Justice Centre
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Ensuring Judges Have the Facts: Protecting the Public and Accused Persons

Submissions on Bill S-217:
An Act to amend the Criminal Code (detention)

Brief to the Standing Committee on Justice and Human Rights

Presented by the

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Introduction

1. *Bill S-217, An Act to Amend the Criminal Code (detention in custody)* (hereafter, "Bill S-217"), is a legislative response to the slaying of RCMP Constable David Wynn by career criminal Shawn Rehn, who was out on bail when he murdered Constable Wynn on January 17, 2015. According to the Province of Alberta's subsequent report (the "Rehn Report"), Rehn had a lengthy criminal history of 206 charges and 68 convictions, ranging from property crime to drug, violence and weapons offences.[1] At the time of his final bail hearing, Rehn also had 29 new outstanding charges including fraud, resisting a peace officer, escaping lawful custody, possessing a prohibited firearm, failing to appear in court, failing to stop for police, dangerous driving and multiple charges for breaching bail conditions.[2]

2. At his Judicial Interim Release ("JIR")[3] application on September 14, 2014, neither Rehn's criminal record nor his outstanding charges were put before the Justice of the Peace who presided over the bail hearing. At that hearing, an Edmonton police constable agreed to the release of Rehn on a $4,500 cash bond and promises that he stay away from illegal drugs, prohibited weapons, and that he appear for his next court appearances.

3. If the justice of the peace had been made aware of Rehn's outstanding charges and lengthy criminal charges, including his historic and documented disregard for bail provisions and the authority of the Court, Rehn likely would have remained in custody. Rehn's release led to the murder of Constable Wynn, an entirely preventable tragedy. Bill S-217 is designed

[1] Rehn Report, pages, 7 and 8.
[2] Rehn Report, pages 5 and 6.
[3] Also known as a bail hearing, see section 11(e) of the *Canadian Charter of Rights and Freedoms*:

to ensure that the physical record of an accused will always be put before a judge at a bail hearing, without exception.

Prosecutors Already Lead Evidence to Prove the Record of an Accused

4. Today, physical criminal records are routinely produced to judges by prosecutors at bail hearings.[4] This is because prosecutors cannot make bare allegations to a judge that an accused has a criminal record without evidence to substantiate the allegation. The Crown introduces, or "leads" evidence to "prove" the record alleged, and does so by presenting a paper copy of the accused's record created by the Canadian Police Information Centre (known colloquially as a "CPIC Record" or simply a "CPIC"), often supplemented with information from the provincial database.[5] When a prosecutor introduces the physical paper record of an accused to a judge presiding over a bail hearing, the prosecutor is "leading evidence" to "prove that the accused has previously been convicted of a criminal offence".[6] A judge may take notice of the record under the current legislative scheme because it is produced by the Canadian Police Information Centre, and is therefore "credible and trustworthy"[7], absent contest from the accused.

[4] Producing the criminal record takes very little time or effort. Crown support staff create the file, and in the process of doing so obtain the CPIC for the prosecutor. A copy of the CPIC is typically disclosed to the accused in the disclosure package. It remains for the Crown prosecutor to provide a judge with a copy of the record and detail the offences contained therein.

[5] CPIC records are regularly found to be incomplete due to a substantial data entry backlog, hence the need for supplementation from the provincial databases. See, for example, *R. v Horne*, 2009 ONCJ 341 (CanLII), where the judge in that case opined that CPIC may not be fulfilling its mandate if it took a year and a half or longer to enter a conviction and sentence. Data entry errors in CPIC records also occur.

[6] See section 518(1)(c)(i) of the *Criminal Code*.

[7] See section 518(1)(e) of the *Criminal Code*: "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case." Also see *R. v. Brooks*, 2001 CanLII 28401 (ON SC) ("*R. v. Brooks*") at para. 26, where the Court stated that the CPIC record at a bail hearing should properly become an Exhibit.

5. The judge in *Piazza c. R.,*[8] summarized the pertinent sections of 518 of the *Criminal Code* as follows:

> According to section 518(1)(a), the Court may, subject to paragraph (1)(b), make such inquiries on oath or otherwise, of and concerning the accused as it considers desirable.
>
> Section 518(1)(c)(iv) allows the presentation of any relevant evidence showing the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused.
>
> Section 518(1)(c)(i) [and] (ii) allows the presentation of the accused's criminal record (pending cases and convictions).
>
> In virtue of section 518(1)(e), the Court may receive and base its decision on evidence considered credible or trustworthy.[9]

6. Section 518(1)(c) is currently used hundreds of times every week by the Crown to "prove" the record of an accused. It is entirely and astoundingly fallacious to suggest that requiring prosecutors to do what they are typically discretionarily doing anyway as a matter of course, will clog the system. It will not.

Accused Retains Right to Challenge Record Whether Bill S-217 Is Law Or Not

7. Bill S-217 would not remove or diminish an accused person's existing right to contest the record produced by a prosecutor. An accused person always has the right to contest the record tendered to the Court, as with any evidence produced by the Crown. The accused may say "that is not my record", or "parts of this record are inaccurate".[10] When this occurs, a prosecutor must call additional evidence in order to support the physical record. Bill S-217 does not change an accused's right to challenge the record, nor could it, as the removal

[8] 2014, QCCS 6559 (CanLII) ("*Piazza*")
[9] *Piazza*, paras. 51-54.
[10] See *R. v. Brooks*, where the prosecutor made a bare allegation that the accused had been convicted of a past offence, which the accused contested. The charge could not be substantiated against the Applicant. The accused was released on appeal.

of this critical component of the bail process would result in an infringement of section 7 and 11(e) *Charter* rights. Bill S-217 merely requires that at every bail hearing, a prosecutor "shall" (must) lead evidence to prove the existence of a prior record.[11]

8. The mistake which led to Constable Wynn's preventable murder was made by a police officer who was running the bail hearing. Today, Crown prosecutors run all bail hearings in Alberta, and across Canada. Unfortunately, having prosecutors run bail hearings (as opposed to police officers) does not ensure that the record will always be introduced to the Court at a bail hearing. In the previously mentioned case of *R. v. Brooks*, for example, the prosecutor failed to bring the record of the accused to Court, despite the fact that she intended to allege the existence of a prior charge. The Court in that case stated as follows:

> Unfortunately, Crown counsel failed to file the document which she asserted contained a statement of the applicant's prior criminal record. Ordinarily, a CPIC printout or equivalent should be made an exhibit. What resulted was a meandering and muddled discussion in which the court and the prosecutor directed questions to the applicant through counsel as to his prior criminal record. This inquisitorial approach is to be deplored. An accused is free to acknowledge the tendered record or not or to make no statement at all through counsel. The accused's right to silence and right against self-incrimination must be respected. Defence counsel herself, for whatever reason, failed to object and indeed participated in the exercise.[12]

***Charter* Considerations**

9. The failure of the Crown in *R. v. Brooks* to introduce the record, and the failure of the justice of the peace in that case to insist on its inclusion, both had an impact on the fairness

[11] The Crown in *R. v. Brooks* was not *required* to introduce the CPIC record. She was permitted to proceed without it, to the detriment of the accused in that case. Bill S-217 prevents this from occurring.
[12] *R. v. Brooks*, para. 26.

of the bail hearing process and the section 7[13] and 11(c)[14] and (e)[15] *Charter* rights of the accused person.

10. If S-217 is rejected, these mistakes will inevitably continue to occur. The case of *R. v. Brooks* illustrates the fact that the failure to produce the record of an accused at a bail hearing may infringe *Charter* rights and impact the fairness of the bail process.

11. There may also be other mitigating factors in the record of an accused which lend themselves toward release, such as a lengthy period of time with no convictions, which would be proven through production of the record, to the benefit of the accused person.[16] Procedural fairness mandates that a judge be aware of such information, especially if the Crown is aware of it.

Misstatements on the Effect of Bill S-217

12. Some witnesses before this Honourable Committee have argued that Bill S-217 would place an obligation on the Crown to produce a "certified" CPIC in order to "prove" the existence of prior criminal records.[17] With all due respect, this interpretation is in error. Certifying a document is merely proof that the copy produced is a true replica of the original. A certified CPIC could still be challenged by an accused, and the Crown may still be required to take additional evidentiary steps to substantiate the CPIC record. If there

[13] Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[14] Section 11(c): "Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence"
[15] Section 11(e): "Any person charged with an offence has the right not to be denied reasonable bail without just cause"
[16] This point becomes particularly relevant in cases of self-represented accused persons.
[17] See, for example, testimony of Rick Woodburn (President, Canadian Association of Crown Counsel), April 6, 2017 before the Standing Committee on Justice and Human Rights, where the witness opined that a certified copy of the record of each jurisdiction would be required in order to present it to the Court at a bail hearing if Bill S-217 became law.

were errors in the original document they would be duplicated in the certified copy; the error would be at the source of data entry.

13. Similarly, we see no merit to the argument of some that Bill S-217 would require a prosecutor to lead *viva voce* evidence as a matter of course at bail hearings, and thereby further hinder the operation of the bail system. Bill S-217 does not require a prosecutor to "prove" the record of an accused to a higher standard than is currently required through the tendering of the physical CPIC record. At a bail hearing, a judge decides what is "credible and trustworthy" evidence and makes his or her decision accordingly. Bill S-217 does not alter this standard of "proof" in the bail context. Bill S-217 *requires* a prosecutor to lead evidence to prove the existence of a prior record, something that is *already* occurring every time a CPIC is led in Court anyway.[18] Whether a prosecutor is *required* to lead the CPIC record, or whether this remains *optional* as is currently the case, an accused has a right to contest the record, and a right to challenge and cross-examine any witnesses called to substantiate it. Bill S-217 does not change this important procedural protection for the accused person. Absent contest from an accused, the usual physical paper CPIC would continue to be "evidence to prove the previous record of an accused" under an amended section 518(1)(c), just as it is today.

[18] With due respect to some witnesses who gave testimony before this Honourable Committee, certain aspects of Bill S-217 have been misstated. For example, Mr. Woodburn's emphatic opinion during his testimony on April 6, 2017, was that Bill S-217 changed "may lead evidence" to "shall prove" the record of an accused in section 518(1)(c). This is a misstatement in regard to Bill S-217.There is a difference between "shall lead evidence to prove" (the language in section 518(1)(c) and "shall prove", the phraseology which Mr. Woodburn repeatedly employed during his testimony. Bill S-217 does not employ the term "shall prove". Bill S-217 requires that prosecutors lead evidence to prove the record of an accused, a discretionary step already typically taken by prosecutors. Bill S-217 simply removes the discretionary component and requires the presentation of the record. The standard of proof remains in the judge's discretion – a judge is entitled to base his or her decision at a bail hearing on evidence considered "trustworthy and credible." That is the standard of proof under the current legislation, and Bill S-217 does not alter this.

14. Finally, it is section 518(1)(e) of the *Criminal Code* which permits hearsay evidence to be admissible in a bail hearing. At least one witness before the Honourable Committee on April 6, 2017, misinformed the Committee that it is section 518(1)(c) of the Criminal Code which currently permits hearsay evidence to be led by the Crown, and that changing the "may" to "shall" in that section would do away with the Crown's ability to lead hearsay evidence.[19] This is also incorrect.

15. The Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Canada*,[20] had the following to say in regard to section 518(1)(e):

> There are practically no prohibitions as regards the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified. **According to s. 518(1)(e) Cr. C.,** the prosecutor may lead any evidence that is "**credible or trustworthy**", which might include evidence of a confession that has not been tested for voluntariness or consistency with the Charter, bad character, information obtained by wiretap, **hearsay statements**, ambiguous post-offence conduct, untested similar facts, **prior convictions**, **untried charges**, or personal information on living and social habits. The **justice has a broad discretion** to "make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable" (s. 518(1)(a)). The process is informal; the bail hearing can even take place over the phone (s. 515(2.2)).[21] [emphasis added]

Prosecutorial Discretion

16. Prosecutorial discretion is an indispensable part of the Canadian criminal justice system. The Supreme Court of Canada stated in 2012 that "[n]ot only does prosecutorial discretion

[19] See testimony of Rick Woodburn, April 6, 2017 before the Standing Committee on Justice and Human Rights: "You say it says "may prove", what's the difference? In 516 we're allowed to use reliable hearsay, and that's because we shall not have to prove anything, as it stands right now. We use reliable hearsay, that's the press of the button, that's the synopsis, and our bail hearings are done." Mr. Woodburn is incorrect here, as well. Section 516 does not speak to the admissibility of hearsay evidence. See Appendix "A".
[20] 2010 SCC 21 (CanLII), [2010] 1 S.C.R. 721 ("*Toronto Star*")
[21] *Toronton Star*, para. 28.

accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law."[22]

17. The Supreme Court of Canada in *Krieger v. Law Society of Alberta*[23] provided the following examples of prosecutorial discretion: whether to prosecute a charge recommended by police; whether to enter a stay of proceedings in a prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings; and whether to take control of a private prosecution." [24]

18. More recently, the Court in *R. v. Anderson*[25] added to the list in *Krieger*, as follows: the decision to repudiate a plea agreement; whether to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; whether to negotiate a plea; the decision to proceed summarily or by indictment; and whether to initiate an appeal, or not.[26] Bill S-217 does not affect or diminish prosecutorial discretion as outlined here above.

19. The Court in *Anderson* noted that prosecutorial discretion was not without limits, and stated that "care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations."[27] The Crown, for example, cannot exercise discretion to withhold relevant evidence, such as the record of an accused person from the accused, but

[22] *Sriskandarajah v. United States of America,* 2012 SCC 70 (CanLII) at para. 27.
[23] 2002 SCC 65 (CanLII) ("*Krieger*")
[24] *Krieger,* at para. 46.
[25] [2014] 2 SCR 167 ("*Anderson*")
[26] *Anderson,* at para. 44.
[27] *Anderson* at para. 45.

has a constitutional obligation to disclose it.[28] Nor can a breach of constitutional rights be excused by prosecutorial discretion.[29]

20. Prosecutors are not guardians of their own interest, or the Crown's interest. They are guardians of the public interest.[30] They are taught that they are not to pursue "wins and losses,"[31] but rather their objective is to uphold the public interest in the administration of justice. It is uniformly and without exception in the public interest for a judge to see an accused's record at a bail hearing. And it was in Constable Wynn's best interest that Rehn's record be before the justice of the peace.

21. <u>There is no conceivable proper exercise of prosecutorial discretion which would justify withholding the record of an accused person in custody from the judge presiding at a bail hearing</u>. A prosecutor properly exercises discretion to lay a charge, and to oppose or grant release pending trial.[32] Once the Crown determines to oppose the release of an accused person, however, it has exercised the limits of its proper discretion at this stage of the proceeding. Thereafter, the decision to release an accused or not pending trial belongs to the judge, and the judge alone. Section 518(1)(e) of the *Criminal Code* is definitive on this

[28] See *R. v. Anderson*, at para. 45.
[29] See *R. v. Anderson* at para. 45: "Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence."
[30] *R. v. Proulx*, [2000] 1 SCR 61, para. 67.
[31] See, for example, *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16, where Rand J. stated, at pp. 23-24: "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."
[32] See, for example, *R. v. Brooks*, [2001] O.R. 533 at para. 22: "Crown counsel are expected to exercise discretion to consent to bail in appropriate cases and to oppose release where justified. That discretion must be informed, fairly exercised, and respectful of prevailing jurisprudential authorities."

point: “the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.” [emphasis added] As the murder of Constable Wynn shows, a judge in a bail scenario requires the record of an accused person to make an informed decision.

Conclusion

22. The amendment to section 518(1)(c) as proposed in Bill S-217 prevents human prosecutorial error by requiring that the physical paper record of an accused is presented at a bail hearing 100% of the time. The introduction of the accused’s record at a bail hearing is universally in the best interests of the Canadian public and the judiciary. The mandatory introduction of the record is also beneficial to protect the *Charter* rights of accused persons themselves, so that they may be aware of the case against them and any errors in the alleged record. Under the existing section 518(1)(c), the record of an accused is currently being led “to prove” that the accused has prior criminal history – there is no merit to the suggestion that Bill S-217 would create a higher burden of proof on prosecutors. The key test for evidence at a bail hearing remains unaltered under Bill S-217: a judge remains entitled to rely on all evidence that the judge considers “credible and trustworthy”. It is Section 518(1)(e) that permits the introduction of hearsay evidence, including the CPIC record of the accused. Bill S-217 not alter this.

APPENDIX "A": Excerpts from the *Criminal Code*

Section 515(10) of the *Criminal Code*

- **(10)** For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

  (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

  (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

  (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

  - **(i)** the apparent strength of the prosecution's case,
  - **(ii)** the gravity of the offence,
  - **(iii)** the circumstances surrounding the commission of the offence, including whether a firearm was used, and
  - **(iv)** the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Section 516 of the *Criminal Code*:

516 (1) A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused

Section 518 of the *Criminal Code*:

518 (1) *In any proceedings under section 515,*

- ***(a)*** *the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;*
- ***(b)*** *the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is charged, and no inquiry shall be made of the accused respecting that offence by way of cross-examination unless the accused has testified respecting the offence;*
- ***(c)*** *the prosecutor may, in addition to any other relevant evidence, lead evidence*
    - ***(i)*** *to prove that the accused has previously been convicted of a criminal offence,*
    - ***(ii)*** *to prove that the accused has been charged with and is awaiting trial for another criminal offence,*
    - ***(iii)*** *to prove that the accused has previously committed an offence under section 145, or*
    - ***(iv)*** *to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;*
- ***(d)*** *the justice may take into consideration any relevant matters agreed on by the prosecutor and the accused or his counsel;*
- ***(d.1)*** *the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence;*
- ***(d.2)*** *the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence; and*
- ***(e)*** *the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.*