

Learning From Those on the Ice: The Impact of Bill C-75 on Nunavummiut

Cassandra Richards

ON MARCH 29, 2018, the Liberal Government introduced Bill C-75, which received Royal Assent on June 21, 2019. The sweeping legislation has implemented various amendments throughout the *Criminal Code*, including provisions targeted at addressing intimate partner violence (IPV). One such amendment has sparked criticism: the introduction of a reverse onus at bail for an accused charged with a violent offence against an intimate partner if they have a prior conviction for a similar offense.

Through qualitative interviews undertaken with seven Nunavut lawyers, this research considers the impact of Bill C-75, specifically the reverse onus in cases of IPV, on Nunavummiut. The paper argues that the introduction of the reverse onus will not only disproportionately and detrimentally affect Nunavummiut accused, it will simultaneously fail to keep complainants and society safer. In effect, “tough on crime” mentalities will continually perpetuate IPV in Nunavut. This paper urges its readers to think about solutions to IPV for Nunavummiut in a holistic manner, looking outside the criminal justice system. Through Inuit Qaujimajatuqangit, empowering communities is the first step to addressing IPV, improving well-being, and ensuring the protection of human dignity.

LE 29 MARS 2018, le gouvernement libéral a présenté le projet de loi C-75. Celui-ci reçut la sanction royale le 21 juin 2019. Cette législation de grande envergure a provoqué une variété de modifications s’appliquant à l’ensemble du *Code criminel*, y compris des dispositions visant la violence conjugale [ci-après «VC»]. Plus particulièrement, une de ces modifications a suscité des critiques : l’introduction d’un renversement du fardeau de la preuve lors de la mise en liberté sous caution d’une personne ayant été accusée de violence conjugale, si cette personne a déjà été déclarée coupable d’une telle infraction antérieurement.

En se basant sur des entrevues qualitatives menées avec sept avocats travaillant au Nunavut, cette recherche examine l’incidence du projet de loi C-75, plus particulièrement le renversement du fardeau de la preuve dans des cas de VC, sur le Nunavummiut. L’article soutient que, non seulement l’introduction du renversement du fardeau de la preuve affectera de façon disproportionnée et préjudiciable les accusés Nunavummiuts, mais que simultanément, ceci minera la sécurité des plaignantes ainsi que celle de la société. En effet, un tel courant de pensée, se voulant plus sévère vis-à-vis la criminalité, fera perpétuer la VC au Nunavut. Cet article invite ses lecteurs à réfléchir à des solutions holistiques pour éliminer la VC en cherchant au-delà du système de justice pénale. Selon la pensée Inuit Qaujimajatuqangit, l’autonomisation des communautés est la première étape à suivre pour combattre la VC, améliorer le bien-être et assurer la protection de la dignité humaine.

CONTENTS

Learning From Those on the Ice: The Impact of Bill C-75 on Nunavummiut
Cassandra Richards

- I. Introduction 159
- II. Understanding Bail: Now, Tomorrow, and in Nunavut 161
 - A. Administering Criminal Justice in Nunavut 161
 - B. Overview of the Current Bail System 163
 - C. The Future of Bail: Overview of Bill C-75 166
 - D. Clause 225: Introducing a Reverse Onus in Situations of Intimate Partner Violence 167
- III. Learning from Those on the Ice: The Impact of Bill C-75 on Nunavummiut 174
 - A. Research Methodology 174
 - B. Overview of Findings 174
 - C. General Concerns 175
 - 1. Constitutional Scrutiny 175
 - 2. The Role of the Justice of the Peace 177
 - 3. The Perspective of the Accused 178
 - 4. Obtaining Bail & Release Conditions 178
 - 5. Remand Increase 182
 - 6. Guilty Pleas 184
 - D. The Perspective of Complainants & Society 185
- IV. Addressing Intimate Partner Violence Through Empowerment: *Pilimmaksarniq* 186
 - A. *Pilimmaksarniq*: Empowerment the Inuit Way 187
 - B. Addressing Systemic Drivers of Disempowerment in Nunavut Communities 188
 - C. Empowering Nunavummiut Women Within the Criminal Justice System 190
- V. Conclusion 193

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I. INTRODUCTION

On March 29, 2018, the Liberal Government introduced Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (the Bill).¹ The Bill received Royal Assent on June 21, 2019. The sweeping legislation proposed various amendments throughout the *Criminal Code*, including provisions targeted at addressing intimate partner violence (IPV). One such amendment has sparked criticism: the introduction of a reverse onus at bail for an accused charged with a violent offence against an intimate partner, if the accused has a prior conviction for a similar offence.² This amendment departs from the general approach to bail by encouraging a presumption of detention, likely separating the accused from the complainant and society.

Indeed, the self-proclaimed feminist government's attempts to address IPV are laudable given the devastating nature of this phenomenon. Urgent action is especially necessary in Nunavut, the jurisdiction with the highest

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1 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, (assented to 21 June 2019), SC 2009, c 25 [Bill C-75].

2 *Ibid*, ss 225(6)–(7).

incidence of IPV.³ The Qimavvik Women's Shelter (Qimavvik), an emergency shelter for women and children fleeing IPV in Iqaluit, epitomizes these statistics. Continuously over capacity and underfunded, the shelter attempts to mitigate the enormous shortcomings of social services available throughout Nunavut.⁴ Those who work at Qimavvik and individuals who use its services are yearning for an end to violence. Will the introduction of the reverse onus create an environment conducive to diminishing IPV in Nunavut? What will this look like on the ground for shelters like Qimavvik and its clients?

Through qualitative interviews undertaken with seven Nunavut lawyers, this research considers the impact of Bill C-75—specifically the reverse onus in cases of IPV—on Nunavummiut.⁵ The following argues that the introduction of the reverse onus will not only disproportionately and detrimentally affect Nunavummiut accused, it will simultaneously fail to keep complainants and society safer.

This paper is organized into three parts. Part one provides an overview of the administration of criminal justice in Nunavut with a particular focus on the bail system. A synopsis of Bill C-75 is provided, focusing on the introduction of the reverse onus in cases of repeated IPV. Part two examines the findings of this research derived from qualitative interviews with lawyers in Nunavut. Lawyers' perceptions of the impact of the introduction of the reverse onus on Nunavummiut are considered from the points of view of the general administration of justice, accused persons, as well as complainants and society. This paper's key finding is the disjuncture between Bill C-75's amendments and the realities of administering justice in Nunavut. Part three briefly considers alternate avenues to addressing IPV in Nunavut through *pilimmaksarniq*,⁶ both outside and within the criminal justice system. This paper urges its readers to think

3 See Chris Durrant, "None of That Paper Stuff Works: A Critique of the Legal System's Efforts to End Domestic Assault in Nunavut" (2014) 19 Appeal 43 at 44.

4 See Michelle LeTourneau, "No Way Out: Women Fleeing Violence—A Life-Threatening Cycle", *Nunavut News* (11 August 2018), online: <www.nunavutnews.com/nunavut-news/no-way-out-women-fleeing-violence-a-life-threatening-cycle/>.

5 Nunavummiut is the plural demonym for the residents of Nunavut. Nunavummiuq is the singular demonym. Nunavummiut includes the Inuit population and Nunavut's non-Inuit residents.

6 "Empowerment". See Pauktuutit Inuit Women of Canada, "Research Report: Applying Inuit Cultural Approaches in the Prevention of Family Violence and Abuse" (30 April 2005) at 9, online: <www.pauktuutit.ca/project/research-report-applying-inuit-cultural-approaches-prevention-family-violence-abuse/>.

critically about the criminal justice system. Can Bill C-75 truly effect change for Nunavummiut?

II. UNDERSTANDING BAIL: NOW, TOMORROW, AND IN NUNAVUT

A. Administering Criminal Justice in Nunavut

Nunavut is no longer a colony of Canada. However, the colonial legacy seeped into many aspects of life in Nunavut can be tragic and debilitating, particularly in the criminal justice system. This system was deliberately imposed as a means to control Inuit populations within Canada's colonial regime.⁷ While the current system has sought to rid itself of its colonial legacy, the colonial framework remains largely intact. Inuit justice is constricted within the structures of the dominant white, southern discourse: "...the use of interpreters, local justices of the peace, diversion programs, provisions for unilingual Inuktitut-speaking jurors, and elders' panels sitting with judges—are just 'crumbs' thrown at aboriginal communities."⁸ Ultimately, the Canadian colonial legacy cannot be divorced from attempts to understand and reshape criminal justice in Nunavut.

Considering the colonial legacy in Nunavut leads to an understanding of who disproportionately interacts with the criminal justice system. Nunavut has the highest violent crime rate⁹ and the highest rate of incarceration in Canada.¹⁰ Almost 100% of individuals interacting with the criminal justice system in Nunavut are Aboriginal.¹¹ The majority of cases unfolding in Nunavut's criminal courts involve a male accused.¹²

In 2016, Census data indicates that the population of Nunavut was 35 580, of which 84% of the inhabitants were Inuit.¹³ Nunavummiut span

7 See Holly A McKenzie et al, "Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses" (2016) 7:2 Intl Indigenous Policy J 1 at 1.

8 Jim Bell, "Nunavut Courts a Scene of Ethnic Conflict: Researcher", *Nunatsiaq News* (3 September 2004), online: <www.nunatsiaq.com/stories/article/nunavut_courts_a_scene_of_ethnic_conflict_researcher>.

9 See Benjamin Perrin & Richard Audas, *Report Card on the Criminal Justice System #2* (Ottawa: Macdonald-Laurier Institute, 2018) at 31 [Perrin & Audas, *Report Card*].

10 See Canadian Centre for Justice Statistics, *Adult and Youth Correctional Statistics in Canada, 2016/2017*, by Jamil Malakieh, Catalogue No 82-002-X, 28 June 2018 update (Ottawa: Statistics Canada, 19 June 2018) at 14.

11 *Ibid* at 17.

12 All interviews.

13 See Statistics Canada, *Census Profile, 2016 Census: Nunavut [Territory] and Canada [Country]*, Catalogue No 98-316-X2016001, 29 November 2017 (Ottawa).

across 25 communities, covering approximately 20% of Canada's land mass.¹⁴ The Nunavut Court of Justice, located in Iqaluit, is the only courthouse in Nunavut. Therefore, Nunavummiut living outside of Iqaluit are served by circuit courts.¹⁵ While the number of circuits continues to increase, the frequency of court sittings in communities is highly dependent on population, geographical location, and unpredictable weather. The circuit court schedule and its inherent delays cause emotional distress for complainants, accused, and communities. While processing times have improved, a traveling court simply cannot accommodate the immediacy of resolution needed by those receiving justice in small communities.¹⁶ In *R v Anugaa*, Justice Bychok illustrated the unique geographical challenges in administering justice in Nunavut:

Distances between our communities are immense: Kugluktuk is 3,392 kilometres from Iqaluit. Arctic Bay is 1,229 kilometres from Iqaluit. To get to five of our communities, the Court must stay overnight in Yellowknife. To get to Sanikiluaq, we must travel via Montreal. Flight times alone to western Kitikmeot can consume up to seven hours. Not surprisingly, the Court's travel budget alone for 2016–17 was \$2,486,000.¹⁷

Nunavut's vast geographical landscape is not the only challenge to administering justice. All judicial proceedings are conducted in English. For many Nunavummiut, particularly residents outside of Iqaluit, Inuktitut or Innuinaqtun is their first language. While Inuit court workers and interpreters assist with translation, this is often insufficient. The colonial language imposition¹⁸ causes difficulty in understanding legal proceedings

14 See Nunavut Department of Executive and Intergovernmental Affairs, "Community Information", online: <www.gov.nu.ca/eia/information/community-information>; Nunavut Department of Executive and Intergovernmental Affairs, "Nunavut FAQs", online: <www.gov.nu.ca/eia/information/nunavut-faqs>.

15 The court system (judges, court staff, interpreters, and lawyers) travels to the community and sets up court to conduct judicial proceedings for residents.

16 See Scott Clark, "The Nunavut Court of Justice: An Example of Challenges and Alternatives for Communities and for the Administration of Justice" (2011) 53:3 Can Journal Corr 343 at 350.

17 2018 NUCJ 2 at para 27 [*Anugaa*].

18 I approach with caution the use of the words "differences" or "barriers" when speaking of challenges in administering justice in Nunavut. While literature often characterizes linguistic and cultural differences as barriers, they are better described as impositions of an illegitimate system in the eyes of Nunavummiut. Speaking of these impositions as barriers reinforces the legitimacy of the colonial system. Nunavummiut should not have to overcome barriers, rather the system should be created for those it serves.

and often impedes an individual's sentiment regarding meaningful justice. Conducting proceedings in English contributes to many Nunavummiut feeling detached from the justice system.

Language impositions are only the tip of the iceberg when examining the transplantation of foreign justice in Nunavut. Aupilaarjuk et al insist that traditional Inuit law—based on *piqujait*,¹⁹ *maligait*,²⁰ and *tirigusuusii*²¹—is often appropriated, translated, and imposed into contemporary Canadian law, yet “derive[s] from completely different cultural perspectives.”²² Hence, the perception of many Nunavummiut engaged in the criminal justice system is negative and adverse, sometimes even hostile. Consequently, the system,²³ fundamentally rooted in its inherent colonial nature and perceived continuing failures, faces significant legitimacy issues in the eyes of those it serves.²⁴

This major issue was echoed by all interviewees: “[i]t’s a southern-based system which isn’t taking into account the unique circumstances of Nunavut.”²⁵ Another lawyer insisted that “[t]here is a major disconnect between accused, victims, witnesses, and the administration of justice because it is largely unfamiliar [and] fails to incorporate Inuit conceptions of justice.”²⁶ As will be further discussed, the Canadian system’s failure to place Inuit conceptions of justice at the forefront of legal changes, and the lack of consideration for the unique circumstances of administering justice in Nunavut, have devastating impacts. This pattern has equally persisted within amendments in Bill C-75, questioning its ability to truly effect change for Nunavummiut.

B. Overview of the Current Bail System

The bail system is a crucial crossroads in criminal procedure for all parties affected by alleged crimes. Upon arrest, actors in the criminal justice

19 What had to be followed. Mariano Aupilaarjuk et al, *Inuit Laws: Tirigusuusii, Piqujait, and Maligait*, 2nd ed by Jarich Oosten, Frédéric Laugrand & Willem Rasing (Iqaluit: Nunavut Arctic College Media, 2017) at 2.

20 What needs to be done. *Ibid* at 3.

21 What shouldn’t be done. *Ibid*.

22 *Ibid* at 2.

23 Legitimacy issues plague all aspects of the justice system in Nunavut, including family, youth protection, health, and housing systems.

24 Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (North York: University of Toronto Press, 2016) at 266.

25 Interview of Lawyer 1 (22 November 2018).

26 Interview of Lawyer 5 (25 November 2018).

system engage in an “exercise of broad discretion” to determine whether the accused should be released prior to trial.²⁷ Police have a variety of options to release an accused after arrest, via an appearance notice, summons, or undertaking. If, however, police believe that the accused should be detained, an accused must be brought before a Justice or Justice of the Peace (JP) within 24 hours for a bail hearing.²⁸ At a bail hearing, an accused may be detained on one or more of the three grounds established by the *Criminal Code*.²⁹

The bail system seeks to balance the protection of society and the complainant against the rights of the accused. The rights of the accused—notably the right to not be denied reasonable bail without just cause,³⁰ the right to liberty,³¹ and the presumption of innocence³²—must guide all bail decisions. Upholding these rights not only requires evaluating contested bail hearings from the default position that, “save for exceptions, [bail will be granted on] an unconditional release on an undertaking,”³³ but also ensuring that “release is favoured at the earliest reasonable opportunity on the least onerous grounds.”³⁴ Therefore, “jail is not the default position when someone is charged with a criminal offence.”³⁵ An individual serving pre-trial detention remains innocent and thus the detrimental punitive impacts of imprisonment must be minimized.³⁶

Unfortunately, in practice, detention rather than release is often the starting point in many bail proceedings, despite this being fundamentally contrary to Canadian law.³⁷ Recently, in *Antic*, then Justice Wagner pointed

27 Gary T Trotter, *The Law of Bail in Canada*, 2nd ed (Scarborough: Carswell, 1999) at 44 [Trotter, *Law of Bail*].

28 See *Criminal Code*, RSC 1985, c C-46, s 503(1).

29 *Ibid*, ss 515(1)(a–c). The primary ground is whether it is necessary to detain the accused to ensure their attendance in court. The secondary ground considers whether there is a substantial likelihood the accused will commit further offences or interfere with the administration of justice if released. The tertiary ground is whether detention is necessary to maintain confidence in the administration of justice.

30 *Canadian Charter of Rights and Freedoms*, s 11(e), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

31 *Ibid*, s 7.

32 *Ibid*, s 11(d).

33 *R v Antic*, 2017 SCC 27 at para 67(c) [*Antic*].

34 *Ibid* at para 29, citing *R v Anoussis*, 2008 QCCQ 8100 at para 23.

35 Gary T Trotter, *Understanding Bail in Canada* (Toronto: Irwin Law, 2013) at 6 [Trotter, *Understanding Bail*].

36 Trotter, *Law of Bail*, *supra* note 27 at 41.

37 The starting point is an accused will be released on the least onerous conditions possible. The Crown must prove why an accused should be detained. See Department of Justice Canada,

to the “widespread inconsistency in the law of bail,”³⁸ and the troublesome phenomenon that “[a]lthough the *Charter* speaks directly to bail, the bottom line so far has been that remand populations and denial of bail have increased dramatically in the *Charter* era.”³⁹ Webster explains that “[i]n practice, all of the principal players in the decision-making process relative to bail would appear to have chosen to ‘play it safe’ by either opposing bail or passing along the decision to someone else. Indeed, any rational decision-maker in our current risk-averse society will favour detention...”⁴⁰

As a federal jurisdiction, the legal rules described above apply in Nunavut. Yet, how these rules are realized on the ground diverges from many jurisdictions across Canada. In “Polar Bail: An Introduction to the Community Bail System in Nunavut,” McNair and O’Connor describe how the unique circumstances in Nunavut have impacted the practice of bail:

The Hamlet of Igloolik is 858 kilometers from the only courthouse in the territory of Nunavut. So, if you’re arrested in Igloolik and held for bail, you’re having a bail hearing by telephone conference or you’re not having a bail hearing until after you’ve been flown, in RCMP custody, to the territorial capital of Iqaluit. There are over 20 remote communities in Nunavut where an accused person under arrest faces a similar system; it is usually only in Iqaluit that accused persons have their bail hearings with in-person access to their defence lawyer and in the same room as the presiding [JP].⁴¹

The situation described above illustrates the challenges inherent in conducting bail hearings for an accused in a remote community, as well as the immense repercussions on an accused should they be detained. Nunavummiut in remote communities do not benefit from the reassurance of having their lawyer present. This creates additional obstacles for lawyers attempting to obtain instructions from clients and contact family members and friends when creating a release plan.⁴² More importantly, the physical absence of the lawyer in the community influences an accused’s

Research and Statistics Division, *Broken Bail in Canada: How We Might Go About Fixing It*, by Cheryl M Webster, Catalogue No J4-73/2015E-PDF (Ottawa: DOJ RSD, 2015) at 3 [Webster].

38 *Supra* note 33 at para 64.

39 *Ibid* at para 64, citing Kent Roach, “A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?” (2008) 40:2 SCLR 717 at 727.

40 Webster, *supra* note 37 at 4.

41 Will McNair & Shannon O’Connor, “Polar Bail: An Introduction to Community Bail System in Nunavut”, *For the Defense* 38:4 (December 2017) 25 at 25.

42 Interview of Lawyer 4 (21 November 2018).

emotional state, as well as their feelings of being heard and appropriately represented.⁴³

The period immediately following an arrest is crucial for an accused, particularly a first-time offender.⁴⁴ It has been recognized that “a bail hearing is arguably the single most important step in criminal proceedings,” given the negative impact of pre-trial detention.⁴⁵ The impacts of release and detention will be discussed in further sections. Moreover, this paper will demonstrate that these adverse effects disproportionately impact many Nunavummiut.

C. The Future of Bail: Overview of Bill C-75

Bill C-75's foundational objective is to address rampant court delays throughout the criminal justice system.⁴⁶ While the majority of the Bill aspires to make all stages of criminal proceedings more efficient, it also implements bail reform, abolishes preemptory challenges in the jury selection process, decreases the availability of preliminary inquiries, and addresses the criminal justice system's response to IPV.⁴⁷

Then Minister of Justice Wilson-Raybould stated that Bill C-75 is the product of three years' worth of substantial and holistic consultations with stakeholders in all provinces and territories.⁴⁸ Round tables took place across the country, online surveys were conducted, and the Standing Committee on Justice and Human Rights was established, which included testimony from 138 witnesses, dozens of written submissions, and hours

43 Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 7 (29 November 2018).

44 Trotter, *Law of Bail*, *supra* note 27 at 37.

45 Justice S Casey Hill, David M Tanovich & Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Thomson Reuters, 2016) at 35-2.

46 See Department of Justice Canada, *Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)*, Catalogue No J2-483/2018E-PDF (DOJ, August 2019) [Department of Justice Canada, *Legislative Background*]. The Bill is largely in response to *R v Jordan*, 2016 SCC 27, which established a new ceiling beyond which delays are presumed unreasonable. These amendments are also influenced by the Supreme Court's decision in *R v Cody*, 2017 SCC 31, which affirms at para 1 the Supreme Court's commitment to ending “the culture of complacency towards delay in the criminal justice system”.

47 Department of Justice Canada, *Legislative Background*, *supra* note 46 at 15.

48 “Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts”, 3rd reading, House of Commons Debates, 42-1, No 354 (20 November 2018) at 1035 (Hon Jody Wilson-Raybould).

of debate and discussion.⁴⁹ As of June 21, 2019, the Bill received Royal Assent, becoming the law of the land.⁵⁰

The last comprehensive revision of bail provisions occurred in 1972; therefore, reform is long overdue.⁵¹ The Bill seeks to address three main issues surrounding bail. First, it seeks to address Canada's "pre-trial detention problem."⁵² Despite decreases in custodial sentences throughout Canada, the remand population continues to grow.⁵³ Second, the amendments seek to address the overrepresentation of Indigenous persons and accused from vulnerable groups who are traditionally and disproportionately disadvantaged within all judicial proceedings, but specifically the bail process.⁵⁴ For example, the rampant use of sureties has disproportionate impacts on accused and sureties from remote Indigenous communities.⁵⁵ Third, the bail amendments seek to reinforce and uphold the rights of an accused, notably the right to not be denied reasonable bail without just cause, the right to liberty, and the presumption of innocence.⁵⁶

D. Clause 225: Introducing a Reverse Onus in Situations of Intimate Partner Violence

This research is primarily focused on the bail amendments in Bill C-75, specifically clause 225(6). Clause 225(6) introduces section 515(6)(b.1) of the *Criminal Code*, which imposes a reverse onus at bail for an accused charged with a violent offence against an intimate partner if they have a prior conviction for a similar offence. Currently, in many bail proceedings the Crown has the onus of proof; however, Bill C-75 has shifted that onus onto the accused in repeated cases of IPV.

It is also important to note that clause 225(3) of the Bill replaces sections 515(3) of the *Criminal Code*, with a clause that requires the justice in a bail hearing to consider:

49 Department of Justice Canada, *Legislative Background*, *supra* note 46 at 10.

50 *Ibid* at 15.

51 *Ibid* at 16.

52 *Ibid*. See also Abby Deshman & Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Canadian Civil Liberties Association, 2014) at 5.

53 *Ibid*.

54 Department of Justice Canada, *Legislative Background*, *supra* note 46 at 16.

55 Deshman & Myers, *supra* note 52 at 41.

56 Department of Justice Canada, *Legislative Background*, *supra* note 46 at 16.

any relevant factors including: (a) whether the accused is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner.⁵⁷

Unlike clause 225(6), clause 225(3) does not impose a reverse onus on an accused. Rather, it asks the justice to consider whether the charge involves IPV.⁵⁸

The motivations for introducing a reverse onus in cases of IPV are well-intentioned. Looking at Nunavut, the territory has the highest rate of family violence in Canada.⁵⁹ Accordingly, a person living in Nunavut is 17 times more likely to experience family violence than a resident of Ontario, the province with the lowest rate.⁶⁰ While family violence is rampant throughout Nunavut, IPV cases take up most of the court dockets and almost entirely involve Inuit men and women.⁶¹ Hence, IPV in Nunavut is a crisis that must be urgently addressed as it deeply affects human well-being and Inuit communities. Moreover, future generations are affected by this violence, as “[t]he impacts of domestic violence in one generation translate into the precipitators of violence in the next generation, creating a downward, negative and self-reinforcing spiral.”⁶²

There exists heightened apprehension that an accused will re-offend if released on bail, specifically in the context of IPV cases.⁶³ Accordingly, society’s impulse towards pre-trial detention—and reverse onus clauses, which make pre-trial detention more likely—is largely based on secondary ground concerns. Throughout the consultations at the Standing Committee on Justice and Human Rights, a handful of interested parties voiced support for the amendment, insisting that it addressees public safety concerns inherent in IPV by keeping complainants and their children safer.⁶⁴

57 *Bill C-75*, *supra* note 1, s 225(3).

58 *Ibid.*

59 Durrant, *supra* note 3 at 44.

60 *Ibid.*

61 Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 5 (25 November 2018); Interview of Lawyer 7 (29 November 2018).

62 See Janet Mancini Billson, “Shifting Gender Regimes: The Complexities of Domestic Violence Among Canada’s Inuit” (2006) 30:1 *Inuit Studies* 69 at 77.

63 Trotter, *Law of Bail*, *supra* note 27 at 139–40.

64 See Canadian Centre for Child Protection, “Submission to the Standing Committee on Justice and Human Rights: Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts” (24 September 2018), online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10008622/br-external/CanadianCentreForChildProtection-e.pdf>; Vancouver Rape Relief & Women’s Shelter (VRRWS), “Submission to the Standing

Alongside encouraging the broadening of the reverse onus given that it excludes those found guilty of IPV but granted an absolute or conditional discharge, Professor Elizabeth Sheehy noted that:

This is an important reform, because a study commissioned by the DOJ showed that DV offenders in fact breach their conditions while on bail at a rate of around 50%, and 50% of those are actually violent breaches. This means that DV offenders in fact are high risk releases, particularly for their partners and children. The reverse onus may give battered women precious time to escape without looking over their shoulders.⁶⁵

The Association des Familles de Personnes Assassinées ou Disparues (AFPAD) equally supported the introduction of the reverse onus, going further to suggest that a reverse onus should apply to first-time offenders as well.⁶⁶

The Vancouver Rape Relief & Women's Shelter (VRRWS) echoed both statements made by Sheehy and AFPAD suggesting the amendment be broadened to include first-time offenders and individuals having received absolute or conditional discharges. However, the VRRWS, equally insisted:

We don't believe prisons successfully reform men and we do not call for longer jail sentences; however, communities do not hold men accountable for the violence men commit. Therefore, women will continue to need the

Committee on Justice and Human Rights: Bill C-75" (24 September 2018), online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10027738/br-external/VancouverRapeReliefAndWomensShelter-e.pdf>; Association des Familles de Personnes Assassinées ou Disparues (AFPAD), "Submission to the Standing Committee on Legal and Constitutional Affairs Regarding Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts" (31 August 2018), online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10008674/br-external/AssocDesFamDePersAssassineesOuDisparues-9898657-e.pdf?fbclid=IwARoGrTdooOR5rnqZy3UlxAXTG2lEYA6CvaPL5XjDUAr_5crvskQETsKoNpQ>; Elizabeth Sheehy, "Submissions on Bill C-75" (24 September 2018), online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10078760/br-external/SheehyElizabeth-e.pdf?fbclid=IwAR2qdQQEIbkA1ODw3H7X9qJ1vtej9Y-KxGXChJrYJOZUKNrw3pV7TOxH85Y>; Canadian Resource Centre for Victims of Crime, "Brief to the House of Commons' Standing Committee on Justice and Human Rights on Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts" (4 September 2018), online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10012187/br-external/CanadianResourceCentreForVictimOfCrime-e.pdf>.

65 Sheehy, *supra* note 64, s 4.

66 AFPAD, *supra* note 64 at 3–4.

criminal justice system for protection, and we as feminists must fight for women's access to the rule of law.⁶⁷

Hence, the VRRWS emphasized that the reverse onus serves an important accountability function:

The change to reverse onus bail in cases of male violence against women is an encouraging step to help reduce the number of men who immediately re-offend and attack their female intimate partners. It is a positive step because the onus is on the offender to prove why they should be let out on bail if they have a history of domestic violence. This sends a message that violence against women is a serious crime.⁶⁸

Ultimately, support for the reverse onus clause stems primarily, and rightly so, from a preoccupation for the safety of complainants and their children. It is seen as a possible vehicle to breaking the cycle of violence of accused who repeatedly engage in violence. Crown counsel regularly identify the probability of the accused reoffending as an important factor to consider in deciding whether to detain the accused.⁶⁹ These considerations are exacerbated in Nunavut due to the high occurrence of IPV throughout the territory. In one of few written bail decisions in Nunavut regarding IPV, Crown counsel insisted on the complainant's safety given the perceived likelihood of the accused reoffending if released:

Crown Counsel argued that there was a substantial likelihood that the accused would commit further offences because he was only six weeks into a conditional sentence when he was back in court charged with similar offences against the same victim. This conduct demonstrated that the accused had little respect for court orders. The Crown also emphasized that the record of the accused involved past violence against the same complainant, thereby increasing the risk of further offences while on bail.⁷⁰

Despite this, many other experts have insisted that the clause raises numerous legal and social issues for accused, complainants, and the

67 VRRWS, *supra* note 64 at 5.

68 *Ibid.*

69 See e.g. *R v A(L)*, 2005 NUCJ 27. Crown counsel must also consider the probability of the accused reoffending per section 515(10)(b) of the *Criminal Code*.

70 *R v A(L)*, 2005 NUCJ 27 at para 11 [*A(L)*]. It is likely that this decision was written because it was a review of a bail decision.

administration of justice.⁷¹ In fact, the Barbara Schlifer Commemorative Clinic expressed concern due to the detrimental impacts this clause could impose on racialized populations:

The Clinic knows first-hand the devastation intimate partner violence (“IPV”) wreaks on the lives of women and children. The emotional and physical scars of such violence may never go away. IPV perpetrators must face consequences for their actions, including criminal consequences. At the same time, the Clinic is aware that the Canadian criminal justice system disproportionately affects the lives of racialized and indigenous people, including widely acknowledged disproportionate incarceration rates. The Clinic is concerned that Bill C-75’s focus on increased incarceration will disproportionately affect already affected populations and accelerate the undue racialization of the incarcerated population in Canada.⁷²

This concern was echoed by the VRRWS, despite their support for the reverse onus: “[It] will disproportionately affect racialized men, while the majority of men who go without being charged and convicted remain unaccountable and undeterred.”⁷³

The criminal justice system already disproportionately impacts marginalized individuals, particularly Indigenous people. Hence, those opposing the amendment have insisted that the reverse onus clause is not the answer to ending IPV, rather it would only further devastate Indigenous communities:

71 See Canadian Civil Liberties Association (CCLA), “Submissions to the House of Commons Standing Committee on Bill C-75 Criminal Code and Youth Criminal Justice Act Amendments” (17 September 2018), online (pdf): <ccla.org/cclanewsites/wp-content/uploads/2018/09/Bill-C-75-CCLA-Submissions.pdf>; The Canadian Bar Association (CBA), “Bill C-75 Criminal Code and Youth Criminal Justice Act Amendments” (September 2018), online (pdf): <www.cba.org/CMSPages/GetFile.aspx?guid=2058601f-9a60-4dbb-9e8b-7e829462213b>; Ontario Federation of Indigenous Friendship Centres (OFIFC), “A Response to Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts” (August 2018), online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10008435/br-external/OntarioFederationIndigenousFriendshipCentres-e.pdf>; Barbra Schlifer Commemorative Clinic, “Submission: Bill C-75 An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts” (1 September 2018), online (pdf): <schliferclinic.com/wp-content/uploads/2018/12/BILL-C-75-AN-ACT-TO-AMENEND-THE-CRIMINAL-CODE.pdf>; Acumen Law Corporation, “Bill C-75: Change Not Necessary” online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10009736/br-external/AcumenLawCorporation-e.pdf>.

72 Barbra Schlifer Commemorative Clinic, *supra* note 71 at 4.

73 *Supra* note 64 at 5.

The damage caused by the presumptive detention of accused people is magnified in small communities, especially in First Nations communities or in minority language communities where there are already language and cultural barriers between community members and police. Rather than making sweeping changes that will further alienate racialized and impoverished people from the state, the state has an obligation to make the criminal justice system more accessible for them.⁷⁴

Other interested parties have asked for the repeal of the amendment given the blatant constitutional scrutiny it will likely face and the fact that the “provision runs contrary to other amendments in Bill C-75 aimed at encouraging the release of those presumed innocent, particularly those historically at a disadvantage in obtaining their release.”⁷⁵

In a 2016 Australian study, Ng and Douglas considered various Australian states that have introduced presumptions of detention in cases of family violence. The authors emphasize the importance of crafting appropriate release conditions that consider the unique situations of each case and the parties involved. Accordingly, they insist:

that many of the legislative changes to presumptions are unjustified and that safety of victims can be sufficiently protected by a focus on the basic assessment of whether the risk that the accused will harm the victim is unacceptable, and on a careful consideration and appropriate tailoring of the conditions of the bail grant.⁷⁶

These conclusions are very similar to the submission of the Canadian Bar Association at the Standing Committee of Justice and Human Rights, which welcomes clause 225(3), yet opposes the introduction of the reverse onus at clause 225(6).⁷⁷

This paper equally echoes the written submission of the Canadian Bar Association. As emphasized by many supporters of the amendment, in cases of IPV the safety of complainants and their children should be the utmost concern of the criminal justice system. Hence, asking a justice to

74 Acumen Law Corporation, *supra* note 71 at 3. See also CBA, *supra* note 71 at 28.

75 *Ibid.* See also CCLA, *supra* note 71 at 3.

76 Emily Ng & Heather Douglas, “Domestic and Family Violence and the Approach to Bail” (2016) 34:2 L in Context 36 at 39. The authors also emphasize the important of other non-legal factors which are necessary to keep complainants and their family safe.

77 See Criminal Justice Section, “Executive Summary: Bill C-75 *Criminal Code and Youth Criminal Justice Act Amendments*” (September 2018) at 9, online: *The Canadian Bar Association* <www.cba.org/CMSPages/GetFile.aspx?guid=28af6c7b-2299-4cf1-9f6f-7ef887423e2f>.

consider whether violence was used, threatened, or attempted against an intimate partner is a relevant factor in the decision-making process and rationally connected to secondary ground concerns. Further, it is a necessary consideration for the justice to craft appropriate release conditions given the circumstances. However, this paper will insist that the reverse onus goes too far and will not achieve the desired outcome of its supporters, which is the protection of complainants and children.

Bill C-75 seeks to address IPV through punitive detention methods offered by the criminal justice system, assuming that a reverse onus will contribute to ending this violence. More specifically, the reverse onus touches on the secondary ground for detention. "Secondary ground considerations occupy much of the current public debate about bail,"⁷⁸ as it concerns the "substantial likelihood" that an accused will commit further offences or interfere with the administration of justice if they are released.⁷⁹ Due to the nature and oftentimes entrenched cycle of IPV, many believe that an accused will engage in further violence against the same complainant or a new partner.⁸⁰ Underlying this apprehension is the belief that the accused should be separated from the complainant, and that this reflects the desires of the complainant themselves. However, the Barbara Schlifer Commemorative Clinic notes that "[t]he Bill [will] exacerbate the lack of agency female complainants have in the criminal justice system."⁸¹ Even when decisions may contradict the wishes of the complainant, the law does not require these to be considered during bail proceedings, nor when establishing a release plan. In fact, the Canadian Liberties Association insists that "[b]road reverse onus provisions interfere with the difficult, individualized judgment calls that are necessary in domestic violence-related bail proceedings and compound existing problems in our bail system."⁸²

The introduction of the reverse onus is imbued with the assumption that the legal system has a role to play in ending this vicious cycle. It is

78 Trotter, *Understanding Bail*, *supra* note 35 at 35.

79 *Criminal Code*, *supra* note 28, s 515(10)(b).

80 Trotter, *Law of Bail*, *supra* note 27 at 140. Trotter explains that: "[t]he criminal justice system is being forced to take a hard look at the way it deals with spousal assault. Growing awareness of the 'cycle of violence,' typical in many abusive relationships, along with certain catastrophic and highly publicized failures of the criminal justice system (especially the bail system) in this context, have created real concern about offending while on bail for spousal assault".

81 Barbara Schlifer Commemorative Clinic, *supra* note 71 at 3.

82 CCLA, *supra* note 71 at 6.

crucial to consider how our current risk-averse society and its permeation into the bail system may influence bail decisions with the introduction of the reverse onus. Moreover, what voices are being prioritized within legislative changes regarding IPV and corresponding bail decisions? This paper encourages its readers to consider the complex existence of the criminal justice system in Nunavut and its past and ongoing impact on Nunavummiut. Accordingly, can the current criminal justice system effectively address IPV in Nunavut?

III. LEARNING FROM THOSE ON THE ICE: THE IMPACT OF BILL C-75 ON NUNAVUMMIUT

A. Research Methodology

The findings of this study are based on data compiled through semi-structured qualitative interviews with seven Crown and defence lawyers who practice or have practiced criminal law as prosecutors or defence counsel in Nunavut.⁸³ Qualitative interviews provided the best avenue for an in-depth exploration into how Bill C-75 will impact people engaged in Nunavut's criminal justice system.⁸⁴ The impact of amendments on the pre-trial process cannot be comprehensively addressed in judicial decisions. Moreover, given the lack of written bail decisions in Nunavut, we may have to exercise patience before seeing a decision that explores this future reality. Therefore, the perspectives of lawyers are invaluable to understanding the implications of these amendments today. These lawyers bring a local and human face to the administration of criminal justice in Nunavut that is generally forgotten within omnibus legislation.

83 A research ethics certificate was obtained prior to commencing these interviews.

84 The interviews were conducted in November and December 2018. Pauktuutit Inuit Women of Canada was contacted for an interview in August 2019 after the Bill received royal assent. However, they were unable to give an interview or statement at that time. Participants were asked approximately 11 open-ended questions disclosed to them prior to the interview. Participants were recruited through my personal connections created during summer 2018 in Nunavut. A significant limitation within this study is the recruitment process utilized and the small sample yielded. Since the sample was non-random and derived from my personal relationships, generalizing these findings should be approached with caution. Nonetheless, given the few lawyers that practice in Nunavut, this research provides timely and contemporary first-hand experiences by seasoned lawyers who understand the realities of practising criminal law in Nunavut. This study fails to consider key voices within the judicial process, notably complainants and accused, as well as families and friends affected by these changes. Should these amendments come into force, future research must consider these important perspectives.

B. Overview of Findings

Fundamentally, this paper asks whether the unique circumstances of administering justice in Nunavut and the needs of Nunavummiut are considered in amendments implemented by Bill C-75. One of the driving considerations behind the legislation has been to reduce delays in the criminal justice system. While case processing times could be ameliorated, this is not a major concern in Nunavut. In effect, Nunavut has among the shortest median criminal case lengths (71 days), despite the highest number of incidents per police officer in Canada.⁸⁵ Interestingly, lawyers interviewed emphasized that the reverse onus would likely increase the number of contested bail hearings, consequently accruing delays in Nunavut's criminal justice system given the limited human resources.⁸⁶

In fact, "Report Card on the Criminal Justice System," a 2018 report surveying all Canadian jurisdictions, ranked Nunavut eighth overall—awarding its criminal justice system's performance a C+ grade. The report emphasized that Nunavut's areas for improvement related to costs and use of resources and, more importantly, addressing violent crime.⁸⁷ While ameliorating the efficiency of the criminal justice system is beneficial to all jurisdictions, it is clear that more pressing issues need to be addressed in Nunavut. This raises serious questions about Bill C-75: were the specific needs of Nunavummiut considered during its drafting?

The following sections discuss the findings from interviews conducted with lawyers working in Nunavut regarding the implications of the reverse onus on Nunavummiut. I will begin with an overview of general concerns highlighted by lawyers including likely constitutional scrutiny and the role of the JP. Subsequently, I will consider the implications of the reverse onus from the perspective of the accused, examining three specific topics: remand, guilty pleas, and release conditions. Finally, I will examine the implications of the reverse onus from the perspectives of complainants and society.

85 Perrin & Audas, *Report Card*, *supra* note 9 at 31.

86 Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 7 (29 November 2018).

87 Perrin & Audas, *Report Card*, *supra* note 9 at 31.

C. General Concerns

1. Constitutional Scrutiny

There are few instances in the *Criminal Code* where the onus of proof is borne by the accused. Accordingly, numerous interviewees stated that the reverse onus would receive significant constitutional scrutiny.⁸⁸ On the one hand, lawyers described the clause as overbroad, raising sections 11(d) and 11(e) *Charter* issues.⁸⁹ In effect, the reverse onus would apply to all accused regardless of whether there was a gap between the current charge and the previous IPV conviction, or whether the offences involved different complainants. One lawyer explained: “think of someone who was convicted of domestic violence in 1994, and then is charged again today in 2018...[The clause] captures individuals with whom there are no secondary ground concerns.”⁹⁰ This concern was echoed in many written submissions to the Standing Committee on Justice and Human Rights.⁹¹ The Acumen Law Corporation’s written submission focused specifically on what they believed were clear violations of section 11(e) of the *Charter*:

Further, the Supreme Court of Canada has also ruled that bail can only be denied through legislation when scope of the denial of bail is narrow. The basic entitlement to reasonable bail of Section 11(e) cannot be denied in a broad or sweeping exception. The current wording of the section, which applies to anyone charged “with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs,” is by definition broad and sweeping. In contrast, Section 515(6)(d), which was challenged in *Pearson*, created the narrow reverse onus that applied only to people who were charged with specific offences in the *Controlled Drugs and Substances Act* that were punishable by life imprisonment. As currently worded, Section 515(6)(b.1) would create a reverse onus for any number of situations, ranging from an accused person with a pattern of serious spousal abuse to an accused

88 Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 2 (23 November 2018); Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 5 (25 November 2018); Interview of Lawyer 7 (29 November 2018).

89 Interview of Lawyer 2 (23 November 2018); Interview of Lawyer 4 (21 November 2018); Lawyer 5 (25 November 2018); Interview of Lawyer 7 (29 November 2018).

90 Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 3 (22 November 2018); Interview of Lawyer 6 (2 December 2018).

91 See e.g. CCLA, *supra* note 71; Acumen Law Corporation, *supra* note 71; CBA, *supra* note 71.

person who has been charged with a minor offence during an argument and was convicted of a different minor offence years prior, in entirely different circumstances.⁹²

On the other hand, lawyers emphasized that the reverse onus will disproportionately affect Nunavummiut accused raising section 15 *Charter* issues. As IPV and recidivism rates are extremely high in Nunavut, particularly within Inuit communities, a significant portion of the population will be targeted by this amendment. The Canadian Bar Association submission regarding Bill C-75 echoed these concerns:

The creation of a new reverse onus provision runs contrary to other amendments in Bill C-75 aimed at encouraging the release of those presumed innocent, particularly those historically at a disadvantage in obtaining their release...the CBA Section discourages the use of reverse onus provisions generally, in part, because of their disproportionate effect on Indigenous accused.⁹³

Webster emphasizes that “if we truly believed in the presumption of innocence,” we would be wary of all reverse onus provisions.⁹⁴ Once this clause comes into force, many believe it should and will be struck down. The findings of this research as well as numerous written submissions for Bill C-75 foreshadow many agitated defence lawyers who will be keen to engage in such a constitutional battle.

2. *The Role of the Justice of the Peace*

An overarching factor which may influence the Bill’s effect is how JPs will implement the amendments. In fact, many lawyers emphasized that due to a systemic lack of training for JPs, the impact of the amendments may be highly dependent on which JP is conducting the bail hearing. The lack of adequate training for JPs has been extensively discussed by the Nunavut judiciary: “[t]he content of the reasons in a bail hearing, conducted by [JPs] in Nunavut who have little legal training, must be set at a lower level than provincial court judges who conduct some bail hearings in other jurisdictions.”⁹⁵ Evidently, this can result in inconsistencies and

92 Acumen Law Corporation, *supra* note 71 at 2.

93 CBA, *supra* note 71 at 28.

94 Webster, *supra* note 37 at 18.

95 A(L), *supra* note 69 at para 15.

legal errors in bail decisions causing devastating impacts on accused, complainants, and the greater public.

Nonetheless, JPs play a crucial role as they “are familiar with the communities they serve and they provide many hours of valuable service to the administration of justice in Nunavut. They deal with high volumes of work, under significant time constraints.”⁹⁶ Given the importance of JPs in providing a localized community-based administration of justice, it is crucial that adequate training be provided.⁹⁷ JPs must be sufficiently prepared, as the implementation of the reverse onus will only further complicate judicial proceedings and threaten the proper administration of justice.

3. *The Perspective of the Accused*

All lawyers interviewed highlighted the fact that the reverse onus would disproportionately impact Nunavummiut accused, specifically Inuit men. Due to the significant amount of IPV cases throughout Nunavut and high recidivism, the reverse onus will constantly be engaged. The interviews yielded the following major consequences given the introduction of the reverse onus: the imposition of more stringent release conditions, a rise in the remand population, and an increase in guilty pleas.

4. *Obtaining Bail & Release Conditions*

Many lawyers characterized Nunavut’s bail system as immersed in a “culture of release.”⁹⁸ Given the high rates of incarceration of Nunavummiut and the recognition that these measures often fail to deter criminal activity and foster rehabilitation,⁹⁹ there have been powerful attempts to foster de-incarceration in Nunavut.¹⁰⁰ Consequently, a Nunavummiut accused is more likely to be released in Nunavut than an individual charged of the same offence down south.¹⁰¹ However, lawyers stated that the reverse onus may divert this trend. The interviewees theorized that the introduction of the reverse onus will serve as an additional obstacle to obtaining bail and,

96 *R v Teemotee*, 2011 NUCJ 17 at para 4.

97 See Katherine Beaty Chiste, “The Justice of the Peace in History: Community and Restorative Justice” (2005) 68 Sask L Rev 153 at 153–59.

98 Interview of Lawyer 2 (23 November 2018).

99 See Ross Gordon Green & Kearney Healy, “Aboriginal Notions of Justice: Questioning Relationships of Force” in Wanda D McCaslin, ed, *Justice as Healing: Indigenous Ways* (St Paul, Minnesota: Living Justice Press, 2005) 61 at 61–62.

100 Interview of Lawyer 4 (21 November 2018).

101 *Ibid.*

if bailed is granted, will result in the imposition of more onerous release conditions.

Numerous lawyers emphasized that obtaining bail will be effectively more difficult for Nunavummiut men due to the inherent presumption of detention underlying the reverse onus. Obtaining bail would become more difficult because the reverse onus “departs from the general approach to bail in two respects: (1) it presumes that bail should be denied and that the accused should be detained pending trial; and (2) it requires the accused to demonstrate on a balance of probabilities why he or she should be released pending trial.”¹⁰²

This difficulty is compounded by the reality that Nunavummiut are already disadvantaged in obtaining bail. The current bail system fails to acknowledge the unique circumstances of Nunavut and how they influence decisions to detain an accused. Many of the lawyers interviewed emphasized that JPs in Nunavut are increasingly sensitive to the challenges of an Indigenous accused attempting to obtain bail, and therefore bail decisions are guided by the principles in *R v Gladue* and *R v Ipeelee*.¹⁰³ However, this practice is inconsistent and insufficient. Therefore, many accused struggle to satisfy some of the factors which would bolster the likelihood of release. “[Nunavummiut] who are disproportionately impacted by substance abuse issues, poverty, lower educational attainment, [unemployment,] social isolation and other forms of marginalization, are being systematically disadvantaged as result.”¹⁰⁴ For example, research has shown that an employed accused is more likely to obtain bail than one who is unemployed.¹⁰⁵ Of course, this is especially problematic considering the dearth of unskilled employment opportunities available in Nunavut.¹⁰⁶

A devastating observation made by numerous lawyers was that the reverse onus would not only impede release, but cause Nunavummiut from communities outside of Iqaluit to face greater challenges in obtaining

102 Department of Justice Canada, *Charter Statement—Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, (Tabled in the House of Commons, 29 March 2018).

103 Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 3 (22 November 2018); Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 5 (25 November 2018). See *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13. *Contra R v Jaypoody*, 2018 NUCJ 36, where Justice Bychok stated that *Gladue* sentencing principles do not apply at bail.

104 Deshman & Myers, *supra* note 52 at 75.

105 Trotter, *Law of Bail*, *supra* note 27 at 45.

106 Interview of Lawyer 4 (21 November 2018).

bail. In effect, the amendment would likely exacerbate the phenomena that release be contingent on the resources of the accused and their community.¹⁰⁷ For example, those accused of IPV are often prohibited from contacting the complainant with whom they usually live. Therefore, Nunavummiut accused regularly ask to be released to Iqaluit, despite residing in another community, because Iqaluit is the only community with a men's shelter. If the accused resides outside of Iqaluit, they must be able to finance their own flight to be released to the men's shelter. Ultimately, an accused who cannot find another house to reside in—a regular impediment for an accused—and who lives in a community lacking support services faces greater and disproportionate challenges in obtaining bail. Lawyers emphasized that because the reverse onus will make JPs ever more reluctant to release an accused in the community where the offence was allegedly committed, an even greater number of accused will be forced to leave their community to reside elsewhere.¹⁰⁸ “People in remote Nunavut communities sometimes get more chances at bail than their more urban counterparts enjoy because, practically speaking, it is more costly to transport them to a faraway remand centre. If triers’ discretion is fettered by a reverse onus provision, more Nunavummiut will be flown out of their far-flung hamlets.”¹⁰⁹ The lack of shelters and social supports in numerous communities will cause an accused to make a difficult choice: consent to detention or agree to leave their community in hopes of obtaining bail. This finding demonstrates how the reverse onus will exacerbate social inequities already borne by Inuit in remote communities, translating these into unequal treatment by the criminal justice system.

If Nunavummiut accused are able to convince a JP to grant them bail despite the greater difficulty imposed by the reverse onus, a JP will likely impose more onerous release conditions. Lawyers emphasized that because the reverse onus presumes detention rather than release, a JP would conceivably justify granting bail by imposing more stringent release conditions on the accused. For example, lawyers foreshadowed that the reverse onus may increase the use of sureties in Nunavut, or that JPs might be increasingly reluctant to grant bail without surety release.¹¹⁰ Throughout Canada, release via surety has become too frequently the

¹⁰⁷ All interviews.

¹⁰⁸ Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 5 (25 November 2018);

Interview of Lawyer 6 (2 December 2018); Interview of Lawyer 7 (29 November 2018).

¹⁰⁹ Interview of Lawyer 7 (29 November 2018).

¹¹⁰ All interviews.

default proposal,¹¹¹ rather than following the ladder principle which was reaffirmed in *Antic*.¹¹² Research shows that “the use of sureties is not only the most common form of release, ... [it] often constitutes a permanent impediment to release [for Nunavummiut].”¹¹³ This was confirmed by a lawyer interviewed:

In *R v Antic*, the Supreme Court tried to curb the problem of overreliance on sureties by reiterating the ladder principle at section 515 of the *Code*. Reverse onus provisions make this problem worse. Counsel do not want to gamble with their client’s liberty by proposing a plan without sureties, so they propose sureties virtually anytime the bail onus is reversed. As a result, despite clear calls from the Supreme Court to proceed incrementally up the bail ladder, many accused persons find themselves starting at the top of it. This approach is in direct opposition to the directive to impose the least onerous conditions appropriate in the circumstances.¹¹⁴

Obtaining a surety for a Nunavummiut accused can lead to numerous challenges. For example, due to rampant housing insecurity throughout the territory, an individual will often deny being a surety for an accused because they simply lack space in their overcrowded home.¹¹⁵

Unfortunately, an accused is likely to consent to disproportionate and very restrictive conditions to avoid pre-trial detention.¹¹⁶ Accused frequently struggle to abide by release conditions, particularly when they remain in their community, given the small populations and the constant police surveillance.¹¹⁷ One lawyer insisted:

There is absolutely a need to protect the public in some circumstances, but many of the release conditions like no-contact provisions are simply impractical and extremely disproportionately harsh, especially to individuals who suffer from trauma-related issues and who live in small communities.¹¹⁸

111 “The use of sureties in bail cases appears to have become the norm rather than the exception in many courts”. See Webster, *supra* note 37 at 6. Confirmed by all interviews.

112 *Supra* note 33.

113 Webster, *supra* note 37 at 6.

114 Interview of Lawyer 7 (29 November 2018).

115 Interview of Lawyer 2 (23 November 2018); Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 7 (29 November 2018).

116 Deshman & Myers, *supra* note 52 at 40. Confirmed by numerous interviews.

117 Interview of Lawyer 5 (25 November 2018).

118 Interview of Lawyer 1 (22 November 2018).

In Nunavut, the reverse onus may cause stringent conditions to be simply copied and pasted on all release orders, regardless of the alleged facts and the profile of the accused. This completely disregards the fundamental principles of bail and their impact on Inuit communities:

There needs to be a more thorough analysis by the JPs at the bail stage, applying the *Gladue* principles to each step of the ladder in bail, as well as the conditions imposed. Many of the conditions do not reflect the realities of very small communities, overcrowding, [as well as] traditional Inuit values surrounding justice and forgiveness.¹¹⁹

While the recent *Antic* decision ardently reaffirms the need to ensure reasonable release conditions, legislating the reverse onus may negate this obligation, given the underlying “tough on crime mentality” infusing this particular amendment. Ashworth notes, “the imposition of punishment requires justification. We should not be satisfied with the proposition that anyone who [allegedly] commits any offence forfeits all rights and may be dealt with by the state in whatever manner the courts decree.”¹²⁰ Considering that Nunavut has one of the highest rates of non-compliance with release orders, those who do obtain bail, despite accusations of IPV, may simply be set up to fail as they will be unable to abide by the conditions, exacerbating the “revolving door” of prisoners.¹²¹

5. *Remand Increase*

All lawyers interviewed emphasized that the introduction of the reverse onus would cause an increase in the remand population due to JPs more frequently denying bail, and the failure of many accused to abide by onerous release conditions in IPV cases.¹²² Despite some of the other amendments in Bill C-75 that encourage reasonable release, clause 225 completely vitiates the latter in cases of IPV. These observations are extremely unfortunate given that a purpose of the Bill is to address the overrepresentation of Indigenous offenders in correctional facilities. Data collected for 2016–2017 showed that 100% of adults in Nunavut’s correctional facilities were Indigenous.¹²³ Furthermore, the rate of incarceration

¹¹⁹ *Ibid.*

¹²⁰ Arie Freiberg, “Three Strikes and You’re Out—It’s Not Cricket: Colonization and Resistance in Australian Sentencing” in Michel Tonry & Richard S Frase, eds, *Sentencing and Sanctions in Western Countries* (NY: Oxford University Press, 2001) 29 at 41.

¹²¹ Perrin & Audas, *Report Card*, *supra* note 9 at 31. Confirmed by interviews.

¹²² All interviews.

¹²³ Malakieh, *supra* note 10 at 17.

is relatively high in proportion to the population. In 2016–2017, on a daily basis, approximately 138 adults were in custody and 71 of them on remand.¹²⁴ Nunavut has the second highest remand rate in the country, with 299 per 100 000 adults on remand.¹²⁵

There are widespread impacts on a Nunavummiut accused and their community should they be detained. Foremost, being detained entails separation from one's family and community, which is even greater for an accused living outside Iqaluit. Family or friends must fly to Iqaluit to visit the accused or communicate by telephone. Furthermore, low incomes in many communities leave many unable to afford phones. Therefore, depending on the resources of an accused and their support networks, an accused may endure extended periods without speaking to their family and friends. Moreover, detention places an accused's employment in jeopardy and most often halts any flow of income for themselves and those they support. Many Inuit men are also the hunters of their family, additionally providing food insecure communities with country food. Hence, their absence can have detrimental impacts on their family and the entire community.

Many lawyers have emphasized that the reverse onus is especially problematic for Nunavummiut, as more men will be detained at the Baffin Correctional Centre (BCC). BCC in Iqaluit houses the majority of Nunavummiut men on remand. One lawyer stated that the increase in the remand population is “compounded by pre-existing overpopulated jails [in Nunavut], one of which is ranked the worst jail in Canada and in breach of UN standards.”¹²⁶

On numerous occasions, the judiciary has spoken out about the deplorable conditions at BCC. Recently, Justice Cooper stated that “[i]n Nunavut, judges routinely give...enhanced credit [for pre-trial detention].

¹²⁴ *Ibid* at 14–15.

¹²⁵ *Ibid*.

¹²⁶ Interview of Lawyer 1 (22 November 2018). In 2015, the Auditor General equally released a report stating that: “the Department has been aware of critical deficiencies at the Baffin Correctional Centre for many years. The centre has been the subject of studies and reports dating back to 1996, including a report from the Office of the Correctional Investigator. These reports have highlighted operational limitations and safety and security concerns for the centre's inmates and staff”. See Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the Legislative Assembly of Nunavut–2015: Corrections in Nunavut—Department of Justice*, by Michael Ferguson (Ottawa: Office of the Auditor General of Canada, 2015) at 6.

This fact reflects the harsh conditions found at [BCC].”¹²⁷ Inmates have also attempted to raise awareness surrounding the inhumane conditions through speaking with their lawyers¹²⁸ or to the press.¹²⁹ Regrettably, nothing has changed. No longer able to tolerate the conditions at BCC, inmates have repeatedly turned to violence to voice their concerns.¹³⁰ The most recent riot was on June 21, 2018, causing significant structural damage and resulting in inmates being flown to southern facilities due to the complete destruction of certain holding units.

Compounded with the loss of one’s liberty and separation from community, detention at BCC clearly leaves a mark on Nunavummiut men. Inmates at BCC constitute some of Nunavut’s most vulnerable—those living with untreated mental health and substance use issues. Detention may result in or exacerbate psychological issues, particularly in a detention facility like BCC, which lacks relevant cultural and mental health support.¹³¹ The need for adequate support is dire. However, Nunavut’s Director of Corrections has publicly stated that the facility is hindering inmates’ rehabilitation.¹³²

While the safety of the complainant and public is a valid concern, the reverse onus will likely lead to the detention of more Nunavummiut men at BCC. How will detention in a facility largely lacking rehabilitation impact the accused and his future interactions once released? If the objective of the reverse onus is to keep the complainant and society safer, are we truly attaining these goals by increasing the use of incarceration?

6. *Guilty Pleas*

Pre-trial detention increases the likelihood of an accused pleading guilty.¹³³ Accordingly, all lawyers interviewed believed that the reverse onus would

127 *R v Cooper-Flaherty*, 2017 NUCJ 11 at para 42 [*Cooper-Flaherty*]. For other decisions speaking out against the conditions at BCC, see e.g. *R v Bishop*, 2015 NUCJ 01 at paras 38–39; *R v Devries*, 2012 NUCJ 07 at paras 56–57; *R v Joamie*, 2013 NUCJ 19 at para 45; *R v Shappa*, 2015 NUCJ 26 at para 68; *R v Uniugsaraq*, 2015 NUCJ 16 paras 25–28.

128 *Cooper-Flaherty*, *supra* note 127 at paras 48–49.

129 Pauline Pemik & Walter Strong “Inmate Who Took Part in Riot at Notorious Iqaluit Jail Says Conditions Making Inmates Worse”, *CBC News* (5 October 2017), online: <www.cbc.ca/news/canada/north/akittirq-bcc-riot-1.4331141>.

130 Nick Murray, “As Long As Decrepit Iqaluit Jail Stays Open, Riots Will Keep Happening, Says Director”, *CBC News* (26 June 2018), online: <www.cbc.ca/news/canada/north/baffin-correctional-centre-jail-conditions-riots-1.4720831> [Murray, “Riots Will Keep Happening”].

131 Interview of Lawyer 2 (23 November 2018).

132 Murray, “Riots Will Keep Happening”, *supra* note 130.

133 Deshman & Myers, *supra* note 52 at 10; Trotter, *Law of Bail*, *supra* note 27 at 40.

lead to more accused being detained and consequently more guilty pleas: “more individuals plead guilty when they are detained in custody. My clients have always been more inclined to plead not guilty and set trial dates if they are on bail.”¹³⁴ Another lawyer insisted, “it’s going to skew things. Any time people are on remand, they want to deal with the matter more quickly, and there comes the pressure for guilty pleas.”¹³⁵

Lawyers also emphasized that an accused from a remote community may feel even more pressure to plead guilty given the delays caused by the circuit court. For example, an individual charged with an offence in Pangnirtung and denied bail will be detained in Iqaluit. The trial would unfold according to the circuit court dates. In 2018, the court travelled to Pangnirtung a mere four times.¹³⁶

A recent report from the Department of Justice found a higher rate of guilty pleas among Indigenous people.¹³⁷ The denial of bail was a major factor inducing guilty pleas: “[y]ou’re supposed to be innocent until proven guilty. In remand, you have to prove you’re innocent.”¹³⁸ Therefore, the higher likelihood of detention flowing from the introduction of the reverse onus is extremely concerning in Nunavut given that essentially 100% of those interacting with the criminal justice system are Inuit. The reverse onus will have detrimental consequences as “many accused would be pleading guilty not because they are factually guilty of the allegations but rather because they are willing to admit the allegations to achieve the desired result of release.”¹³⁹ This phenomenon completely undermines the principles of fairness and due process that are fundamental to the criminal justice system. Everyone has the right to benefit from the presumption of innocence and should only be found guilty through fair judicial proceedings. However, “when Canadians decline, out of expediency, to exercise their rights, those rights are eroded. Those rights never come back.”¹⁴⁰ The reverse onus will negate procedural fairness—further ingraining the

¹³⁴ Interview of Lawyer 5 (25 November 2018).

¹³⁵ Interview of Lawyer 4 (21 November 2018).

¹³⁶ Nunavut Court of Justice, “2018 Circuit Schedule” (available by request from the Nunavut Court of Justice).

¹³⁷ Department of Justice Canada, Research and Statistics Division, *Guilty Pleas Among Indigenous People in Canada*, by Angela Bressan & Kyle Coady, Catalogue No J4-62/2018E-PDF (DOJ RSD, 2017) at 5–7.

¹³⁸ *Ibid* at 10–11.

¹³⁹ Interview of Lawyer 5 (25 November 2018).

¹⁴⁰ Interview of Lawyer 7 (29 November 2018).

notion of the “colonial criminal justice machinery”¹⁴¹ as an “assembly-line conveyor belt” of guilty pleas.¹⁴²

D. The Perspective of Complainants & Society

The most devastating finding elucidated from the interviews was that none of the lawyers believed that the reverse onus would reduce the rate of IPV in Nunavut. Furthermore, the interviewees stated that complainants and the public will not be safer as a result of this reform: “there will be no correlation between these amendments and the levels of domestic violence in Nunavut.”¹⁴³ The amendment “will simply delay the inevitable next assault.”¹⁴⁴

These results are utterly disheartening—considering the underlying objective of the clause is to address IPV, and importantly, to keep complainants safer. While disappointing, it is unsurprising. Addressing IPV through punitive measures, specifically detention, perpetuates cycles of violence. The over-incarceration of Inuit men has only further ravaged communities across Nunavut. Green and Healy explain that, “[w]hile our clients generally dislike custody, their return rate is high...Their families attest that the longer they are in custody, the worse they are when they finally return home. To state the obvious, our clients and their families agree that the use of punitive force...has been unsuccessful.”¹⁴⁵ Accordingly, addressing IPV through the criminal justice system will inevitably yield disappointing results. Criminal law intervenes in these situations *ex-post*, once the devastation has been inflicted on complainants, children, and communities. Lawyers themselves seem to have lost faith in the criminal justice system: “there is very little the system can do from a general deterrence perspective to lower [IPV].”¹⁴⁶

141 Monchalin, *supra* note 24 at 145.

142 Kent Roach, “Four Models of the Criminal Process” (1999) 89:2 J Crim L and Criminology 671 at 677.

143 Interview of Lawyer 5 (25 November 2018).

144 Interview of Lawyer 3 (22 November 2018).

145 Green & Healy, *supra* note 99 at 61–62.

146 Interview of Lawyer 5 (25 November 2018).

IV. ADDRESSING INTIMATE PARTNER VIOLENCE THROUGH EMPOWERMENT: *PILIMMAKSARNIQ*

This research has demonstrated that the introduction of the reverse onus will not only disproportionately and detrimentally affect Nunavummiut accused, it will simultaneously fail to keep complainants and society safer. The underlying objective of the amendment is, therefore, far from attained in Nunavut. The following section will briefly consider alternate avenues to addressing IPV in Nunavut. I will begin by exploring the concept of *pilimmaksarniq*¹⁴⁷ as a framework for addressing IPV. I will emphasize that community empowerment must be prioritized by addressing drivers of disempowerment causing IPV, specifically the lack of support services for mental health issues. Finally, I will offer suggestions to empower IPV complainants within the bail system.

A. *Pilimmaksarniq*: Empowerment the Inuit Way

Capacity building within and outside the criminal justice system which seeks to empower Nunavummiut must be founded on Inuit *Qaujimajatuqangit*,¹⁴⁸ and sensitive to Nunavut's unique context. Pauktuutit Inuit Women of Canada (Pauktuutit) emphasize that *pilimmaksarniq*¹⁴⁹ is a key principle within Inuit *Qaujimajatuqangit* and should be utilized as a guiding framework for IPV prevention strategies. Pauktuutit defines *pilimmaksarniq* as "empowerment," and the quest "to work toward a balanced and strengthened Inuit society."¹⁵⁰ Hence, society, or community, plays a central role in both benefiting from and leading empowerment initiatives.

Empowerment has long been central to anti-IPV movements, specifically in relation to supporting survivors. This conceptual framework remains dominant because of its focus on respecting human dignity by fostering an individual's ability to exercise agency and control, and to engage in informed decision-making.¹⁵¹ Empowering Nunavummiut women is key

147 "Empowerment". See Pauktuutit Inuit Women of Canada, *supra* note 6 at 9.

148 "Inuit knowledge". Frédéric Laugrand & Jarich Oosten "Transfer of Inuit *Qaujimajatuqangit* in Modern Inuit Society" (2009) 33(1-2) *Inuit Studies* 115 at 116.

149 Pauktuutit Inuit Women of Canada, *supra* note 6 at 9.

150 *Ibid.* Pauktuutit Inuit Women of Canada also include the following in the definition of *pilimmaksarniq*: "It applies here in the sense of accessing information, gathering it and using it to make right that which is wrong socially and spiritually[...]"

151 See Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) at 4-5.

to addressing IPV. However, IPV is not solely a “women’s issue,” which is why empowerment initiatives must equally include men and communities. Accordingly, Pauktuutit insists that, “in the Inuit understanding, the problems of an individual are the problems of the community as a whole.”¹⁵² However, one lawyer interviewed noted that:

Jailing those accused of violence against intimate partners does not have the effect of deterring violence. Jail cuts Nunavummiut off from the only resource they have at their disposal to address the root causes of IPV: their peers and elders in their communities. Preventing IPV has to start in the offender’s home community. Removing the offender from that community and walling him off with other offenders is a step in the wrong direction.¹⁵³

Hence, real change will only occur through the prioritization of community action. Through Inuit *Qaujimaqatuqangit*, empowering communities is the first step to addressing IPV, improving well-being, and ensuring the protection of human dignity.

B. Addressing Systemic Drivers of Disempowerment in Nunavut Communities

Ending IPV in Nunavut requires addressing root causes of violence enmeshed in a system which disempowers Nunavut communities. Williamson uses imagery to explain the complexities of IPV. She insists that those analyzing IPV “focus not on the incidents of abuse...but to understand the nature of domination, to focus on the ‘cage.’”¹⁵⁴ Accordingly, the cage for many Nunavummiut afflicted by IPV is reinforced by “[p]ast and present colonial violence [which] directly contributes to the intersecting issues of poverty, unstable and unsafe housing, systemic discrimination, substance misuse, and other individual, family, and community health concerns.”¹⁵⁵ Based on interviews with lawyers, additional factors include: male jealousy, lack of employment opportunities, lack of educational facilities, food insecurity, and a “lack of desperately needed mental health resources.”¹⁵⁶

¹⁵² Pauktuutit Inuit Women of Canada, *supra* note 6 at 8.

¹⁵³ Interview of Lawyer 7 (29 November 2018).

¹⁵⁴ Emma Williamson, “Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control” (2010) 16:12 *Violence Against Women* 1412 at 1414.

¹⁵⁵ McKenzie et al, *supra* note 7 at 8.

¹⁵⁶ Interview of Lawyer 5 (25 November 2018).

A common observation made in the literature and echoed by interviewees was the role of alcohol in precipitating violence and exacerbating systemic socio-economic factors which lead to IPV. The aforementioned is highlighted in interviews in Billson's research.¹⁵⁷ One woman emphasized: "[t]he problem is alcohol or drugs, but when they get too much on their minds because their kids are up to something bad, they start worrying and fighting."¹⁵⁸ Another woman's comments point to the rampant mental health issues experienced by Nunavummiut, exacerbated by a lack of mental health resources and therefore alleviated by substance abuse: "[m]en hit their wives for different reasons. Maybe he's jealous or the woman cheated on him. If he had a problem and didn't talk to anyone, it's all bottled up inside. He gets angry and takes it out on the wife."¹⁵⁹

Ending IPV in Nunavut is a complex and multifaceted task, requiring a holistic, gendered, and culturally appropriate approach based on Inuit *Qaujimajatuqangit*, which promotes community and individual well-being. While the systemic factors leading to IPV discussed above need to be addressed, all lawyers interviewed identified that mental health and support services are urgently needed.¹⁶⁰ Similarly, Pauktuutit considers the lack of these services as the foremost issue perpetuating IPV in Inuit communities:

Most communities are without specialized counselling and support services to address unresolved intergenerational trauma, which is a major mental health issue among Inuit. Inuit communities continue to report the need for crisis and long-term counselling, safe shelters, second-stage housing and training of Inuit front-line workers in order to address these issues. Mental health has been identified as the primary health issue facing Inuit, including issues related to violence, abuse and unresolved trauma, but the lack of sustained resources has meant that change is painfully slow. Women and children who are experiencing violence and abuse in their homes often have no place in their community to seek safety. More than 70% of the 53 Inuit communities across the Canadian Arctic do not have a safe shelter for women, and often the homes of family and friends are overcrowded... For Inuit women, this can mean there can be literally

157 Billson, *supra* note 62. Billson's research utilizes qualitative interviews with Inuit women to understand their experiences surrounding intimate partner violence.

158 *Ibid* at 76.

159 *Ibid* at 77.

160 All interviews.

nowhere to go to find safety, and many women have lost their lives to family violence.¹⁶¹

The Nunavut judiciary has equally underscored the dire need to address inadequate services related to mental health leading to IPV in Nunavut:

Alcohol abuse is tearing apart the fabric of our society. It fills our criminal and family court dockets as well as our jails. Yet, 19 years after division from the Northwest Territories, Nunavut still does not have a single residential treatment centre. Too often, we hear about offenders dropping out of the program after being sent south for treatment because they find it too hard to succeed so far from home. Our elderly in need of care are routinely sent south, where they are isolated and surrounded by an unfamiliar culture. Adults subject to public guardianship orders—our most vulnerable citizens—are routinely shipped south. Our federal inmates continue to be sent south. Few communities have safe houses for families in crisis. Chronic overcrowding continues. Food insecurity is widespread. Deficits in broadband communications reinforce isolation and impede the adequate delivery of remote health care and other social services.¹⁶²

Ultimately, numerous actors have repeatedly asked for the root causes of IPV—particularly lacking mental health services—to be addressed in Nunavut, to create a meaningful change in the well-being of women, their partners, their families, and their communities.¹⁶³ The drivers of disempowerment in Nunavut discussed above are well-known. Therefore, legislative amendments such as the reverse onus prove futile to addressing IPV because “the root causes of domestic violence isn’t that we aren’t tough enough on crime.”¹⁶⁴ It is time to overcome the inertia through action both within and outside of Nunavut. Action must be founded on Inuit *Qaujimajatuqangit*, particularly *pilimmaksarniq*, and led by Nunavummiut. The first step in empowering Nunavummiut requires addressing root causes of violence, and foremost establishing culturally appropriate long-term mental health facilities and supports now.

161 Pauktuutit Inuit Women of Canada, “Violence and Abuse Prevention” (last visited 30 October 2019), online: <www.pauktuutit.ca/abuse-prevention/>.

162 *Anugaa*, *supra* note 17 at para 33.

163 Monchalín, *supra* note 24 at 146; Billson, *supra* 62.

164 Interview of Lawyer 4 (21 November 2018). See generally, OFIFC, *supra* note 71 at 3. The OFIFC’s written submissions insist that detention and imprisonment are not solutions to IPV. Rather, the organization advocates for addressing the root causes of IPV through culture-based programming.

C. Empowering Nunavummiut Women within the Criminal Justice System

The criminal justice system equally has a role to play in empowering Nunavummiut. Unfortunately, the introduction of the reserve onus will only serve to disempower Nunavummiut women within the process. The amendment assumes that women want to be separated from their partner, denying them the opportunity and ability to make decisions which intimately affect their lives. Moreover, it reinforces what Mutua describes as the savages-victims-saviours construction.¹⁶⁵ Actors within the criminal justice system are seen as Inuit women's saviours, separating them from the oppression of Inuit men.

The rise of *Victim Law* has made important contributions to granting victims greater meaningful participation within the criminal justice system, establishing a landmark participatory right for victims in criminal proceedings.¹⁶⁶ Thus, the movement emphasizes that a victim's views should be considered at all stages of decision-making within the criminal justice apparatus.¹⁶⁷ However, the voices and needs of Inuit women are largely absent from bail proceedings and reforms implemented by Bill C-75.¹⁶⁸ Pre-trial proceedings should consider the perspectives of complainants. Numerous lawyers elucidated that most IPV complainants in Nunavut do not want to press charges.¹⁶⁹ Charges are frequently dropped because complainants avoid coming to court or deliberately give inadequate evidence when forced to testify against their partner. Moreover, the majority of complainants do not want to be separated from their

165 See Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Intl LJ 201.

166 See Benjamin Perrin, *Victim Law: The Law of Victims of Crime in Canada* (Toronto: Thomson Reuters, 2017) at 36 [Perrin, *Victim Law*].

167 *Ibid* at 35–36. However, victims have not been granted the status of "party" to criminal proceedings. Perrin notes that the right to participation is a "major development, recognizing that victims have a legitimate interest and legal right as participants in criminal justice proceedings where their rights under the *Canadian Victim Bill*...are affected. Victims are not *parties* to proceedings, but in certain circumstances they may be *participants* with a right to convey their views to decision-makers and to have those views be given consideration" (*ibid* at 36) [emphasis in original].

168 The voice of the complainant is largely sidelined in many criminal justice proceedings, particularly pre-trial proceedings.

169 Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 3 (22 November 2018); Interview of Lawyer 4 (21 November 2018); Interview of Lawyer 5 (25 November 2018).

partner or subject to no-contact conditions.¹⁷⁰ One lawyer explained that: “my experience with domestic accused and complainants is that shortly after an incident has taken place and after a ‘cooling down’ period, the parties want to reconnect and reconcile.”¹⁷¹

A fundamental building block of *pilimmaksarniq* is providing individuals with opportunities within which they are able to exercise their agency through informed decision-making.¹⁷² Therefore, when reasonable, the criminal justice system should allow complainants to play a more active role in decision-making at the bail stage regarding detention of the accused and the imposition of certain release conditions. For example, if the complainant desires, a JP could consider their preferences during a bail hearing by allowing them to submit a written statement regarding whether and how they would want contact to unfold with the accused.¹⁷³ “Consideration of protection or safety of victims is part of making a ‘reasonable bail’ decision under section 11(e) of the *Charter*.”¹⁷⁴ Hence, complainants are directly impacted by bail decisions and are best placed to enunciate their safety concerns. Nunavummiut women’s “ability to secure safety is not located solely within the criminal justice response...”¹⁷⁵ Safety should be understood from the perspective of complainants themselves and “in a holistic sense, encompassing physical and emotional safety, financial security, and fostering healthy relationships.”¹⁷⁶

170 Interview of Lawyer 5 (25 November 2018); Interview of Lawyer 1 (22 November 2018); Interview of Lawyer 3 (22 November 2018).

171 Interview of Lawyer 5 (25 November 2018).

172 Pauktuutit Inuit Women of Canada, *supra* note 6 at 5. See generally Nussbaum, *supra* note 151.

173 Interview of Lawyer 5 (25 November 2018) stated that a way to keep complainants safer would be to give them a greater role in determining contact between themselves and the accused: “An option for this would be to encourage bail conditions that allow for a *graduated level of contact at the complainant’s wishes*. For example, no contact for the first couple of weeks, and then contact for the purpose of counseling, and then full contact with written revocable consent, and then no restrictions save and except a 24-hour cool-off period at the insistence of the complainant or the RCMP” [emphasis added].

174 Perrin, *Victim Law*, *supra* note 166 at 68.

175 Holly Johnson & Jennifer Fraser, “Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase 1” (2015) at 23, online (pdf): *Women’s Shelters Canada* <www.endvaw.ca/wp-content/uploads/2015/12/dvc-do-theymake-women-safer.pdf>.

176 *Ibid.* Johnson & Fraser’s research also concludes: “There was broad consensus across the focus groups that the goals of the criminal justice system (the aggressive prosecution and punishment of offenders) are often at odds with the goals of women who experience intimate partner violence (to end the violence and find safety). In fact, many participants noted that criminal justice responses to intimate partner violence often contribute to women feeling and being unsafe, for example, the fact that arresting or charging an abuser

Ultimately, promoting complainant participation when desired empowers women within the criminal justice system, as it allows them to exercise their agency and be part of decision-making processes that intimately affect their physical and psychological well-being. The criminal justice system must provide women these opportunities and listen to their concerns. It is time to end legislation, such as the reverse onus, which impedes and substitutes women's decision-making.

V. CONCLUSION

In February 2016, the Governments of Canada and Nunavut announced they would be investing in a new facility in Iqaluit, the Qikiqtani Correctional Healing Centre.¹⁷⁷ While the name may connote a facility providing healing and rehabilitation to inmates, in reality this is yet another correctional centre dolled-up with a few bells and whistles. The new establishment is really “a bigger and improved version of the decrepit [BCC].”¹⁷⁸ The project includes the construction of a new two-story maximum security unit, as well as renovations to transform BCC into a medium security facility.¹⁷⁹ On the other side of town, the Qimaavik shelter is constantly putting out fires, able only to provide emergency and short-term services to women and children afflicted by IPV, as many others continue to knock at their door.

The Qikiqtani Correctional Healing Centre project—like the introduction of the reverse onus—exemplifies the government's prioritization of building prisons, rather than empowering communities. This paper has demonstrated that the introduction of the reverse onus implemented by Bill C-75 will not only disproportionately and detrimentally affect Nunavummiut accused, it will simultaneously fail to keep complainants

does not necessarily ensure he will not harass, intimidate or assault her, and that punishment does not necessarily lead to a change in behavior” (*ibid* at 23).

177 See Nunavut Department of Executive and Intergovernmental Affairs, “Governments of Canada and Nunavut Investing in New Correctional and Healing Centre in Iqaluit” (1 February 2017) online: *Department of Executive and Intergovernmental Affairs* <www.gov.nu.ca/eia/news/governments-canada-and-nunavut-investing-new-correctional-and-healing-centre-iquait>.

178 Nick Murray, “New Iqaluit Jail Unlikely to Break Ground This Summer As Planned”, *CBC News* (8 May 2018), online: <www.cbc.ca/news/canada/north/new-iquait-jail-construction-delay-1.4652136>.

179 Nunavut Department of Executive and Intergovernmental Affairs, *supra* note 177.

and society safer. In effect, “tough on crime” mentalities will perpetuate IPV in Nunavut.

Viable solutions to address IPV in Nunavut must be founded on Inuit *Qaujimajatuqangit*, and guided by *pilimmaksarniq*. This framework asserts the need to focus, foremost, on empowerment from a community perspective. Community building and well-being is dependent on eliminating drivers of disempowerment among Nunavummiut. This includes providing communities with adequate social services. Moreover, *pilimmaksarniq* concerns both process and outcome. Accordingly, Nunavummiut communities must be part of decision-making processes which promote community-based empowerment initiatives. Similarly, Nunavummiut women must be engaged in decisions within the criminal justice system which directly impact them. These actions are foundational to empowering those most affected by IPV as “Inuit female well-being is understood within the context of Nunavut’s general health characteristics.”¹⁸⁰ The federal government’s approach to ending violence in Nunavut has proven to be generally fruitless. However, I am encouraged by the brilliance, strength, and resilience of Nunavummiut who imbue and alter perceivedly illegitimate colonial systems with Inuit *Qaujimajatuqangit*. These communities are eager for change, and willing to end violence.

180 Billson, *supra* 62 at 73.