many of those are being stayed because of this time limit, and then those judges are not available for family, civil and child protection cases, which are also very important, so we need to take a pause. The Parliament of Canada has the last word on that, not the Supreme Court of Canada, at least for a five-year timeout.

It should not be the preserve of the courts to make that policy decision, and the charter says as much, but somehow the notwithstanding clause gets a bad name. It should not. It's a fair, balanced conversation between branches of government on an important constitutional issue, and it's in the Constitution. It's in the charter. It's there to be rarely used, but appropriately used in a crisis before the courts, such as this.

**Hon. Kerry-Lynne Findlay:** Thank you very much.

**The Chair:** Thanks very much, Mr. McCarthy.

We'll now go on to Mr. Maloney, for six minutes.

Go ahead, sir.

**Mr. James Maloney (Etobicoke—Lakeshore, Lib.):** Thanks, Madam Chair.

Thank you to both of our witnesses.

I don't have a lot of time, so I'm going to try to jump right in.

Mr. McCarthy, first of all, it's good to see you again. It's good that you are here. Thank you for your presentation. I'm particularly happy you're here because whenever we have discussions about court systems and issues in the courts, the default position is criminal courts. You are a civil lawyer, like I was, and we tend to be under-represented, so I'm pleased to see you here speaking on our behalf.

There is a lot of discussion about what's going on during COVID and what impacts it is having. You talked about them. as did Ms. Hardie. Hopefully this will be over and we will not be dealing with these unique situations like Tim Hortons anymore.

The bigger issue, in my mind, is what takeaways from this we're going to adopt going forward in the system, because virtual hearings are going to become part of our process going forward. I think the default position should be in-person hearings, not just for trials but for pretrials, discoveries, motions, all proceedings. You should have to present an argument as to why it should be otherwise, because, as you said, Mr. McCarthy, deadlines impose pressure, and that's at all stages.

What permanent features do you see going forward that have been adopted during COVID?

**Mr. Todd McCarthy:** Definitely the Zoom hearing for matters that are based on a paper record are ideal because you can't just make written arguments on affidavits and then have the judge pop out a decision. The exchange between bench and bar is very important, especially when there may be some impact on the development of the law, but that can be done effectively with a Zoom hearing, a motion for summary judgment, a pretrial where everyone is represented.

We all have these Canadian winters that have often delayed cases that had to occur in person, and the Zoom technology, next February and in February 2023, will be very welcome when, for example, we're not flying from Toronto to Pembroke in the province of Ontario just to do a summary judgment hearing that could be done by Zoom. Most certainly, the beauty of that is that court resources can be better used by the combination of embracing Zoom where appropriate and continuing with it, while also having the default of in-person hearings.

The rules committees provincially are grappling with how to deal with this. As you put it, should the default be in-person, or should the default be Zoom? I agree with you, Mr. Maloney, but I think that for some types of processes, Zoom should be the default position.

**Mr. James Maloney:** We agree on that. I think back to my trips to Haileybury for a one-hour pretrial. It would be a 13-hour day. My clients didn't like it, but there is some importance to being there in person.

You talked about deadlines at trials. There is some threat when somebody has to incur those costs to go to do that. It creates pressure that gets cases resolved, and that shouldn't be lost, but I'm glad to hear that the rules committee is dealing with that.

There's another thing, and I just want your thoughts on this. If you're having a Zoom trial or a Zoom process and it's appealed, right now judges go out of their way to make findings based on credibility, to make the decisions unappealable or hard to appeal, but in a world now where things are virtual, do you see lawyers asking that things be recorded virtually, which would then allow appellant courts to be asked to consider reviewing findings of credibility because they have the opportunity to look at witnesses?

● (1125)

**Mr. Todd McCarthy:** Well, to your point, Mr. Maloney, the situation is exemplified by a recent trial that was done by Zoom, a public trial in the civil justice system, Fabrizi v. Chu, and there was a huge issue of credibility. Who saw what? Who recalled better? The case was 12 years old when it was heard.

Whether or not there's an appeal on that, as in any case involving credibility, the issues of credibility really are for the trier of fact who saw and heard the witness. The appeal court, as you know, is only going to review a transcript. There's not going to be a change in the practice that somehow they get to see a recording of the original witnesses, because the trial judge is always in a better position to deal with that issue, but appeals will continue—

**Mr. James Maloney:** I agree with you but I could see lawyers asking for the Zoom proceeding to be recorded so that that process could be addressed. I do agree with you, and I'm sorry to interrupt, but I have only a few minutes and I do want to move over to Ms. Hardie if I can.

**Mr. Todd McCarthy:** Yes, sure.

**Mr. James Maloney:** Ms. Hardie, I know you represent transcriptionists and court reporters. I'm not sure how many of the court reporters in courthouses you represent. I'm not sure if they're represented by a different group or not but I have a question for you. One of the things we've heard about during this pandemic is the issue of safety.

Everybody had to go home and work from home, so what's happened, in Toronto at least—and Mr. McCarthy will agree with this, I think—is that a lot of the judges are working from home and working remotely on Zoom, but the court reporters, for example, have been forced to go into the courthouses because they don't have the technology at their disposal, which puts them on public transit and back in the courthouses, so right now, during this third wave of lockdown in Toronto, for example, the court reporters are going downtown to the courthouse.

What measures can be taken to address that?

**Ms. Joanne Hardie:** We have had some indication that reporters are working from home, and the DRD, which records the proceedings is then the virtual courtroom and it's turned on wherever the reporter is.

**Mr. James Maloney:** Yes, okay. How many court reporters do you represent?

**Ms. Joanne Hardie:** None.

**Mr. James Maloney:** All right. Thank you. I think I'm out of time.

**Ms. Joanne Hardie:** The ministry, I guess, is responsible for that.

**Mr. James Maloney:** Right. Thank you both. Sorry for having to rush through it, but time is limited.

**The Chair:** Thank you very much, Mr. Maloney.

Thank you, Ms. Hardie.

I will now go to Monsieur Fortin for six minutes.

Go ahead, sir.

[*Translation*]

**Mr. Rhéal Fortin (Rivière-du-Nord, BQ):** Thank you, Madam Chair.

I thank the witnesses for joining us today.

I have a few questions for you, Mr. McCarthy. I would like you to tell me more about the conversation you would like to see take place among the various levels of government. How much do you think this conversation could help advance the administration of justice with regard to trials that are partially virtual and partially in person?

[*English*]

**Mr. Todd McCarthy:** Through you, Madam Chair, *merci*, Monsieur Fortin.

The issue of whether the trial is remote or in person is equally affected by the fact that judges who have general jurisdiction have to be deployed for criminal cases first. Otherwise cases get stayed if they've taken too long to get to trial. That's what Jordan does. That then has the ripple effects across the system, because a lot of times they can't get to them in time and then they're stayed anyway. Legitimate prosecutions are stayed, and then those judges have been deployed and others have been kept waiting in all the other areas of law within the jurisdiction of those courts—family, civil and child protection.

There's no right to a trial within a reasonable time in those other areas of the law, so the conversation between the branches of government that I propose is thank you for your [*Technical difficulty—Editor*] court from five years ago but you didn't see this pandemic and the delays associated with it coming. We, the elected Parliament, are saying it's time for a pause, a timeout. We're going to suspend the effect of that decision, and let's work toward new solutions. Allow the judges to do their job with counsels. We have dedicated, hard-working judges who are doing the best they can, but the system is falling apart, and we need to be able to take a pause so that criminal cases are not put in peril by this court-imposed time limit.

I have to say, Monsieur Fortin, the courts are not always right. Our Supreme Court of Canada in 1929 famously said women are not persons for purposes of Senate appointments. The courts are dreadfully wrong sometimes on matters of public policy. They're not coming from Mount Olympus with great wisdom. As Professor Hogg pointed out, they have their own failings. They're not perfect. They don't pretend to be perfect. Many of them don't want awesome powers. The charter provision for the over-ride is there for this conversation that has to happen in times of crisis. It's not the War Measures Act. It's a balanced conversation about how to carefully use scarce judicial resources in our trial courts so that all of our citizens have access to justice.

● (1130)

[*Translation*]

**Mr. Rhéal Fortin:** I understand.

Only the king can do no wrong, not the judge.

We agree in saying that holding trials only virtually does not seem to be a solution. There are various problems, including those related to assessing the credibility of witnesses. Law is still a human science, and I think in-person attendance is essential in most cases.

Nevertheless, we are going through a situation that is making us question the usual parameters of the practice of law. There will always be in-person hearings, but chances are, there will still be virtual hearings over the coming years, probably even increasingly so.

The current crisis is temporary. In one year, we have completely changed our habits. However, this way of administering justice may remain for a long time, at least in part.

You are telling us about a conversation to put aside the time frames imposed by the Jordan decision. That may work over a short period of time. However, over the long term, I assume that you agree we cannot go back to time frames of seven to 10 years for a decision to be handed down in a trial. That must be done within reasonable time frames.

In that sense, the Jordan decision seems well founded to me.

Over the long term, would this kind of a conversation to set aside the Jordan decision be useful?

Shouldn't we instead find ways to be more effective by working virtually and in person?

[*English*]

**Mr. Todd McCarthy:** Thank you. It's a great question, Mr. Fortin.

Remember this is temporary. The charter provision for the override is five years maximum. It will expire if a future Parliament doesn't re-enact it, and Jordan would be the law again. It has its limitations.

I'm talking about a timeout in this conversation. This 30-month ceiling, which is leading to the monopoly of criminal cases by judges of general jurisdiction, the ignoring of many other cases, and the loss of legitimate prosecutions just because they fall outside this timeline, is not tolerable in the crisis of COVID-19 delays to the justice system.

The people of this country, through their elected representatives, I submit, ought to be able, through the charter, to be part of the conversation and say they're not going to have any time limit right now.

You're right, in the long run there should be time limits. In a perfect world there should be. Their right is not there to be ignored; it's just to be paused until we get through this terrible crisis in the courts.

[*Translation*]

**Mr. Rhéal Fortin:** What do you think the time frames should be?

[*English*]

**The Chair:** You're out of time.

[*Translation*]

**Mr. Rhéal Fortin:** Thank you, Madam Chair.

**The Chair:** Thank you for your patience, Mr. Fortin.

[*English*]

I appreciate it.

We'll now go to Mr. Garrison for six minutes.

**Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP):** Thank you very much, Madam Chair.

Ms. Hardie, my late mother would never forgive me for not talking to transcriptionists and reporters after her long career as a court reporter in family court.

In your presentation you did a good job of outlining some of the challenges that have been presented by the change to the use of Zoom technology. I'd like to hear a bit more about both short- and long-term solutions to those problems from your point of view.

● (1135)

**Ms. Joanne Hardie:** Our point of view is that we would like the ministry to respond to our concerns. That's the major point; they haven't. We simply want the audio recording to improve and to find a platform that would accommodate eight separate channels of speakers. Right now everything is coming through on that one channel and the transcripts can't even be certified because there is so much interruption and cutting out as the Wi-Fi becomes unstable. It's a serious concern. Transcripts are supposed to reflect what happened in a person's experience in the justice system. We don't have the death penalty, but if you don't get a good transcript, there are real, severe repercussions. We're just asking. That's our one and only concern: Just let us do our job. We can't right now.

**Mr. Randall Garrison:** Is this a matter of which platforms people are choosing to use or the fact a platform for this does not exists?

**Ms. Joanne Hardie:** There isn't one. It's not being connected; it's not being integrated into Zoom. The platform or the system that exists in every courtroom has not been integrated into the Zoom platform, so we have one channel that we can transcribe from, and that's it. It's becoming impossible. It's been 14 months, and we just want to know where it's going. Why can't they fix this now?

**Mr. Randall Garrison:** Have you seen any evidence that anybody is actually working on developing either the equipment to Zoom or another platform that would do this?

**Ms. Joanne Hardie:** We do a lot of research in our association. We've been tracking things, keeping on top of stuff, reading articles and, I guess, snooping, because we're not getting any kind of really direct response from the ministry. Yes, there is a platform available, but we don't know what's happening or what its status is. It has been 14 months. That's a long time.

**Mr. Randall Garrison:** I want to be very clear on this. Are you saying that from your research you believe there is an alternative platform that would allow you to do your job directly at this point?

**Ms. Joanne Hardie:** There is an option. Liberty Recording services now provide all of the systems in the courtrooms. We believe there's a platform that they have available and would connect right now.

**Mr. Randall Garrison:** I think that's very important information for us. I thank you for bringing it to our attention.

**Ms. Joanne Hardie:** Thank you.

**Mr. Randall Garrison:** I want to turn to Mr. McCarthy at this point.

Did you have the same concerns about the Jordan decision before the COVID crisis? Would you have been suggesting the same temporary solution of using the notwithstanding clause were we not in this COVID crisis?

**Mr. Todd McCarthy:** That is a very important question.

The Jordan case was controversial and imposed exact time limits of 30 months or less. It was a great burden on the courts, and the deployment of judicial resources to criminal matters did begin to delay judicial resources for other types of cases. That was the immediate effect of Jordan, but I wouldn't have recommended it without the COVID-19 pandemic. I'm addressing the use of the notwithstanding clause to overcome it as a temporary measure because of the severe impact of the COVID-19 pandemic.

Also, of course, as I've indicated in my written paper submitted to the committee, there's no doubt that the court was well intentioned in trying to give real definition to the 11(b) right to trial "within a reasonable time". That's what courts can and should do. When something unexpected comes up, the Supreme Court of Canada can't reverse itself until a case comes up before it in particular circumstances.

You might well get five of the nine judges in a COVID-19 type of case saying, well, wait a minute, section 1 of the charter says that these rights are subject to reasonable limits prescribed by law, and so on. You might get a different result in a certain fact situation, but how long do we wait for such a case to get all the way to the Supreme Court of Canada?

Judges are not active. They have to wait for a case to come to them, whereas the Parliament of Canada can be proactive. The time is not to sit back and wait for a new precedent that might go a certain way. The time to act is now, to be part of the conversation. That is your right and role as parliamentarians. That is what I think our citizens expect of our parliamentarians. It's a conversation that has to happen and that probably wouldn't have had to happen in non-COVID times and won't have to happen again.

To Monsieur Fortin's point, it doesn't have to be permanent. Jordan can become the law again if this Parliament decides to suspend the effect of it for a period of time. You can actually invoke it for less than five years if that's what you put in the legislation.

● (1140)

**Mr. Randall Garrison:** Thank you very much, Madam Chair.

I believe there's so little time that I'll wait for the next round.

**The Chair:** Thank you very much, Mr. Garrison.

I will now go into our second round of questions.

Mr. Cooper, please go ahead.

**Mr. Michael Cooper (St. Albert—Edmonton, CPC):** Thank you, Madam Chair, and to the witnesses.

I'm going to direct my questions to Mr. McCarthy.

I want to pick up on the Jordan decision. It goes without saying that when the presumptive ceilings were established, it obviously was long before the court could have possibly contemplated something like COVID. Can you speak to how the courts have addressed COVID in the context of Jordan to date? Is there anything we should be looking for?

**Mr. Todd McCarthy:** Well, certainly, remote appearances on routine criminal matters are being embraced. They were looked at even before COVID, but now they're being embraced more than ever.

Why should someone have to be brought from a distance while being in custody—if they were denied bail pending trial—just to make a one-minute court appearance to set a new date for a preliminary inquiry or a trial? That just is a waste of time and resources.

Even in criminal cases where the liberty of the subject is at play—the liberty of the subject being a very important consideration—in-person appearance is not always required.

Those kinds of changes can, will be and should be permanent, but let's face it: Credibility is often a big issue in criminal trials, so the courts have been trying to get to as many in-person trials as they can. However, the COVID-19 restrictions, especially in Ontario recently, have kept pushing back the ability to have, for example, in-person jury trials until, at this point, after June 7 in most venues in Ontario and after July 5 in Toronto and Peel.

The courts are just dealing with it. They're hoping for plea bargains. They're hoping for resolution. I can tell you, having done all kinds of litigation—I am a civil litigation specialist like Mr. Maloney was—I did defend our fellow citizens accused of offences, and, boy, what a great defence to be able to raise the section 11(b) defence. I successfully raised it for many of my clients, rightfully so, invoking the proper charter right.

However, should this become a mass amnesty? Does this create a scenario where we have to, virtually or otherwise, deploy judges for criminal cases to save those cases from being stayed, and then not get there in time, while in the meantime having ignored other cases? That's why we're in this crisis, and it's going to get much worse before it gets better.

The courts are doing the best they can, but they need help from this Parliament on this issue.

**Mr. Michael Cooper:** Thank you for that.

I want to ask you a little bit about virtual hearings and some of the concerns that have been raised. For example, at our last hearing, Madam Justice Lynch raised concerns with regard to the open court principle and whether that could be truly respected in the context of virtual hearings. There were issues of privacy concerns—for example, going in camera. There were also issues around using private platforms from a privacy and security standpoint.

Could you address those three issues?

**Mr. Todd McCarthy:** I sure can. It depends on the case, Mr. Cooper.

For appeals on questions of law, the open court process is actually enhanced by Zoom because more people can get access to a hearing before three judges of an appellate court or even the Supreme Court of Canada through Zoom. That's a wonderful new form of technology in open court, and we should embrace it.

However, you're right. There are trials at the trial court level where there are real privacy concerns, where people are recording the testimony of witnesses even when they're told that they can't and that it's an offence to do so. How do we check that? How do we protect the witness who does not want to be identified? Even jurors, as we know, in the recent George Floyd trial in the United States, were kept away from the general public so that they could not be identified by those viewing the case.

Everyone has an interest in an open court system, but particular cases do require the control that comes from in-person hearings, and it is case-specific.

● (1145)

**The Chair:** You've muted yourself, Mr. Cooper.

**Mr. Michael Cooper:** I think my time is just about to expire, but maybe I'll just go to the point of private platforms and the use of private platforms such as Zoom. What are your thoughts on that from a privacy and security standpoint?

**Mr. Todd McCarthy:** Our courts in Ontario have fully embraced the Zoom technology, and it's working extremely well just because.... It's a concept of private-public sector partnerships in a way. It's a good platform from the private sector. It's been chosen over others. The court was free to do that, and it dealt with it very thoughtfully and carefully before it embraced it.

**The Chair:** Thank you.

Thank you very much, Mr. Cooper.

We'll now to go Mr. Virani for five minutes.

Go ahead, sir.

**Mr. Arif Virani (Parkdale—High Park, Lib.):** Thank you, Madam Chair.

I'm going to direct my questions to Mr. McCarthy.

Welcome, Mr. McCarthy.

In the context of addressing some of the issues you've highlighted, would you say with respect to unrepresented accused that allowing court officials to assist them in administrative matters would be a step in the right direction?

Second, with respect to preliminary inquiries, would you say that allowing an accused to appear by video in a preliminary inquiry and a trial on consent, including when evidence is taken, would be step in the right direction?

**Mr. Todd McCarthy:** These are two very separate but important issues. I was a duty counsel in my younger days, when you had per diem duty counsel. The presence of an individual who can assist and advocate not only helps the individual unrepresented litigant in family and criminal cases in particular; it also assists the court to make sure that people are steered in the right direction. That's a very important feature. That's for the provinces to fund. I think there's a place for volunteerism, too, among duty counsel.

With respect to the second question, can you remind me of that again?

**Mr. Arif Virani:** It was about preliminary inquiries and ensuring that an accused can appear by video in a preliminary inquiry and a trial on consent.

**Mr. Todd McCarthy:** Right.

There are many who say that maybe we have to end the preliminary inquiry, because it's largely a discovery mechanism, but certainly in terms of being present before the court—a preliminary inquiry really is about hearing the evidence, maybe testing the evidence and sometimes getting a committal on a lesser offence—I submit that it's a very good and proper use of the accused not having to necessarily be there in person, but rather remotely. It really is a discovery process. His or her liberty is not truly at stake in a preliminary inquiry.

**Mr. Arif Virani:** Right.

I want to address some of the aspects of Jordan that you talked about at length with some of my other colleagues. I agree, as a former litigator, that obviously judges are not infallible. That's fair, but with the Jordan case, I feel like it's been—

**Mr. Todd McCarthy:** Don't tell them I said that.

**Mr. Arif Virani:** Fair enough. You're appearing before them still, and I'm not right now.

What I would say is that it appears we're giving a bit of short shrift to the decision itself. Paragraphs 69 to 71 of the decision in Jordan talk about exceptions and extenuating situations. It wasn't as if the judges crafted the rule to be ironclad. At the end of paragraph 71, they indicated the following:

> Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

To my mind, and I'm wondering what your opinion is, wouldn't the pandemic be considered an exceptional circumstance?

**Mr. Todd McCarthy:** Yes. It is. No doubt a judge applying Jordan, in the wise words you just quoted, would perhaps use the fact of the COVID pandemic to not grant a stay. But remember, every time you deploy a judge to a criminal case to deal with anything, because it's a priority over all of the other cases because of Jordan, you've just used judicial resources that can't be used in other types of cases where there aren't time limits.

So you're missing the point, with respect. I'm saying that a pause is necessary on this issue so that judicial resources are not deployed as a priority in criminal cases at the expense of family, child protection and civil cases. That's what's happening. We need a pause on the monopolization of our judges in the superior courts across the country because of the effect of the Jordan case and its unintended consequences. They didn't foresee the pandemic coming. You can't just deal with that on a case-by-case basis, because if you do, you're tying up judicial resources and you're just compounding the problem.

● (1150)

**Mr. Arif Virani:** I have just a minute left here, but I'll confess to you that you asked for a conversation to take place, and conversations have already taken place. Some of the changes that I put to you at the start of my questioning already exist in Bill C-23. That bill is the product of conversations. We don't have any instances of any provincial leaders or attorneys general asking the federal minister to invoke the notwithstanding clause.

You'll forgive me for thinking that maybe this is a bit ideological, because we know it's been used by certain governments, including by the government in the province where I am located. I know you've been a candidate for the provincial Conservatives in Ontario and a candidate for the federal Conservatives. So is your interest in invoking the notwithstanding clause simply based on ideological perspectives?

**Mr. Todd McCarthy:** Mr. Virani, not at all. I will be happy to report to you that I've been a candidate for the Conservative Party of Canada, but I've also voted for Liberal and NDP and Green candidates whom I respect and who have run in my ridings.

I'm non-partisan on this. I come to you as a counsel and advocate before the court. I am currently on the rules subcommittee on experts for the civil justice rules. It's a plea for help for our courts.

**The Chair:** Thank you very much, Mr. McCarthy and Mr. Virani.

We'll now move on to Monsieur Fortin for two and a half minutes.

[*Translation*]

**Mr. Rhéal Fortin:** Thank you, Madam Chair.

Mr. McCarthy, I feel discriminated against, as you have not mentioned that you voted for the Bloc Québécois in the past. So I am probably the only one here you have never supported.

That said—

[*English*]

**Mr. Todd McCarthy:** I've been voting for 40 years, but I've never lived in a Quebec riding, Mr. Fortin. Sorry about that. I would probably vote for you if I could, because I respect you very much.

[*Translation*]

**Mr. Rhéal Fortin:** Mr. McCarthy, just quickly, as I have only two minutes left.

I understand the principle of the discussion you wanted to launch in order to do away with the time frames imposed by the Jordan decision during the crisis.

I also understand my colleague Mr. Virani's arguments, which are correct. Some provisions make it possible to deviate from it, in exceptional circumstances.

That said, Mr. McCarthy, would you not agree with me that the issue with unreasonable time frames, when it comes to the administration of evidence, did not start a year or two ago? That was a problem well before the Jordan decision. Issues with time frames are very old news. They go back years, even decades.

Don't you think it would be time to consider a different way to hold trials?

For example, plea bargaining is often talked about. Is there a way, even in civilian matters, to make a mediation stage mandatory, so that people would have to talk to each other before the court sets a trial date?

Couldn't the appointment of new judges help increase the number of hearings and eliminate or mitigate this issue of unreasonable time frames?

I would like to get your opinion quickly, as I am being told that I have one minute left.

In your opinion, aside from the Jordan ruling being suspended, could other measures be implemented to resolve this issue?

[*English*]

**Mr. Todd McCarthy:** Those measures have been implemented, and are being embraced. In fact, the system would collapse without mediation and pretrials.

However, this is about the use of judicial resources in courts of general jurisdiction. Judges are being monopolized by criminal cases in the adjudication, even of these stay motions, at the expense of other very important cases in family child protection and civil justice.

That's the problem. We're talking about the court system, not the settlements that are reached because of these measures outside the court system. It's been widely embraced, and it's working. This is about judicial adjudication.

[*Translation*]

**Mr. Rhéal Fortin:** I apologize, but time is running out.

Correct me if I'm wrong, but mandatory mediation is not in place, even in Ontario. Perhaps you are asked, like in Quebec, to report that mediation was proposed, but it is not mandatory.

Is there an obligation?

[*English*]

**Mr. Todd McCarthy:** There is, and it's mandatory: Rule 24.1 of the rules of civil procedure in Ontario.

**The Chair:** Thank you very much. We'll stop there.

I will now go to Mr. Garrison, for two and a half minutes.

**Mr. Randall Garrison:** Thank you very much, Madam Chair.

I want to return to the Jordan decision and time limits.

I thank Mr. Virani for pointing out that there is still discretion for trial judges to decide what are exceptional circumstances.

As we look down the road, though, I always worry about the use of the notwithstanding clause and believe it should be used sparingly. It would seem to me that the real, long-term question here is the under-resourcing of the court system as a whole at the provincial level. If the provinces were providing adequate resources, both in terms of the number of judges and all the associated court personnel we need to make trials move forward, we wouldn't have this problem with delays.

I'm interested in Mr. McCarthy's views on that.

● (1155)

**Mr. Todd McCarthy:** Remember, I'm talking about section 94 respecting courts and section 96 respecting judges. The judges were appointed not by provincial governments but by your government. That's first and foremost.

**Mr. Randall Garrison:** The positions are created by the provincial government, and filled by the federal government. The number of judges is up to the province, and the federal government then fills the positions, am I correct?

**Mr. Todd McCarthy:** I respectfully disagree with you. The federal government has sole power to appoint or not appoint section 96 judges and fill those vacancies. Sometimes the government has been slow to do so, which causes a backlog in and of itself, but that's not what we're here to discuss today.

The point is, yes, of course, the notwithstanding clause should be used sparingly, but it's gotten to the point where it's got such a bad name and there are partisan views of it. It is a legitimate constitutional tool.

I encourage you to read Professor Hogg's comments on it. It's a unique Canadian instrument. In this case, it would temporarily ensure that judges would not be monopolized with even having to deal with exceptional circumstances. They wouldn't have to deal with these stay applications if this were invoked. That ties up their time. Whenever they have to have a hearing, remotely or otherwise and make a decision, that is use of judicial resources. That takes them away from other matters within their jurisdiction in that same court. That's the problem.

**Mr. Randall Garrison:** I thank you very much for bringing this issue before us. I think it is an important one for us to consider.

With that, I'll end my questions, Madam Chair.

**The Chair:** Thank you very much, Mr. Garrison.

We are now approaching the end of the hour, so I'll take this time to thank our witnesses for appearing before us today and for your testimony.

For anything that needs further clarification from the questioning today, and if you feel so inclined, please do provide us with written clarifications. We would appreciate that. You can do that by sending an email to the clerk.

Thank you very much.

We'll suspend temporarily as we let in our next panel.

● (1155)

_____(Pause)_____

● (1205)

**The Chair:** I'll resume this meeting and I'll just say a few comments for the benefit of the new witnesses who have joined this panel.

Welcome first and foremost. Thank you for being here today. I'll point out a few housekeeping rules. When you are not speaking please make sure that you are on mute, and before speaking please wait until I recognize you my name and then you can unmute and speak. Once you are finished speaking please make sure that you put yourself back on mute.

I will remind you that all comments should be addressed through the chair. For all of you, interpretation is available at the bottom of your screen. You will see a little globe icon for interpretation. Select the language that you would like to listen to. You can speak in any language that you so choose, English or French.

With that I'll welcome our guests here today. As an individual we have Joshua Sealy-Harrington, an incoming assistant professor at Lincoln Alexander School of Law, Ryerson University, and a lawyer at Power Law. We also have. from the Criminal Lawyers' Association of Ontario. Mr. John Struthers, president, and Mr. Daniel Brown, vice-president. Moreover, we have the Indigenous Bar Association of Canada, represented by Mr. Drew Lafond, president.

To the witnesses, each of you will have five minutes to make your opening remarks per organization. I have a one-minute time card and a thirty-second time card to help you keep track.

We'll go ahead and get started with Mr. Sealy-Harrington.

Please go ahead, you have five minutes.

**Mr. Joshua Sealy-Harrington (Incoming Assistant Professor, Lincoln Alexander School of Law, Ryerson University, and Lawyer, Power Law, As an Individual):** I want to begin by thanking the Standing Committee on Justice and Human Rights for inviting me to appear today to speak about the pandemic and the criminal justice system.

I have only five minutes, so I'll cut straight to the point. In many ways, COVID-19 has not created new problems for criminal justice, but rather, exacerbated existing ones.

With this in mind, the state should not be making minor individual changes to respond to COVID-19; rather, the state should be making major structural changes to respond to persistent systemic disadvantages, and thus, comply with constitutional obligations it has long neglected, particularly for Black, indigenous and low-income people.

Specifically, to stem the tide of prosecutions overburdening our courts, I would urge this committee not prioritize increasing investment in carceral institutions, but instead, to decrease our reliance on them.

With respect to the prior witness, Mr. McCarthy, the just response to pervasive constitutional violation is not to license that violation with the notwithstanding clause, but rather to remedy it. To be clear, there is nothing non-partisan about thinking that the best response to a constitutional defect is to let it continue for five years.

I will briefly discuss two key points to advance this thesis: one, the problem, and two, the solution.

First, let's start with the problem. It is not COVID-19, and the Canadian government conceded as much in this year's budget. Two examples, drugs and safety, are illustrative.

With respect to drugs, the Canadian government recognizes that the opioid epidemic was worsening before the pandemic began and that the pandemic has simply compounded the ongoing opioid overdose crisis in Canada.

With respect to safety, the Canadian government recognizes that crime has root causes, independent of COVID-19. True, pandemic-related job losses and financial stresses have increased rates of gender-based violence, for instance, but these structural conditions are not unique to the pandemic. Indeed, the government is well aware that access to jobs, education and stable housing make communities safer by helping to end the cycle of crime.

What solutions should the government consider? Again, drugs and safety are illustrative.

With respect to drugs, the government has declared that its taking a public health-centred approach to addiction, yet it persists in criminalizing simple drug possession. This is incoherent. As activists in communities with the vulnerable and racialized populations impacted by punitive drug policy explain, decriminalization is urgently needed, especially by a government that purports to be committed to fighting systemic racism.

With respect to safety, the government's response overemphasizes increasing prosecutorial capacity and a well-funded police service with improved training processes. But how does policing respond to the root causes and structural conditions the government itself knows lie at the origin of crime? Those conditions cannot be addressed without significant investment, and investment means freeing up government money. For this reason, myriad community organizations have united in calling for defunding police, dismantling carceral institutions, and building alternative systems that focus on the very conditions the government itself acknowledges contribute to crime, for example, housing, health and education.

If, as the government concedes, the aftermath of gender-based violence costs Canadians billions annually, then actually addressing the conditions that lead to that violence, even if it demands unprecedented public investment, is ultimately prudent fiscal policy.

To be clear, the policy positions that I am describing are not unrelated to criminal justice trials and court delays; they are foundational to them. For instance, to reduce court delays the government plans to add 13 new superior court positions. This will not work. One reporter recently described court staff as being totally overwhelmed and overworked, with scheduled hearings not proceeding and vulnerable justice system participants left in profound confusion.

In my understanding, simple two-day trials are currently being booked into March of next year. The system is, without question, overwhelmed. The pipe is bursting and we cannot fix it by frantically taping over holes as they inevitably appear; rather, we need to turn off the source and that means systemic reforms, including ceasing policing and prosecution of administration of justice offences and drug possession.

In sum, if this committee wants to decrease delays in the criminal justice system, a crisis long predating the pandemic, it must decrease criminalization, policing and prosecution. Other modest tweaks will simply not do. The longer this government delays implementing such changes, the longer justice will be denied to everyone, both victims and accused alike.

Thank you.

● (1210)

**The Chair:** Thank you very much, Mr. Sealy-Harrington.

We'll now go to the Criminal Lawyers' Association of Ontario. You have five minutes between you.

**Mr. Daniel Brown (Vice-President, Criminal Lawyers' Association of Ontario):** Good afternoon, Madam Chair, vice-chairs and honourable members.

Criminal cases are more complex and consume greater court resources than ever before. We all know that lengthy court delays can violate an accused person's constitutionally protected right to a trial in a reasonable amount of time and lead to charges being stayed. Ongoing and repeated delays in the court system caused by the COVID-19 pandemic can also diminish the public's confidence in the criminal justice system, which is fundamental to its operation.

The answer isn't to give up and to ignore constitutionally protected rights, as advocated by Mr. McCarthy in the last panel. The Criminal Lawyers' Association believes that the answer to COVID-related backlogs in the court system is to enact policy changes that will ensure the system has both the time and resources to focus on the most serious cases and those that just simply can't be solved without a trial.

In our time here, we'll focus on three suggestions that will help remove cases that are clogging up the court system but shouldn't be. Number one is to remove barriers to resolving cases without a trial. Number two is to divert administration of justice offences out of the court system. Number three is to decriminalize drug possession offences.

The decision about whether or not an accused person should proceed to trial can be heavily influenced by the sentencing consequences of a particular crime. A person is far less likely to plead guilty if there are consequences that impact their immigration, their employment or will simply incarcerate them for a long period of time. These significant consequences act as barriers to solving cases without trials. One of these barriers is mandatory minimum sentences. I don't just mean mandatory minimum jail sentences, but mandatory minimum consequences that flow from certain criminal convictions.

Drinking and driving convictions, for example, require the sentencing judge to impose the mandatory criminal record in every single case, even for a first offender who's barely over the legal drinking limit. These otherwise resolvable cases are clogging up the courts. It's no coincidence that drinking and driving offences are one of the most litigated categories of cases and one of the offences that frequently breaches the delay ceiling set by the Supreme Court in the Jordan decision. Eliminating mandatory sentences would drastically reduce the number of cases that go to trial, which would, in turn, ensure timely justice for other cases in the system.

Another barrier to resolving cases is the five- to 10-year waiting period a person with a criminal conviction must endure to have their criminal record cleared through the record suspension process. The proposed changes in Bill C-22, introduced by this government, address some of these barriers, including the elimination of some mandatory minimum sentences, but fails to address other ones like the drinking and driving mandatory convictions. Bill C-22 also fails to address the barriers to obtaining record suspensions, including the prohibitive costs and lengthy wait times.

Another way we can reduce backlogs in the court system is to divert administration of justice offences from the system all together. These offences, including failing to appear in court and failing to comply with a court order, account for more than one in five cases right now in our justice system. Following Senate recommendations in 2017, the government changed the Criminal Code to include a process whereby the police or the prosecutors could now opt to not charge somebody and opt not to prosecute them for one of these offences. Instead, they can refer them to a judicial referral hearing where a judge would potentially tweak the bail release plan or decide to reincarcerate the person. This regime avoids piling on criminal charges, which come with their own requirements for disclosure, meeting with the prosecutor, guilty pleas, trials and sentencings.

Unfortunately, these diversion tools simply aren't being utilized by the crowns or the police who must initiate the referral hearing process. This new regime designed to reduce some 175,000 cases in our system is lying dormant. The solution here is simple: Remove those barriers that prevent either a judge from referring a case or place discretion completely in the hands of the police and the crowns.

A similar concern exists with the increased discretion afforded to prosecuting low-level drug offences. Bill C-22 goes some way toward decriminalizing these offences by encouraging prosecutors to divert some drug cases out of the system in favour of drug treatment programs. Placing discretion to divert these charges entirely in the hands of prosecutors and the police creates obvious problems. For example, will they use this discretion?

We're also concerned about whether this discretion will be applied equitably. We know that discrimination and bias run rampant through the justice system, adversely impacting indigenous and black defendants far more than any other race. If we accept that drug addiction is a public health issue, not a criminal law issue, we shouldn't be prosecuting these cases at all.

● (1215)

In conclusion, removing barriers to guilty plea resolutions and diverting drugs and access to justice offences from the justice system would free up precious court time and resources that could be redeployed to other cases in danger of being tossed for unreasonable delay following the COVID-19 pandemic, and ensure timely justice for victims and accused persons.

Thank you.

**The Chair:** Thank you very much, Mr. Brown.

We'll now go to Mr. Lafond.

Mr. Lafond, I know that your headphones are downstairs in your reception area, but maybe you could try to speak loudly and slowly to ensure that we get the best interpretation possible. Perhaps you can send somebody downstairs to pick them up, so, at least with the questions and answers, we can capture your voice as much as we can.

Please go ahead. You have five minutes to make your opening remarks.

**Mr. Drew Lafond (President, Indigenous Bar Association in Canada):** Okay, absolutely, I'll work on that.

Thank you for the invitation today.

[*Witness spoke in indigenous language*]

[*English*]

My name is Drew Lafond, and I'm here on behalf of the Indigenous Bar Association. I'm serving currently as the president in my second year of a two-year term. The IBA is a national, not-for-profit organization comprising indigenous lawyers, judges, law—

**The Chair:** I'm so sorry, Mr. Lafond, but there seems to be some kind of an interruption in your sound. Maybe we should just wait for your headset to arrive before you make your opening statement.

In the meantime, would members feel comfortable if we went into the round of questions, or do we want to wait for Mr. Lafond's opening statement?

Go ahead, Mr. Moore.

● (1220)

**Hon. Rob Moore (Fundy Royal, CPC):** Madam Chair, I could hear Mr. Lafond perfectly before he put the earbuds in. I don't know if that's going to make any difference. I could hear him perfectly earlier, but then he was asked to put earbuds in and now, as you said, it's very difficult. I don't know if that's worth trying so we can hear the testimony before questions and answers.

**The Chair:** The challenge, Mr. Moore, is with the interpretation so that members have access to that interpretation into French. That is the main issue.

Mr. Lafond, if you want to perhaps try again without your headphones, maybe we can do that.

**Mr. Drew Lafond:** Good morning, can you hear me now?

**The Chair:** Yes, and I'm just going to pause you and go to Monsieur Fortin.

Monsieur Fortin, are you getting any translation? Are you able to understand the witness?

[*Translation*]

**Mr. Rhéal Fortin:** Yes, I am hearing the interpretation in French.

I understand that we don't have the witness's text, his notes. They may have been useful.

We can begin with the other witnesses, as you suggested. That may be simpler. It's up to you.

[*English*]

**The Chair:** Okay, thank you, Monsieur Fortin.

Perhaps we'll go into our first round of questions as we wait for Mr. Lafond's headset. Once it has arrived, we'll give him his five minutes and get back into the questions.

We'll start with Mr. Lewis for six minutes.

**Mr. Chris Lewis (Essex, CPC):** Thank you, Madam Chair. I certainly appreciate it.

My first question is for Mr. Brown.

Sir, you spoke a lot about backlogs within the justice system and that type of processing. Obviously, we have quite a case on our hands with a lot of people getting fines. When I speak to that, I mean people who are arriving by plane at our airports and saying, "You know what? I'm not even going to bother going to do a 14-day quarantine. Just give me that fine." I mean people who are coming across our borders and saying, "I'm not going to quarantine. Just give me that fine." There will be an extreme backlog with what the courts will be facing in this respect, because people are not going to pay it, quite frankly.

Could you comment on where this is going to go? Are the courts just going to throw these cases out? You were speaking a lot about drinking and driving cases, and I respect that, but I'd like to go down a different path. Truthfully, I believe the court system is going to be stretched to the limits. I'm wondering if you could comment on what this will look like, going forward. I believe you mentioned that the courts are looking into March of next year. Potentially, we could be talking about March of 2025. What happens in that circumstance?

**Mr. Daniel Brown:** Mr. Lewis, what I can say is that the courts don't just have this ceiling that, once it's breached, is an automatic violation of somebody's charter rights. We have to look at the reason why this ceiling was breached. If the case takes too long, we look at why it took too long.

As Mr. Virani said in the last panel, [*Technical difficulty—Editor*] the court [*Technical difficulty—Editor*] exceptional circumstances or discrete exceptional events. Things like the pandemic are simply subtracted from the delay assessment. It's as if no delay occurred where the delay that happened because the courts have been shut down is attributable to the COVID-19 pandemic.

I suppose we can assume, as you are, that everyone is going to fight their case or that everyone goes to trial. We simply know that this isn't the case. We know that some people will go to trial. Some of these offences aren't the types that would clog up the criminal court system. They are what we call provincial offences. They are things like traffic tickets and parking tickets. Again, the sky isn't falling here. We have a situation here where the courts have come up with some great ideas to remedy these problems in the short term. We've offered to you some solutions in the long term, finding ways to get some of these cases that just don't need to be there out of the court system. There are lots of other solutions to come up with.

I don't think we need to worry about simply having these fines being simply dismissed because they've taken too long to come to trial. I think the courts are going to account for the delay, and the reasons behind the delay, in assessing whether any of these cases should be thrown out or simply dismissed.

● (1225)

**Mr. Chris Lewis:** Thank you for that, Mr. Brown.

You mentioned federal and provincial, and herein lies the issue that I see. Our borders and our international airports are very, very federal. In the event that they get a quote-unquote ticket, will that land on the lap of the provincial jurisdiction or will that be federal jurisdiction?

**Mr. Daniel Brown:** Mr. Lewis, it really depends on who's initiating the offence in the first place. If it's the province that's enacting some sort of bylaw infraction, that's going to end up in the provincial system. If it's some sort of piece of federal legislation that's being violated, that's going to be part of essentially the criminal system, in the same way that drug offences or other offences are prosecuted. Either way, it's the same judges that are likely going to deal with these problems. We have to be prepared for it. We have to acknowledge that these issues may come through.

Again, I don't think the solution is simply, as some panellists have suggested, to suspend someone's constitutional rights indefinitely to accommodate for the ability to prosecute some of these fines. I think the answer is to look at what else we can do to relieve the burden off the justice system. We know that it will be a tragic situation if a victim of a crime has to wait years and years and years for a case to make its way through the justice system, and likewise for an accused person who is facing strict bail restrictions or is in custody. We can't have situation where we just allow those cases to go on indefinitely. We have to find other solutions.

**Mr. Chris Lewis:** Thank you.

My last question is also for you, Mr. Brown. I'm sorry. I'm not trying to pick on you, sir. I really respect...and I was listening to your testimony very, very much in depth.

The federal government has introduced Bill C-23 to try to address some of the backlog. Do you have any other thoughts or feedback on the legislation as it was introduced?

**Mr. Daniel Brown:** I'm going to pass this one to my colleague Mr. Struthers. I'm sure he will have some things to say about the importance of Zoom trials and the ability to accommodate those trials.

**Mr. John Struthers (President, Criminal Lawyers' Association of Ontario):** Madam Chair, if I may, our Zoom trials have been an absolute godsend. The system would have failed completely without them. We have done very well for the past 13 or 14 months now, getting an awful lot of things done by Zoom.

As to your question about the airports and the courts and the interrelationship between those two things, the problem in the courts isn't a series of rich scofflaws taking $3,000 tickets at the airport because they want to go home. This is not the problem. Deflecting to suggest that the problem with COVID or with the justice system is a federal problem at the airport is, frankly, complete nonsense, with the greatest of respect, sir. This is not the issue.

If there are four people in Canada who took a $3,000 ticket in the past 12 months to enter Canada and say “The heck with you, I'm not going into quarantine—I can afford $3,000”, if you can find those four people, I would be amazed. This is not the issue.

With the greatest respect, what we have now, and what Mr. Sealy-Harrington was very clear to point out, is that you don't lose weight just by exercising. You have to lose weight by eating less. You have to digest less, which means that what we have is an entire system that is criminalizing mental health, poverty, domestic problems, and drug addiction and expecting the criminal justice system to solve all these social problems. It can't do that.

**The Chair:** I'm going to stop you there, Mr. Struthers. My apologies. We're well over time.

**Mr. Chris Lewis:** Thank you, Madam Chair.

**The Chair:** Thank you, Mr. Lewis, but that was—

**Mr. Chris Lewis:** To Mr. Struthers, saying there are four is an understatement.

Thank you, Mr. Struthers, and Madam Chair.

**The Chair:** I notice that Mr. Lafond has his headset now, which is wonderful to see.

Mr. Lafond, if you would like to make your five-minute opening remarks, please go ahead and do so now.

● (1230)

**Mr. Drew Lafond:** Thank you for the invitation and apologies for the delays, everybody. Thank you kindly for your patience.

[*Witness spoke in indigenous language*]

[*English*]

My name is Drew Lafond. I'm here as the president of the Indigenous Bar Association in Canada. Serving as president, I'm in the second of a two-year term.

The IBA, by way of background, is a not-for-profit organization comprised of indigenous lawyers, judges, academics and students across Canada. Our mandate, generally, is to promote the advancement of legal and social justice for indigenous peoples in Canada and the development of laws and policies that affect indigenous people, generally.

In response to the request by the committee for submissions, the past year has been rife with examples about territorial sovereignty, broken treaty promises between the Crown and indigenous peoples and more shockingly, the disvalue of indigenous lives, particularly the lives of indigenous women and youth.

The COVID-19 pandemic is worsening the underlying legal, political health, economic and social injustices that indigenous peoples and communities face. Against this backdrop, the IBA is acutely concerned with the treatment of indigenous peoples in the recognition and respect of their human rights. The IBA responded to the events in the last year by finding some pragmatic and timely responses to the rapidly changing political, economic and social realities facing indigenous peoples.

The first initiative we undertook was in April 2020. We partnered with researchers at the Department of Indigenous Studies at the University of Saskatchewan to conduct an online survey that examined the legal impacts of COVID-19 and the ability of the legal profession to respond to those impacts. As part of that study, the participants primarily spoke about jurisdictional issues that they were facing, such as conflicts over who has the authority to regulate who's coming into indigenous communities and who has the authority in relation to a community's pandemic and health response. It includes the exacerbation of jurisdictional issues that were happening prior to the pandemic, including the state undermining indigenous laws and legal authorities. Participants expressed concerns regarding consultation and negotiations where existing agreements and precedents meant to uphold indigenous rights were too often being ignored in the interest of economic revitalization plans. Concerns were raised about the case delays, which have worsened an already slow process and deferred indigenous rights matters further. These delays are uneven, with indigenous clients having to wait for access to the courts while resource extraction approvals by the Crown continue at a regular and accelerated pace.

We must address the clear gendered issues in relation to the COVID-19 pandemic. These include increased family violence, disproportionate family care responsibilities faced by indigenous women, access to safe and stable housing, gender violence outside of the home, concerns about industry or “man camps” posing dangers to the health and safety of nearby indigenous communities, and worsening economic inequalities for indigenous women. These gender-specific injustices create barriers to indigenous women being able enforce their rights and access meaningful, legal participation.

Secondly, the IBA worked with the UBC faculty of law, the Union of B.C. Indian Chiefs' BC First Nations Justice Council, the Nuu-chah-nulth Tribal Council and the first nations or indigenous legal clinic in B.C. to study 21 reports in the last 30 years concerning indigenous peoples in the justice system.

As a result of that study, we pulled 10 recommendations for immediate action, which I'll mention briefly here: create a national indigenous-led police oversight body; establish a national protocol for police investigations; redirect public safety funding to services that increase community safety; implement a multi-pronged indigenous de-escalation strategy; establish a national protocol for police engagement with indigenous peoples; amend Canadian and provincial-territorial human rights codes to include indigenous identity as a protected ground against discrimination; create indigenous courts; increase indigenous representation across all levels of the criminal justice system; and establish requirements that judges give written reasons in all indigenous sentencing cases and require that judges give written reasons in all indigenous child apprehension cases where a child is placed outside of the indigenous community.

Just to close off, during the COVID-19 pandemic, we're facing significant challenges in being able to centre our well-being and our legal rights, including our rights to health, access to our territories, to our laws and to self-determination. Canada has fiduciary obligation to support the enforcement of rights and protections for indigenous peoples.

Those are my submissions to the committee today. Thank you.

**The Chair:** Thank you very much, Mr. Lafond. Your sound was coming through quite clearly. We appreciate that.

We'll resume our questioning.

We'll go to Madame Brière for six minutes. Please go ahead.

**Mrs. Élisabeth Brière (Sherbrooke, Lib.):** Thank you, Madam Chair, and thank you to all of our witnesses. I appreciate your expertise.

My question is for Mr. Sealy-Harrington.

● (1235)

[*Translation*]

You said in your introduction that COVID-19 has not created new problems, but has rather exacerbated existing ones. Do you think it would be a good idea to strengthen the use of other dispute resolution methods, such as mediation, to support the effectiveness and the quality of our justice system?

[*English*]

**Mr. Joshua Sealy-Harrington:** Madam Chair, I think that alternative systems, like mediation, can be part of holistic approaches to dispute resolution with a view to addressing things through a lens of efficiency. But I do want to reaffirm the idea that something like mediation falls towards the kinds of tweaks that I want to caution the committee against, insofar as multiple people who have spoken today have described the extent to which the system is completely and, in many ways, catastrophically overwhelmed.

I don't know that adding or increasing avenues towards mediation is a proportionate response that would be able to comply with the constitutional obligations at play. I would say that while that could be one of various tools that could be added, I strongly suspect it would fall short of the systemic change needed to bring dispute resolution within Canada back under constitutionally required thresholds.

[*Translation*]

**Mrs. Élisabeth Brière:** Thank you.

As for sexual assault or domestic violence cases, during our study on another topic, we heard that integrated courts could be a good solution. I would like to know what you think about that idea, where the victim would not have to keep repeating their entire story and where everything would be heard within a single system.

[*English*]

**Mr. Joshua Sealy-Harrington:** Madam Chair, I haven't done a lot of study of integrated sexual violence courts. I do think that alternatives to the kinds of existing, pervasive, and highly punitive approaches to addressing sexual violence are ineffective. I think they are ineffective both for accused and for victims for various reasons, including some that Ms. Brière mentioned.

I think I would respond to this in a similar way to the idea of mediation—not identically, but similarly. I don't think that when we're trying to deal with the systemic problems I've described and that others have described, increasing mediation or creating a parallel court when we're trying to deal with a variety of cases that are pushing us well beyond our limits, are responses that will effectively address that problem. I won't say that integrated courts are something I would oppose per se, and I haven't studied them extensively, but I will say that creating a parallel court system without removing the gigantic amount of input that goes through the criminal punishment system as a means of dispute resolution, I strongly suspect, will not address the core issues here today, which is delays. I think the committee needs to strongly consider reducing the inputs into the criminal punishment system if delays are its concern.

[*Translation*]

**Mrs. Élisabeth Brière:** In your introduction, you talked about structural changes. Do you have any concrete examples that could enlighten us?

[*English*]

**Mr. Joshua Sealy-Harrington:** Madam Chair, absolutely.

There's decriminalization of drug possession, dropping mandatory minimum sentences, as Mr. Brown mentioned, and the impact that has on the resolution of disputes. I think more fundamentally, as I raised in my remarks, the government itself, in its budget, admits and describes the various ways in which the conditions of people in society—low-income people, racialized people—is foundational to cycles of criminality.

The government spends a lot of money on criminal punishment—on policing, on prosecutions, on incarceration. These are not cheap fixes, and money is fungible. I would stress that if the goal is decreasing crime and deceasing delays, meaningful and substantial, perhaps even unprecedented, investment, in communities—which I'm happy to hear some other witnesses echoing in their remarks—is an approach that would will engage with the root causes of crime.

There are certain labels that come up in the government budget: root causes, systemic racism. I would urge the committee to take those terms seriously and not refer to them performatively, but to think about the ways in which significant change as to how we approach public safety within Canada is urgently needed if we actually want to decrease delays.

I think the ideas you're proposing may work in certain ways to tweak the system, but I would encourage the committee to think more broadly in terms of how we approach public safety in Canada.

● (1240)

**Mrs. Élisabeth Brière:** Thank you very much.

Do I have time for another question, Madam Chair?

**The Chair:** You have five seconds.

**Mrs. Élisabeth Brière:** Okay, thank you.

**The Chair:** Thank you, Madam Brière.

We'll now go to Mr. Fortin for six minutes.

Go ahead, sir.

[*Translation*]

**Mr. Rhéal Fortin:** Thank you, Madam Chair.

I thank the witnesses who are joining us.

I appreciate each of the opening statements, but I was especially affected by Mr. Struthers' statement.

I really liked your analogy, Mr. Struthers, when you said that losing weight was not just about exercising, but also about eating less. That is something we should perhaps hold on to.

As for the lesson we should learn from this, I am wondering whether our justice system is currently paralyzed by procedure and is struggling to digest all the cases it must manage or whether it is simply underfunded. Aren't we, the legislators, the ones who are overfeeding the justice system by introducing a certain number of offences that did not previously exist, thereby creating congestion? That is my question for you.

At the same time, I also really liked Mr. Brown's comments, which were very consistent. He talked about barriers. I think that is important. Barriers are currently preventing a certain number of cases from settling out of court—in other words, without the use of courts or the entire justice system.

Mr. Brown, could you provide us with a copy of your notes, which are really interesting?

Mr. Struthers, could you tell us more about why the justice system is clogged up? Eating less, exercising, I get that, but is the justice system being fed too much, too little or too poorly?

[*English*]

**Mr. John Struthers:** Madam Chair, thanks very much for the opportunity to speak about it. The problem is this. We have a whole bunch of societal problems, and we've decided that they are going to be dealt with by policing. We're going to arrest our way out of the problem of mental health. We're going to arrest our way out of the problem of drug addiction and arrest our way out of the problem of poverty. This is never going to work. Our resources are being thrown heavily into issues that are not going to be resolved by the criminal justice system.

Addiction and mental health are strongly related, but let's just look at what we're doing. Let's compare our criminalization of drugs with what we do regarding alcohol. Let's say that you knew that one out of 10 bottles of wine is going to kill you, and yet the government insists that all of the labels be removed from the wine bottles, which is what's happening on the streets of Vancouver right now. These are not, if you will, overdoses; they're poisonings. People aren't deliberately overdosing; they're taking things when they don't know what they are because there's no label. We have a whole bunch of problems that we are throwing into the criminal justice system. Instead of investing in poverty reduction, or in mental health or addiction treatment, we're investing in the criminal justice system where we're caging people.

You know, there's a new regime that thinks about the way we look at these things based on trauma-based evidence. The fact is that most of the people in the criminal justice system have suffered trauma in their lives one way or the other, What we're doing is that we're inflicting more trauma on them. Can you imagine taking someone with a serious mental health problem and thinking the solution is to put them solitary confinement in a jail? This will not work.

We have to divert things from the criminal justice system, and as Mr. Brown said, the barriers have to be removed very quickly. The thing people want to avoid is a criminal record. They're not avoiding the counselling; they're not avoiding the stay away; they're not avoiding not having a weapon. They're avoiding a criminal record because it prevents them from working, from going on a school trip with their kids or travelling in the States. They don't want the record.

If there were a way to do all of this work up front, be it probation, counselling or whatever it is, and then have the charge dismissed, as they do in many American states, we would resolve a lot more. There are solutions out there. We need to have fewer people in the system, and we need to make it easier for them to get out of the system; otherwise, we are going to have way too much to deal with for a very long time.

Thank you, Madam Chair.

● (1245)

[*Translation*]

**Mr. Rhéal Fortin:** That's interesting. You are president of the Criminal Lawyers' Association of Ontario. I assume that you have a few years of experience in private practice. Civil courts are also backed up. As the previous witness, Mr. McCarthy, was saying, those are closely linked. Since the R. v. Jordan ruling was handed down, time frames imposed on criminal trials have resulted in judges being engaged extensively in criminal cases and moving away from civil law cases. Those are in fact closely linked.

You are telling us about those barriers in a criminal trial. I understand the idea, and I think it makes sense. We should discuss this further. However, there are also similar barriers in civil law cases.

Can you talk to us about that? What do you think prevents certain cases from being resolved in civil courts?

[*English*]

**Mr. John Struthers:** Thankfully, I'm not a civil lawyer. I made the clear decision in my life never to go near civil files because they last six to eight years. The civil system is a complete mess. However, I do not agree with the premise that people in custody—in jail—waiting for their trials do not take priority over people arguing about money. Those people can go into a room and argue about money all day, but the people who are in jail have to have priority because it is a human rights issue.

Thank you very much, Madam Chair.

[*Translation*]

**Mr. Rhéal Fortin:** I agree with you, Mr. Struthers, but I was just wondering whether you had ideas on the barriers preventing the resolution of civil law cases.

Mr. Brown, I have a few seconds left. Perhaps you would like to say a few words.

Could you provide us with a copy of your presentation document?

[*English*]

**Mr. Daniel Brown:** Yes.

What I'd also say is that I've touched on a few points here, a few barriers, but there are other ones as well. The unavailability, right now, of conditional sentences for many offences, like fraud offences.... I know that's something the government is trying to reintroduce again in Bill C-22, but it is something where there's an absence of legislation to address a lot of these challenges.

Also, there is the fact that, right now, when somebody is found guilty of a fairly serious criminal offence, they are automatically deported without any right of appeal. There are so many reasons why people refuse to solve their cases, and they hang around the justice system and hang around and go all the way to trial and wait to see if their case gets thrown out for delay because there is just simply no way to solve these cases in advance. We need to find other opportunities to solve cases, to remove those barriers. If we're continuing to eat the same amount, we have to figure out at least a way to get rid of these cases that are in the system so that we can make room for these other cases.

**The Chair:** Thank you.

[*Translation*]

**Mr. Rhéal Fortin:** I thank each and every one of you.

**The Chair:** Thank you, Mr. Fortin.

[*English*]

We'll now go to Mr. Garrison for six minutes.

Please go ahead.

**Mr. Randall Garrison:** Thank you very much, Madam Chair.

I'm going to resist the temptation to use my entire six minutes to applaud this panel. I think it is very important that they've directed our attention to the root causes of delays in the system and to the importance of protecting constitutional rights.

We will have opportunities in Parliament to discuss other bills that deal with some of these questions, and I hope that we will see these witnesses come back to give us further input on Bill C-22 and Bill C-23.

I want to take the time today to talk about one of my concerns: that our shift to the Zoom platforms during COVID, while necessary in an emergency, may make some fundamental changes in our justice system, which I believe will disadvantage indigenous people, racialized Canadians and those who live in poverty.

I'd like to hear from each of the witnesses what they think about this shift of platforms and its impact on those who are most marginalized in the justice system already.

Maybe I will start with Mr. Sealy-Harrington.

**Mr. Joshua Sealy-Harrington:** Madam Chair, what I would say in response to concerns about shifting to, primarily, digital forms of dispute resolution would be that it's integral to the committee to adopt a systemic lens in terms of how it vets different digital options. What I mean by that is that I'm thrilled to hear Mr. Garrison reference concerns about systemic disparities, about the ways in which different procedural paradigms can have a disparate impact on different groups. I think that's true.

To be frank, I haven't been running trials during COVID, digital or otherwise, so in that sense, I would defer to the Criminal Lawyers' Association in terms of their perspective on the consequences of this for disparate groups.

I could see circumstances where it's very important and other circumstances where it has negative consequences, so I think the contribution I can make to this conversation is to say that it is foundational to be thinking not only about procedure, what works and what seems fair in an abstract sense, but also about the material consequences.

An earlier individual during this meeting spoke about how one of the benefits of logistical complexities with certain hearings is that it pressures people toward settlement. I would say that a systemic lens would raise concerns about that. If there is pressure toward settlement because of financial limitations, that's a systemically racist policy, full stop.

That systemic lens is very important, but in terms of specific procedural ideas, I would defer to the other witnesses who would have more personal experience with that.

● (1250)

**Mr. Randall Garrison:** Thank you very much.

Let's turn, then, to Mr. Struthers and Mr. Brown.

Maybe you two can decide who wants to go first.

**Mr. John Struthers:** I will go first, if I could.

I've dealt with multiple matters over Zoom, everything from peace bonds to murder prelims over the past year. There were very serious cases, including sexual assault cases. I did one case where I was the only person on Zoom. Everybody else was in the courtroom.

The problem isn't the technology. It's a tool, and used properly, it can be used very well. Counsel can now appear in Attawapiskat on a Tuesday. They couldn't otherwise because it would take them three days to get there and get home.

Here's the problem. We have a charter right to retain and instruct counsel. The “retain” part seems to have gone sideways because we have an enormous number of self-represented litigants, both in civil and criminal cases. The problem isn't really what technology you use. Impoverished people may not have MacBook Pros to come to court via. That, of course, is a very serious issue, but the most serious issue is that they don't have a lawyer.

Legal aid has been so dramatically cut—in Ontario by one-third—and not topped up by the federal government, particularly, as you know, in the criminal context for many years, that we have thousands and thousands of people who are self-represented in the system.

This is enormously problematic for delay. If you're trying to speed things up, believe it or not, there are some circumstances where lawyers are actually helpful. One of them is in the criminal justice system, because if you don't know what you're doing, it's going to take much longer. Of course, the judge has to effectively become your surrogate lawyer by explaining every step of the procedure, every step of the way, and presenting all of the evidence because you're not effectively able to admit it.

Legal aid is a critical issue. It's much more critical than whether you're appearing in person, on Zoom, on Teams or whatever format you want to use.

**Mr. Randall Garrison:** Thank you very much for that, Mr. Struthers.

I'm afraid of running out of time, so I want to turn to Mr. Lafond and ask him, first of all, if he would table with the committee the report by the Indigenous Bar Association. I think it would be useful for this study and other work we're doing. I would also like to ask him the same question about this shift to digital platforms and its impact on the people he represents.

**Mr. Drew Lafond:** The Indigenous Bar Association would be happy to table the report with the committee when it becomes available. We're currently working with the University of Saskatchewan to get all of our ethics approvals in place and to finalize the drafts. The report itself is subject to a SSHRC grant, so there are some administrative hoops we need to jump through before we can finalize it and get the sign-off for it. Upon completion, we would be happy to share the results of the report with you guys.

When it comes to the issue of virtual representation in communities, the IBA had the opportunity to meet with the staff of the justice minister's department. We had raised with them the possibility of discussing the 21 reports published in the last 30 years that outline the difficulties indigenous peoples face with the justice system.

Substantively, I don't think this is a brand-new area. The relationship between indigenous peoples and the justice system is probably one of the most extensively and heavily studied topics in Canada right now. It's not a matter of actually going back and getting more commissions at this point. It's a matter of implementation, and that's where we got our recommendations from. Again, there are 10 recommendations that we want to see implemented in the immediate future.

The problem we had with respect to the discussion about virtual representation in communities was that this was raised during our discussions with the minister's staff about the increase in digital platforms and what that would mean for indigenous peoples—

● (1255)

**The Chair:** My apologies, Mr. Lafond, but we're really running short on time. Can I perhaps ask that you provide a written response to the remainder of the question? That would be helpful to the committee.

We will now go into our second round of questions, starting with Mr. Moore for five minutes.

**Hon. Rob Moore:** Thanks, Madam Chair.

Thank you to our witnesses for appearing today.

We're studying the impact of COVID on the justice system. I know some of what we have talked about today deals with matters that pre-existed COVID.

We heard from panellists earlier this week about how courts in high-pressure situations have had to adapt, in much the same way that we, as parliamentarians, have had to adapt. We're conducting this meeting today by Zoom, which just didn't happen in the past.

Mr. Brown, from what you're hearing from your association's members, is there one thing that has come out of COVID that you would say we should keep in the future? Is there something solid, something that should be built upon? Also, is there an aspect of our current situation, specifically the response to COVID, that you think we should abandon?.

On either of those, what comes to mind for you?

**Mr. Daniel Brown:** Madam Chair, COVID really has been a blessing in some ways when it comes to the technological advances in our justice system. We can now file documentation digitally, we can conduct court appearances digitally, and we don't need to drive to court to pick up evidence packages, which now can all be produced digitally. These are great time-saving functions. They're making the justice system more efficient. They're reducing the number of court appearances that need to take place. This should all be encouraged.

What we don't want is a system where there's absolute rigidity when it comes to how we make our court appearances. We don't want a situation where every trial is mandated to proceed by Zoom or where every witness must appear remotely. There are some cases where that works perfectly fine, and other cases where that harms the administration of justice, where in order to make full answer and defence, we need the witnesses in the room.

To the extent that we can manage public safety and manage available court resources, we also want to be able to maintain that option. As I said, with that greater flexibility, we can allow for opportunities to utilize this technology and reduce delay, and also ensure fairness in the process.

**Hon. Rob Moore:** Thank you.

Mr. Lafond, thank you for your presentation today.

With regard to your membership as well, we did hear concerns about the downward pressure of dealing with criminal cases and then the fallout for some very important cases, like family law matters and how delays there are problematic as well. What are some of the major concerns when justice is delayed, whether it's in the criminal or the civil context?

I recognize that there certainly was a problem with the system before COVID. We have managed to have some developments that have helped with efficiency. Perhaps you could speak specifically to delays in the system, whether criminal or civil, and how that impacts the system. Furthermore, is there something that has come out of COVID that you would like to see courts and the system maintain?

**Mr. Drew Lafond:** Falling short of calling COVID a blessing, I think it's been catastrophic for a lot of the indigenous communities. The results have been horrific for our populations. Mortality has increased and access to health services has been extraordinarily frustrating and slow. In terms of the ability of our elders to recover from this, the long-term effects have yet to be seen.

When it comes to your specific question on delays in the justice system, this point wasn't actually a point that was heavily emphasized in the report that we conducted with the University of Saskatchewan. Again, going back to my presentation, the participants in the survey spoke largely about jurisdictional issues. The questions and their focus weren't heavily on the delays, although they noted that delays to the justice system exacerbated some existing procedural issues that had been identified by previous reports and commissions.

The real issue is that this needs to be seen as an opportunity to fundamentally and systemically restructure the justice system in the ways we identified earlier today and in our correspondence to Justice Minister David Lametti's office on numerous occasions.

● (1300)

**Hon. Rob Moore:** Thank you.

**The Chair:** Thanks very much.

We'll now go to Ms. Damoff for five minutes.

Go ahead.

**Ms. Pam Damoff (Oakville North—Burlington, Lib.):** Thank you, Chair.

It is an absolute pleasure to join this committee today.

Mr. Brown, you mentioned record suspensions, and I couldn't agree with you more. It's something I was really pleased to see in the budget in terms of dealing with those mean-spirited increases in the record suspension fee, which meant that people couldn't apply. It is in the budget. There are 700 pages there, so I am not surprised if you may have missed that, but it is something that we're committed to changing.

I want to thank all the witnesses today for your testimony. You've been talking a lot about indigenous peoples, Black Canadians and racialized Canadians who are disproportionately impacted by their being touched by the criminal justice system. It costs us $330 a day to put someone into prison, and that's not the place where most of them need to be.

Because you've brought up those issues, I want to focus on Bill C-22, because that bill does include reducing mandatory minimum sentences, drug diversion and conditional sentences. It's dealing with a number of issues that you've all touched on as being of concern.

There was a study that was done of 44 indigenous women—the fastest-growing prison population in Canada—who received conditional sentences prior to 2012. It was found that 36 of them would have been ineligible to receive a conditional sentence under the Harper government restrictions. I met two of them when I visited the Edmonton Institute for Women. They were women who should not have been in jail, and because they were in jail, it was going to impact the rest of their lives.

I'm just wondering if each of you could maybe talk a bit about how important it is to get Bill C-22 passed—and passed quickly.

**The Chair:** That was for Mr. Lafond, I believe.

Go ahead, sir.

**Mr. Drew Lafond:** Sure, I can chime in on this one.

On Bill C-22, again, we've had a lot to say to the minister's office on this point specifically. Our written correspondence outlines that while we're pleased to see some changes that reflect some of the calls to action—specifically, call to action 32—there's nothing of any substantive or systemic value in Bill C-22 or Bill C-23.

We've raised 16 points—10 immediate action points need to be addressed today. They need to be addressed immediately. They've been studied extensively and repeatedly and, again, set out in 21 commissions, reports and studies over the last 30 years. The problem we have with Bill C-22 and Bill C-23 is that the scope of their focus is too narrow and doesn't focus on any of the systemic items that we've identified need to take place immediately.

Just to name a few—I've named 10 already in my initial presentation—there are others that we've communicated: addressing over-policing and over-criminalization of indigenous peoples; implementing a multi-pronged indigenous de-escalation strategy; and ensuring appropriate systems are in place for carefully and systemically investigating reports of crime and violence against indigenous victims. These are systemic items that have been identified on numerous occasions, and what we lack right now is the implementation.

**Ms. Pam Damoff:** Thank you, although mandatory minimum sentences, drug diversion and conditional sentences are also important.... I'm not arguing with you that there is a lot more that needs to be done, but I think that for a number of people who come in contact with the criminal justice system, those would make a difference.

I'm wondering if Mr. Brown and Mr. Sealy-Harrington want to add any comment.

**Mr. Daniel Brown:** Madam Chair, I'm happy to address this.

I can say that we really do applaud the government for introducing these changes to conditional sentences. I think they're going to make a huge difference.

It takes $330 a day, in fact, on average, about $100,000 a year, to house an inmate in custody. That $100,000 a year could be used for education programs, for addressing at-risk youth or even for hiring a prosecutor to get through some of these other cases. There is absolutely no reason not to bring these types of things back and to allow more people to simply resolve their cases without having to go to trial, to avoid these mandatory harsh jail sentences.

● (1305)

**Ms. Pam Damoff:** Does Mr. Sealy-Harrington have time to respond, Chair?

**The Chair:** You have 15 seconds or less.

**Mr. Joshua Sealy-Harrington:** Madam Chair, I'll just say that I spoke with Senator Kim Pate about my concerns about Bill C-22. If you listen to that interview, you'll be able to hear a detailed discussion about my support of certain aspects of it, but also my significant concerns with it.

**The Chair:** Thank you.

Thank you very much, Ms. Damoff.

We'll now go to Monsieur Fortin for two and a half minutes.

[*Translation*]

**Mr. Rhéal Fortin:** Thank you, Madam Chair.

I agree with Mr. Moore that there is a lot of talk about the entire administration of the justice system. In addition, I do agree with the witnesses that there are clearly elements for improvement in terms of barriers to be removed, among other things. So certain actions that are currently considered as offences shouldn't be.

That said, this entire situation is exacerbated by the problems experienced during the COVID-19 pandemic. I would like to hear Mr. Brown speak to virtual hearings.

I understand that those hearings have a significant impact, especially on determining the credibility of witnesses. What do you think are the advantages and disadvantages of virtual hearing, be they fully virtual or only partially?

[*English*]

**Mr. Daniel Brown:** One of the benefits, absolutely, is the fact that it's easy to get everyone in the same place at the same time. People don't necessarily have to travel from far distances.

One of the other benefits we hear from judges is the ability to see everyone's faces at the same time. Often a piece of evidence is heard, and the judge is trying to look in various places in the courtroom to gauge the reaction of the parties, to watch the witness or the accused person. This allows an opportunity to see the whole room. Those are the benefits.

The disadvantage is that we don't know what's happening behind the scenes. There may be cases—and we've certainly seen examples in the U.S.—where a witness is testifying, and the accused person is in the next room coaching them.

We do have some concerns about privacy and about whether or not the integrity of the system is being undermined in some cases. However, I think there are lots of advantages to focus on.

[*Translation*]

**Mr. Rhéal Fortin:** In terms of controlling time frames, do you not think that being able to proceed more quickly using the virtual method helps eliminate certain barriers?

[*English*]

**Mr. Daniel Brown:** In our experience, the resources that are required to run the courtroom, the staffing and the judges, don't change just because we've removed it from a physical courtroom to a virtual one. The problem isn't the courtroom case, then; it's the people who need to be in the courtroom to process the case, and that hasn't changed.

[*Translation*]

**Mr. Rhéal Fortin:** Thank you.

**The Chair:** Thank you, Mr. Fortin.

[*English*]

Last but not least, we'll now go to Mr. Garrison for two and a half minutes.

**Mr. Randall Garrison:** Thank you very much.

Earlier this week, we heard some disturbing testimony from the Elizabeth Fry Society about the impacts of COVID on the legal rights of those who are incarcerated at this time. The witness talked about sustained lack of access to legal counsel. She talked about delays and problems with access to parole hearings. I had a separate meeting with the Congress of Aboriginal Peoples, who raised those same concerns.

I'd like to ask Mr. Lafond to comment on the impacts of COVID on the access to the legal system and to legal counsel for those who are already incarcerated.

**Mr. Drew Lafond:** I'd just like to hark back to the results of the study we performed at the University of Saskatchewan that spoke primarily to jurisdictional issues. There were concerns raised about case delays and how processes, which have slowed since COVID, have had the effect of deferring the assertion or development of indigenous rights.

Specifically with respect to the delays in the justice system and the ability of accused to have their cases heard in a timely manner, this wasn't a central focus of the participants in the study. It was primarily dealing with the assertion of jurisdictional issues and the ability of different jurisdictions to co-operate with one another to have matters of conflict mediated or adjudicated in a timely fashion.

● (1310)

**Mr. Randall Garrison:** Thank you very much.

I wonder if other members of the panel have run into this problem of lack of access to legal counsel and an inability to access legal rights for those who are incarcerated during COVID.

**Mr. John Struthers:** I can address that, Madam Chair, very briefly.

It is a serious issue. As you know, jails are meant to keep things out. They have very thick walls, and it's even hard to run wires in, we're told, so the lack of communication to the jails is a serious problem.

We've been working with the regional justices and with the Ministry of the Attorney General and the Ministry of the Solicitor General to try to solve it. Communication is key to get things moving with our clients and with the Crown attorneys.

As a result, if we don't have the ability to get in by video to show a disclosure and by audio to get instructions, it will slow things down, so an investment in communication would be very welcome.

Thank you.

**The Chair:** Thank you very much for that. That concludes our rounds of questions. At this time, I'd like to thank our panellists, our witnesses, for their very compelling testimony today. If there are any shortcomings or anything you'd like to clarify, please do provide written submissions to the clerk. We'd be happy to receive them.

Thank you, everybody.

At this time the meeting now stands adjourned.