An Interview with Professor Steve Coughlan on Bill c-75

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Weldon Times: Good afternoon, Professor. Thank you for sitting down to chat. Over the summer, Bill c-75 gained royal assent. There are numerous changes to substantive criminal law as well as criminal procedure contained in c-75. What, in your opinion, were the catalysts for the bill?

Steve Coughlan: I think there are probably three things that are most important to it. The first was the election of a new government. Now, it's not as though the fact that the Criminal Code was dreadfully out of date is a particularly political issue. It was equally neglected by liberal and conservative governments over many decades, but the new government coming in was talking about how it's going to address social justice issues and look at the criminal justice system. So, it seemed like a good time to engage in some lobbying with the government around how outdated the Criminal Code had become. A number of us who teach criminal law at law schools across the country wrote a letter to the Minister of Justice trying to highlight all of the various concerns there were with the Criminal Code, and we got some purchase with that. We were sort of engaged in some negotiations and discussions with the Department of Justice and the minister's office about what might be done.

As that was going on, the second catalyst came along: the Vader trial in Alberta. One of the issues that we had pointed out to the Department of Justice was the number of provisions which had been declared unconstitutional but nonetheless we're still in the Criminal Code. Now, the Vader trial was a very high-profile case where the accused, Travis Vader, was charged with having murdered an elderly couple in their RV. The judge, to his credit, decided that as a way of opening up the justice system to the public, he was going to live-stream his decision. So, he read his decision, live streamed it to everybody, and in that decision he relied on an unconstitutional provision in the Criminal Code in order to convict Travis Vader of murder.

WT: Well, that's not good!

***SC*:** That's not good. Now on the other hand the theory behind the open court system is that it allows those people to see what's going on and to detect error quickly, and that is exactly what happened. Immediately, people who are aware of this issue noticed what had occurred. And so people were tweeting about it, and of course, the media very quickly saw some of these tweets from criminal law academics saying: ”wait a second!” An appeal was launched, and it became a big public issue. The events, while obviously terribly unfortunate, had the effect of really driving home the point that the things that this group of criminal law academics had pointed out to the Minister of Justice we're not some abstract academic concern, but a thing with real world consequences. That, I think, gave the Department of Justice much more impetus to actually try to do some things to the Criminal Code.

The third catalyst, and I think this is the last one, to think about in this context is the *Jordan* decision about trial within a reasonable time and trial delay. That decision really lit a fire under everybody to try and make things operate more quickly. A lot of the provisions in Bill c-75 are clearly sparked

by that concern. They want to try and find ways to make the system operate more efficiently.

WT: It appears that the *Jordan* catalyst is what spurred the change in preliminary inquiries?

SC: Yes, I think so. It's ironic because that has the potential to backfire. The *Jordan* decision sets relatively strict ceilings within which time cases must be tried. But it sets two types of ceilings: a ceiling for cases which are tried in provincial court, and a ceiling for cases which are tried in superior court. The SCC's decision in *Jordan* allows more time for those cases tried in superior court. The whole reason that we give more time to cases that are tried in superior court is because they have a preliminary inquiry first. So, if you have now taken away 95% of the preliminary inquiries, you've taken away most of the justification for the higher ceiling for Superior Court trials. It's not going to be long before somebody makes that argument. So, I'm not sure that was a well-advised delay reduction technique.

WT: You were involved with advising the government on some of the changes that should be made to the Criminal Code. Can you tell us about your involvement?

SC: I was involved with a number of things. I've mentioned the letter; I was actually the primary drafter of that letter. I had a number of telephone conversations with a variety of people in the Minister's office and the Department of Justice. I flew up to Ottawa to meet with some senior people in the Department of Justice, and with a few other academics, we discussed the kinds of changes that might be done, and ways in which academics might be involved in helping with that. The Minister was already conducting a number of round tables on criminal justice reform, and I think the fact that we were now kind of waving our hands at her and saying "you should be listening to us," led to academics being invited to most of the round tables across the country, and their voices being heard. In addition, we've had continuing behind the scenes conversations about particular issues along the way.

WT: Let's talk about the hybridization of offences. C-75 reclassifies a large number of offences from solely indictable offences to what are known as "hybrid offences." These offences can be tried either as indictable or on summary conviction. This change has drawn some criticism from politicians. What is your opinion on the change? Why was the change needed?

SC: I don't know that it was needed. I take it that it is intended as a delay reduction technique because if the offence is indictable, then of course the accused has got the election, and they might elect Superior Court. But if the Crown is proceeding summarily, then it's necessarily going to provincial court. The vast majority of trials take place in provincial court now, and provincial court tends to be quicker in dealing with things. So, presumably the notion was that this gives the crown the ability to decide: "I'm going to treat this as a summary conviction offence and we're going to get through the system more quickly." This change certainly creates the mechanism to do that. Now, that's no guarantee that that is in fact what will happen, of course. Crowns could still continue to treat these more-serious offences as indictable offences, in which case there will be no change.

But the other changes which have happened to all summary conviction offences will still

be in place. Part of the package of this reform is not just that they changed some more-serious offences from purely indictable offences to hybrid offences, but also, as a consequence, the average seriousness of hybrid offences has gone up. Therefore, the average seriousness of things that might be treated as summary conviction has gone up. They've also changed the time limit on launching prosecutions for summary conviction offences. It used to be six months, now it's a year. They have also changed the maximum penalty for summary conviction offences. It used to be six months, now it's two years less a day. So, they have lumped in some formerly purely indictable offences as hybrid offences so that they are potentially summary conviction, and that has a potential benefit (that might or might not be realised), but the flip side of it is that for every summary conviction offence, it can be launched after a longer period of time and the potential penalty for the accused is four times what it used to be. So, there's definitely a trade off there. If we do get the benefits of Crowns deciding to treat more-serious offences as summary conviction and speed up the system that way, perhaps it is a reasonable trade off – but there's a big "if" there.

The other big "if" is whether it will actually work at all. In some provinces, in each province's "barrister and solicitor acts," or whatever they're called in the individual province, there is a limitation on what kind of cases article clerks or students at legal aid clinics are allowed to be involved in. In some cases, those are only for offences which have a maximum penalty of six months. This means that there's potentially a bar to article clerks taking these cases which might actually increase trial delay rather than decrease trial delay. Now, it's not that no one is aware of this issue, and certainly steps were being taken to try to work out this unintended problem created by the change. Certainly, if you created this situation, and it now meant that lawyers couldn't send their clerk to do a hearing, then that would actually slow down the system. So that's an issue that is being worked on. It is a provincial issue rather than a federal one.

WT: So, hopefully in the future that will see some change that may allow articling clerks to take on those cases?

SC: We might. Now, I don't know the situation in every province. It might well have been resolved in some provinces and might not have been a problem in the first place in some other provinces. it's a kind of thing that just varies according to the rules and jurisdiction.

WT: You mentioned preliminary inquires earlier. A big change to criminal procedure involves preliminary inquires. Preliminary inquires are now only available for offences punishable by fourteen years or more in prison. Could you expand a bit more on your opinion of this change and what impact you see the change having on the justice system?

SC: I'm quite divided on this one. I have been skeptical of the value of preliminary inquiries for a considerable period of time. They really were meant to have two rolls, one of which was to provide some kind of disclosure to the accused, and the other of which was to act as a filter to prevent unmeritorious cases from going to court. But there are far better disclosure mechanisms now because there is a charter guarantee of the right to disclosure – this didn't exist when primary inquires first began. Further, realistically they don't function as a filter either. The number of cases that fail to get past the preliminary inquiry stage basically rounds off to zero. It

is so rare for a case not to get past the preliminary inquiry stage, it's not really functioning as a filter anymore. So, I've been doubtful that they really had that much utility at all. I've been largely expecting that preliminary inquires might well end up being abolished at some point anyway. So, the fact that c-75 has left them still available in some places is a little surprising. It wouldn't have amazed me if the government had eliminated preliminary inquiries completely.

Now, on the other hand, defense counsel are very keen on preliminary inquiries. The issue is whether their reasons for being keen on them are legitimate reasons or not. Defence counsel present preliminary inquires as a good way to test the evidence in a way that merely having disclosure of what this witness is going to say or has said in a police statement, doesn't give them. That seeing that person on the stand, working out whether they are a good witness or a bad witness, or getting them to commit to a version of events on the stand and under oath that they then might contradict in their testimony at trial. Those things, I think, are legitimate ways to do it. However, it's certainly known that there are also instances, especially in cases of sexual assault, where it really seems as though the purpose of this cross examination in the preliminary inquiry is less to discover the evidence of this witness and more to make it very unpleasant for this witness to go any further. Essentially, to make them decide to back down. To the extent that removing preliminary inquiries is merely removing an opportunity to intimidate and harass witnesses, I don't think we should be worried about that loss. So, defense counsel are very keen on having that opportunity to cross examine before trial, and there are both legitimate and illegitimate reasons to want that opportunity. I'm in no position to judge which of those reasons is more prevalent.

WT: So, if preliminary inquiries really aren't functioning as they were originally supposed to, why do you think the government chose to keep them for offences which have the punishment of fourteen years or more in prison?

SC: Well they were originally going to be limited to s. 469 offences, which is a very few number of offences. I think the reason they didn't limit preliminary inquires to only s. 469 offences was largely because, at the committee stage, the government invites submissions from interested parties—one of whom is groups of defense counsel—and this is one of the things about which defence counsel was vocal. Clearly Parliament was persuaded that defence counsel had a legitimate point that preliminary inquires shouldn't be limited as much as the government had originally planned, but should still be limited somewhat, and so they've arrived at the compromise of fourteen years or more.

WT: For jury trials, c-75 eliminates peremptory challenges and modifies the procedure for challenging a juror for cause. The elimination of peremptory challenges is controversial. Proponents of the change argue that it stops counsel from eliminating jurors for arbitrary reasons, but opponents of the change argue that peremptory challenges are an important safeguard against the inclusion of possibly bias jurors. How do you think this change will impact jury trials in the future?

SC: It's definitely going to have a big impact, and I think it's important to look at it in light of one of the other changes: the role of the judge in the jury selection process. We can contrast those two. There's potentially

something fundamentally shifting in our approach to jury trials here. Our approach to jury trials has always been that, presumptively, any person is a fit juror for any other person. That's been a very strong presupposition within our jury selection process and it's the exact opposite of the approach taken in United States. In the United States a person gets called for jury duty and everyone is thinking "you're probably no good, but let's check." Potential jurors in the US get questioned for a very long time until people are satisfied and say "okay, will take you." So, jury selection takes a long time in United States. In Canada we take exactly the opposite approach. Some random person is called, and we think "yeah, they're probably good. If you think they're not, you prove it," and then we put severe obstacles in the way of proving it. So, we have a strong presumption that any person is a fit juror or for any other person. That is a reflection of our confidence in the general fair-mindedness of people.

On the other hand, we have recognised in the justice system over the past twenty-five years or so that that confidence in the fair-mindedness of people might be misplaced, especially when it comes to trials of Aboriginal people and people of colour generally. So, that particular rule – anyone can be a fit juror for anyone – has now become subject to an exception: unless there are possible issues of bias against the accused because of their race. So, we've allowed that exception to our general presumption that "anyone will do."

Other than that exception I just mentioned, because we've had this presumption that anybody will do, the strong principle on which our system has been built is *randomness*. We have always thought of a representative jury as a random jury. Representativeness has not meant "each characteristic in society is reflected on this jury, or every gender is equally reflected, every race is equally or is proportionally reflected." We have not only not meant that, we have explicitly rejected that. We have thought "*representatives means randomness*." Now, of course, peremptory challenges have always been difficult to reconcile with randomness because they allow the accused to eliminate from the jury a certain number of people. In the case of serious offences, twenty people can be eliminated, and if it's, say, three accused jointly charged with murder, that will be sixty people. Then the Crown gets another sixty because the accused had sixty. So, 120 people can be arbitrarily and individually removed from the jury pool. If somebody wants to exercise that power in a discriminatory way (either the Crown or of the defense), then these peremptory challenges completely overrides the principle of randomness. It's just not random. And if we have an accused, or for that matter a Crown, who thinks "well I want to make sure there are no visible minorities on this jury," in a lot of jurisdictions in Canada the number of peremptory challenges are greater than the number of people in a visible minority likely to have been among jury pool, and so the power could be used to stop those people becoming part of the jury. There's no question that peremptory challenges could be used in that way. Now, whether that is in fact the way they are used, whether that happens significantly, or whether that is only a very minor percentage of the times that it is used, I don't think we really have that information available.

If it was commonly used in a discriminatory way, then yes absolutely we should be getting

rid of peremptory challenges because they override both what we should think of as the legitimate involvement of visible minorities in the justice system, but also the principle of randomness that we are operating under. If on the other hand, the discriminatory use almost never happened, and people just used peremptory challenges because they're thinking "I don't know if I liked the way that juror looked at me. He looked at me kind of funny when he came in. I just don't trust him to sit in judgement," which is the rationale for the challenges, then perhaps we shouldn't get rid of the challenges. Nevertheless, Parliament has decided we are getting rid of them, and there is an argument for that.

Here's the thing that I say we have to look at in light of this change: another way which the government has changed the Criminal Code is that the judge now has an additional standby power. Judges have always had a standby power which is kind of a halfway house between excusing someone and not excusing someone. Trial always begins with the judge asking the members of the jury pool "well, is there anyone who wants to be excused?" People sometimes want to be excused, and it might be a very good reason like they're having surgery on the day the trial begins. The judge is going to say, "that's fine, you are excused." However, the person might not have a very good reason at all. The reason might just be, "Well, that's the day of the Blue Jays home opener." The judge is going to say to that person "well that's too bad but you're not excused." Sometimes though, the person's got a reason that isn't obviously good enough but it's not bad either. They might have this big trip planned which they could reschedule but don't really want to. And the judge can say to that person, "Tell you what, you just stand by. We have like 400 people in the room here. I'll make you number 400. So, just stand by." The person probably won't get called, but if they do, the judge will decide then if the excuse is good enough. What Bill c-75 has done is given the judge an additional standby power. That is, the ability to have a person stand by not just for reasons of personal hardship, but for the purpose of "maintaining public confidence in the administration of justice."

WT: Okay, what does that mean?

SC: That's the difficult question! Clearly, they did this in response to the Gerald Stanley trial which is the case where it's believed the defence counsel was excluding Aboriginal people from the jury. This is the case that has led to peremptory challenges being taken out of the Criminal Code.

WT: Yes, I was going to ask about the Stanley trial, but you have beaten me to it!

SC: Right, and so it's clearly in response to that. The conclusion seems inescapable that it likely means the judge should be trying to make the jury more reflective of the community, or something like that. Maybe we've got a room full of people, half men and half women, but because we call them in random order, we've called twenty men in a row and we're getting a lot of men on the jury. So, maybe the judge is supposed to think, "Well, I'm going to stand by the next few men until we randomly call a woman." Maybe the judge is going to think, "Well, there are people who are visible minorities in this room but none of their names are being called randomly. So, I'm going to stand by the people who aren't visible minorities until we get some of those people who are visible minorities called." If that's what the change means, and it's hard to see what else it could mean given the impetus for it, then that's actually fundamentally at odds with our

notion that jury representativeness means randomness. It is actually directing the judge to interfere with randomness to achieve a version of representativeness which has been explicitly rejected in the case law about juries up until now.

WT: So, if that's really the purpose, then it wouldn't it make more sense to just create a statute that says the jury must be representative of the social and cultural make-up of the community? But, as you have said, that is in conflict with the case law.

SC: Yes, right. So, it might be that we're seeing a shift here because, of course, you know Parliament can change the approach that we've taken, and the court will respond to what Parliament does. So, although the court has said that representativeness means randomness and does not mean trying to actively reflect every kind of membership in the community on the jury, if Parliament clearly says, "No, representativeness means reflecting societal make-up now," well then that's what courts will start doing. Now, it looks like that's what the change to the Criminal Code is doing, but it's not clear. So, I think it's actually going to be a real dilemma for judges who are dealing with jury selection to try to work out what to do. Do I, as a judge, keep doing what the Supreme Court of Canada has very clearly directed me to do or do I start doing what Parliament has kind of hinted but not clearly said to do?

WT: So, this is going to be a live issue? It's going to be one to watch.

SC: I think so. I don't think it's been much observed in all the commentary on c-75, but I think it's got real potential to cause confusion.

WT: We have discussed some of the notable changes c-75 makes to criminal law and procedure. What is the most important or likely-influential change in your opinion? Are there any other important changes that you think our readers should be aware of?

SC: Yes, I think the biggest change in c-75 is arguably the best one. It's one we haven't talked about yet. It is the concept of administration of justice offences and the creation of this new thing called a "judicial review hearing." I think the rationales for this, there are several of them, all come together to make this a really clever idea.

One of the problems already talked about in the criminal justice system is trial delay. Trial delay is partly caused just by volume of work. Roughly 20% of cases in the criminal justice system are people violating bail conditions, people who were supposed to show up on a particular date for trial but missed the trial date. There are separate offences in the Criminal Code for these kinds of actions and those people are charged with a new offence. So not only are they charged what they were originally charged with, but they are charged with an additional offence as well.

As I said, about 20% of the total caseload courts are dealing with are those kinds of offences. In addition, those kinds of offenses have been particularly noted in a number of studies as one of the sources of Aboriginal overrepresentation in the criminal justice system. It becomes a kind of revolving door where you miss one court date and now, suddenly, you're one charge has become three charges. It becomes harder to comply with the conditions because they are stricter, and so now you're one charge has become seven charges. You eventually get to court and end up with a criminal record for seven things, or

in some cases six things because you're acquitted of the thing you were originally charged with, but you're convicted of six offenses along the way.

It's a problem for everybody, but it's a particular problem, a number of studies have identified, contributing to aboriginal overrepresentation. And it's unnecessary because the reason that we're prosecuting people for these sorts of things is really just as a way of trying to make them comply with the conditions, and make sure they show up to court on time. These kinds of offences are not like theft, assault, or most criminal offences. This is why c-75 has created this concept of administration of justice offences. The idea being that we told you to do something and you didn't do it.

WT: So, it's not quite below the "don't be a jerk line?" A phrase I'm sure your 1L class will soon come to know.

SC: Right yes, at least it isn't often below that line. It might be that we can get you to start complying with your bail conditions in some other way than actually charging you with an offence for failing to comply with your bail conditions! Maybe we just need to reconsider your bail conditions. All we are really trying to do is make sure people comply with conditions of their release. We can do that without charging them with an offence for failing to comply. So, the government has created this notion of administration of justice offences, and they've created the concept of a judicial review hearing which is a way to deal with these kinds of breaches which does not involve laying an additional charge. I think that for everybody that's good because these are relatively minor offences, that probably should not have been criminal in the first place now won't be charged, and this ought to have particular benefits for Aboriginal people as well. It should also remove a significant portion of that 20% caseload which will allow the system to operate more efficiently as well. So, the notion of administration of justice offences and judicial review hearings, once that gets into full swing, I think is something with real promise.

WT: So, are these administration of justice offences some kind of regulatory offence?

SC**:** They're not really offences at all. The person who fails to comply gets called to a judicial review hearing and the judge in the judicial review hearing can do a number of things, such as drop the problematic condition, or keep it exactly as it is, or even make the conditions stricter, but without dealing with it as an offence. Now, the original offences haven't been removed, so it's possible to still charge someone, but c-75 creates an alternative to charging them. We are just trying to get people to comply without using criminal sanctions.

WT: Finally, I would like to touch on Bill c-51, which gained royal assent in December of 2018. C-51 eliminated many legal burden reverse onus provisions in the Criminal Code. Tell us a little about these changes?

SC: What C 51 did in that regard was take a look at many offences which included something like, "In the absence of legal excuse the proof of which lies on him." These burdens are phrased in various ways but essentially those kinds of phrases. The example that I've used in class around it is that of, "Being in possession of a forged passport without lawful excuse the proof of which lives on him." In virtually all of these kinds of provisions they've just chucked out the words, "the proof of which lies on him."

In practical terms, I'm not sure this makes a huge difference because it strikes me that, realistically, most of those circumstances captured by these offences are ones where a judge would be perfectly entitled, on a common sense basis, to think that the accused doesn't have a legal justification or excuse, and stick to that permissive presumption unless the accused offers something to rebut it. Basically, the Crown is going to prove absence of lawful justification from the fact that the accused has not offered any justification. So, although we have removed the legal burden on the accused, realistically, we would expect the accused to tell the court if they had some kind of lawful excuse. It is still in accordance with the presumption of innocence to reason that, unless the accused has offered some excuse, the accused doesn't have one. So, in terms of its impact in the real world, I wouldn't imagine that there are a lot of people out there who formerly would have been found guilty who are now going to be acquitted. I suspect it won't have a huge impact on results, but it does mean that we've removed a lot of reverse onuses from the Criminal Code, which is a sensible thing to do. These onuses violated the presumption of innocence, whether they were saved under s. 1? Maybe, maybe not. But a lot of them really weren't all that important. I think there's some value in making our statutes conform to the charter.

The Weldon Times would like to thank Professor Coughlan for graciously making time to speak with us.