Presentation to the
Standing Senate Committee on
Legal and Constitutional Affairs

BILL S-217
AN ACT TO AMEND THE CRIMINAL CODE (DETENTION IN CUSTODY)

Remarks By:
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CACP Law Amendments Committee

Canadian Association of Chiefs of Police

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Introduction

Distinguished members of this Committee, my name is Dave Truax. I am a Detective Superintendent with the Ontario Provincial Police. I am joined here today by Rachel Hunstman, Q.C., legal counsel to the Newfoundland Royal Constabulary, and Lara Malashenko, legal counsel to the Ottawa Police Service. Together, we would like to express our sincere appreciation to this committee for allowing us the opportunity to speak on the important issues relating to bill S-217.

We are here today as representatives of the Law Amendments Committee of the Canadian Association of Chiefs of Police (CACP) and we are speaking on behalf of the President, Chief Clive Weighill and CACP members.

The mandate of the CACP is "safety & security for all Canadians through innovative police leadership". Ensuring the safety of our citizens and our communities is central to the mission of police services. Police officers discharge their obligations with professionalism and dedication in often

dangerous situations for their lives, as demonstrated by the tragic events in St. Albert in January 2015.

In this context, those who commit crimes repeatedly or do not comply with their conditions of release, often pose a significant safety risk to the public and to the police officers called upon to interact with them.

The Police, the Crown and the Court all have the opportunity to reduce this risk by making the decision to detain these high-risk offenders in custody while awaiting trial.

The decision to hold or to release has been described as an exercise in risk-assessment. Those who are duty-bound to protect the public must predict whether an offender will attend Court, re-offend, abide by release conditions. These important and far-reaching decisions on bail have to be made expeditiously. Just as is it is important that the high-risk offender be detained in custody, it is a Charter protected right that persons not be denied bail without reasonable cause.

In order to deal with these people according to law, the various stakeholders of the criminal justice system must have the relevant information before them when deciding their provisional release, remembering that the purpose of a bail hearing is to apply the criteria set out in s. 515(10) to the facts of the accused's case.

Bill S-217 proposes in particular to strengthen the rules of the Criminal Code to make sure that offenders whose detention is necessary, will not be released for lack of information about them. Our presentation will address issues that directly concern police work, namely the changes proposed by Section 2 of the bill, which refers to paragraph 518 (1) c) of the Criminal Code.

Overview

We support the objective of this measure. However, we wish to draw the attention to the honourable members of some unexpected impacts of this change and propose legislative alternatives that would achieve the desired objective

without compromising public safety or increase the delays that overwhelm our system of criminal justice, as CACP has already discussed before this Committee earlier this year.

CPIC

The Canadian Police Information Centre (CPI Centre), which maintains a national police information-sharing system, referred to as the CPIC system, links criminal justice and law enforcement partners across Canada and internationally. The information contained within this system includes the National Repository of Criminal Records (NRCR), as well as records pertaining to criminal investigations which are maintained by CPIC agencies across Canada.

The Alberta Report prepared by Nancy Irving in February 2016 devotes several pages about what should be in the contents of the bail packages prepared by policing agencies, and how best to ensure the information's accuracy and availability.

The report underscores how CPIC material is outdated, and how difficult it is to obtain information from other provinces or jurisdictions. The Alberta report recommends that police and prosecution services explore opportunities to increase information-sharing between provincial jurisdictions, including information on criminal convictions, outstanding charges and release orders.

Our RCMP colleagues, who manage the Canadian Police Information Centre, will further address the issue of CPIC. In relation to CPIC, we will limit ourselves to the following :

Accurate criminal record information has a direct impact on the proper administration of justice as this information is critical to the decisions made daily by police, prosecutors, judges, and correctional officers on matters such as release and bail, charge screening, plea negotiations, sentencing and offender management.

Public safety can be put at risk in the absence of complete and accurate criminal records.

The need for quick access to accurate records is perhaps the

most important in the arrest/release and bail stage.

The administration of criminal records is a shared responsibility involving all police services, which however are not legally required to provide criminal record information for adults to the RCMP.

It is important to note delays do exist between a conviction being rendered in court and the details being accessible through CPIC.

Additional information relating to outstanding charges where the individual is awaiting trial may be available through other law enforcement databanks, local police records or local court records.

Specifics of Bill S-217

Imposing a duty on the prosecutor to present evidence concerning criminal record, pending charges, failure to comply with a bail condition or to attend court when

required is a way to ensure that the police, the prosecutor and the judge shall give such circumstances the attention and importance required.

Apart from the question concerning the obligation to produce evidence, which we will return to in a moment, the bill provides that the prosecutor should establish "the fact" that the accused has a criminal record, pending cases, breach of conditions or failures to appear in court.

With respect to the proposed amendment under 518(1) (c), the obligation to provide/lead evidence requires further discussion and contemplation. We would therefore seek further clarification in terms of what this specifically entails. With the added wording of the prosecutor “shall” lead evidence to prove “the fact” in paragraphs I – III and V, it is unclear as to what the prosecutor is being required to do in order to lead this evidence. For example, will they be required to call evidence through the Investigating Officer, will affidavit evidence now be considered or will the introduction of a criminal record along with any other

information regarding the circumstances surrounding previous and current allegations suffice?

If these amendments contemplate the Crown leading evidence and proving the facts (akin to at trial) as opposed to obtaining relevant documentation from the police and presenting it to the court (i.e. by reading in this information), it is conceivable that this evidentiary requirement may significantly lengthen bail hearings (with further added pressures on police resources) and create further adjournments which could prove to be counter-productive in a system that is already strained and operating at full capacity.

Presumably, these requirements will apply in consent release situations as well. The proposed prosecutor's obligation to produce such evidence will fundamentally alter the way that bail hearings are conducted. It will lengthen bail hearings, necessitate additional adjournments, and mean more time in remand and more police resources. It will also no doubt create added pressures on police

resources if in fact police officers are going to be required to testify at every bail hearing and be required to put together more detailed bail briefs sooner.

In addition, it is important to consider that the current evidentiary burden at the bail hearing stage is a standard of balance of probability and elevating the criteria to prove a fact can conceivably raise the burden. For example, the rules of evidence (such as hearsay) are more relaxed at the bail hearing stage than at trial but imposing a requirement to prove a fact may suddenly create a higher standard of proof and can in effect, impact issues of admissibility.

Section 518 of the Criminal Code sets out the nature of the inquiries and the types of evidence that can be called at a bail hearing. This section not only sets out the evidence that the prosecutor may lead, but also permits the justice to make such inquires of the accused as he or she considers desirable. By permitting the justice to make inquires, we submit that Section 518 imposes a shared responsibility on

both the prosecutor and the justice to ensure that all relevant and necessary evidence is lead when deciding the issue of detention or release of the accused. While it is important to highlight what evidence the prosecutor can lead, we submit that it is equally desirous to legislate that the justice is also permitted to make these same inquiries of the accused. After all, under certain circumstances, the accused is arguably in the best position to speak (under oath if requested) to his/her criminal record, outstanding charges and failures to appear.

We propose an amendment to s. 518(1)(a) that would follow the essence of s. 518(1)(c) in that the section should specifically set out that the justice is permitted to question the accused on his/her criminal record, outstanding charges, and failures to appear along with any other inquires that the justice considers desirable. By specifically setting out these inquiries, we submit that these important circumstances would be considered by the presiding justice when he or she is making the decision to hold or release the accused.

Upon consideration of these issues, we propose that a shared approach be contemplated which enables the police to continue to assist the Crown by obtaining and providing the prosecutor with relevant information where reasonably possible and inquiries be made on the part of the justice to allow for a more complete analysis of the situation before them. Such a joint collaborative approach may assist towards positive change and avoiding tragic outcomes in the future.

We also believe that a provision inspired by section 737.1 (2) of the Criminal Code (restitution to the victim of offences) that would require the Justice of the Peace to inquire of the prosecutor if reasonable steps have been taken to obtain the material. This way, we would have a measure that alerts the prosecutor and the justice while ensuring flexibility.

Because of the constraints that we have previously discussed and the objectives of Bill S-217, we believe that legislative amendments would be useful to highlight the need to benefit

from the fullest possible information concerning the accused's criminal record, pending criminal charges and failure to comply with conditions or to attend court. Secondly, these measures should be feasible and consistent with the proper administration of justice, to ensure their effectiveness and sustainability in the interest of the safety of Canadians.

Sincere thanks are extended to this Committee for allowing the Canadian Association of Chiefs of Police the opportunity to offer comments and suggestions on Bill S-217. Merci.