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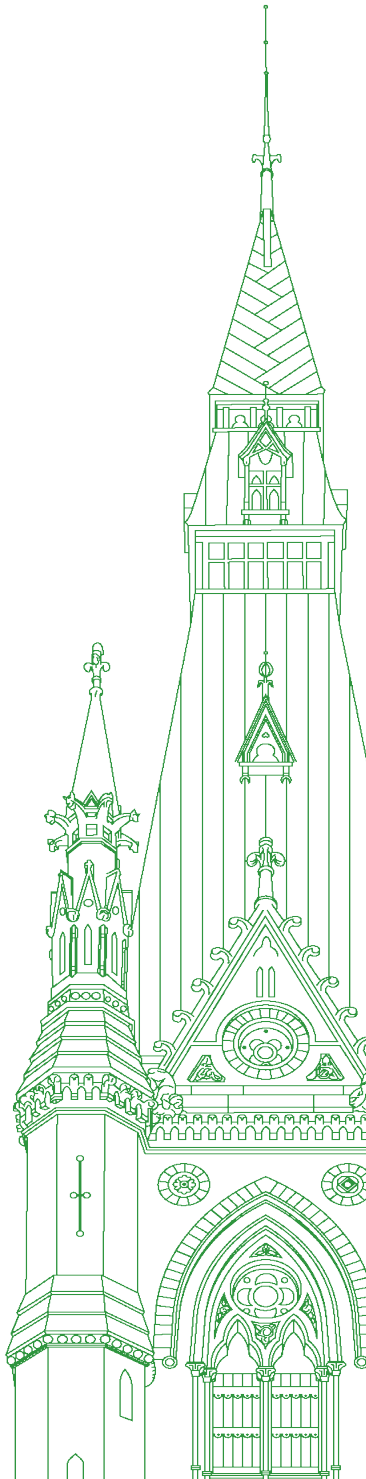

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Thursday, December 7, 2023

● (1535)

[*English*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): I call the meeting to order.

Welcome, colleagues. This is meeting number 88 of the House of Commons Standing Committee on Justice and Human Rights.

We are here today to continue our study of Bill C-40, an act to amend the Criminal Code, to make consequential amendments to other acts and to repeal a regulation on miscarriage of justice reviews.

I think you all know the rules by now, but I'm happy to read them at some point, if need be.

With us today we have two witnesses from the Department of Justice.

[*Translation*]

They are Julie Besner, senior counsel, public law and legislative services sector, and Shannon Davis-Ermuth, acting general counsel and director.

Welcome.

[*English*]

I'm ready to start the clause-by-clause.

Before I do so, I will recognize Monsieur Fortin on a point of order.

[*Translation*]

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

I just want to mention that, a little while ago, we received two notices of meetings for two meetings being held tomorrow. That isn't in keeping with the rules of procedure, which require 48 hours' notice, so I would ask that you revise the notices of meetings. If you really want the committee to meet Saturday or Sunday, please tell me, but holding a meeting tomorrow seems to be in breach of the rules.

The Chair: Thank you for pointing that out, Mr. Fortin.

Go ahead, Mr. Caputo.

[*English*]

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, Madam Chair.

First off, before we really get going, I have a point of order. I know that our two lawyers and legal experts are here. Obviously, we welcome them. Obviously, these sometimes cannot be the easiest of times, to sit here and watch Parliament, so we thank them for being here and exercising such patience and diligence to be ready at a moment's notice. First and foremost, I want to say that.

Madam Chair, my recollection is that we were to have the minister here. We don't have the minister here. I am inquiring as to how and why that occurred.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): It's because of you.

An hon. member: What?

The Chair: Okay, that's fabulous.

Thank you. I will respond to that—

Mr. Larry Brock (Brantford—Brant, CPC): I have a point of order, Chair.

The Chair: Okay. What we're going to do is—

Mr. Frank Caputo: No, he has a point of order.

The Chair: Would you like me to take all points of order and make notes and then respond to all of them? Let's do that.

Go ahead, Mr. Brock.

Mr. Larry Brock: Yes. I think, in this particular case, it's probably very appropriate.

Of all the committees I have sat on—and I have sat on plenty, not as a permanent member but certainly floating from time to time, depending on what the issue is—I can tell you something that I think is testament to both your chairing abilities and those of Mr. Sarai, our previous chair. We generally are a collegial group. We get the job done.

More importantly, we are respectful of each other. We have disagreed rather strenuously on pieces of legislation and on points of order, but at the end of the day—and I think to all the lawyers sitting at this table, particularly Mr. Mendicino, Mr. Maloney, me, Mr. Caputo and Mr. Van Popta—

An hon. member: Don't forget about Mr. Housefather.

Mr. Larry Brock: Oh, I'm sorry.

I apologize, Mr. Housefather. I didn't know your background.

An hon. member: He's an eminent litigator.

Mr. Larry Brock: There's also Monsieur Fortin.

Hon. Rob Moore (Fundy Royal, CPC): And me. You've named everyone else.

Mr. Larry Brock: I'm sorry. I'm in the doghouse.

Hon. Rob Moore: There's our chair as well.

The Chair: I'm going to insist that you start that again, please, because that's not respectful, and I know you didn't mean it that way.

Mr. Larry Brock: I absolutely did not, and I thank you for the ability to correct a very obvious faux pas on my part. With a very minor exception, everyone who sits on this committee has a law degree, and I'm aware of that.

I'm particularly talking to those individuals who have litigation experience. I don't know about Mr. Housefather's background, but Mr. Maloney, Mr. Mendicino, Mr. Moore, Mr. Caputo, Monsieur Fortin, I believe, and I have litigation experience.

The reason I'm suggesting we go down this path very momentarily is that when you are in a litigation environment, whether that's a tribunal, a committee room or a courtroom, you fight like gladiators. You're advancing your position. In my case, it was advancing the interests of the state, representing the Crown. Mr. Mendicino did the same thing on behalf of the Department of Justice.

Then you leave the courtroom and you are collegial with your opposing counsel. You shake hands; you may engage in a discussion or you may have coffee, etc.

I'd like to believe that my experience, as limited as it has been since my election in September 2021, has been a very positive experience, particularly on justice. Justice is primarily my home in terms of my committee work. I've always felt a warmth, a generosity and a kinship with all the members of this committee. As I said, we may disagree, but we walk out of this room, just like in a courtroom, and we're collegial with each other.

I am bringing this to the chair's attention because I'm prepared to give Mr. Garrison the benefit of the doubt on this. I do respect Mr. Garrison, but I did not appreciate the outburst that he displayed. It was directed toward my colleague, Mr. Caputo, and inferred that we are to blame for the sudden notice of meeting that was delivered to our inboxes.

I'd ask Mr. Garrison to perhaps reflect upon that. If it was delivered with some degree of malice or intent, I think it's disrespectful. I think it's unparliamentary, and I am asking for an apology and a retraction.

Thank you.

● (1540)

The Chair: Are there any other points of—

My God, I'm going to say this. This is not a good sign. Everybody in front of me is a gentleman.

Are there any other points of order around the table, gentlemen?

Mr. Frank Caputo: I'm sorry. Mr. Brock made his point of order.

Madam Chair, you're the chair. You have the ability to chair the meeting as you see fit. I'm not trying to usurp that or take that away.

I would hope that we could do as follows: I've asked a question on a point of order. If you're sure you're prepared to answer that question, I may have follow-ups, and then we can go from there. My hope is that we can have a civilized discussion.

We don't have the minister here. The question I have is, why?

The Chair: All right. Are you all ready to hear my responses without interrupting?

Mr. Frank Caputo: Certainly. I may have a follow-up question after, but you go ahead—uninterrupted, of course.

The Chair: That's fabulous. Thank you.

We started with Bill C-40. That was what we were reviewing. We did not conclude that.

My role as chair is to call meetings and set a number of administrative tasks, so within my role I decided to continue with what we had not yet started, which was Bill C-40, which we came back to at the last meeting. We didn't do that at the last meeting either, and to be fair to Mr. Garrison, my recollection of the last meeting—and I believe it went on for over two hours—was that members of the Conservative Party had a number of things to address, and we started to address them.

I'm not sure if they're finished or not, and so I am allowing a lot of time to ensure that members of the Conservative Party and anyone else who wishes to has plenty of time to address those. That is why, in my capacity as chair—and I can give you the page number if you like, and I know you will like, so I have it ready—I specifically scheduled meetings tomorrow, just to ensure that the Conservative Party members have enough time to address whatever points they would like to address, in the hope of concluding clause-by-clause on Bill C-40, which, in my recollection, all the parties in the room have pretty much come to an agreement on. That would be the end result of my meetings right now, to ensure that at least, at minimum, I get the clause-by-clause done, so that we can deal with other matters that were scheduled.

We started a speaking order. Thank you, Mr. Clerk, for writing it down.

I believe Mr. Moore is on that list, so Mr. Moore, I go over to you.

[*Translation*]

Mr. Rhéal Éloi Fortin: You haven't ruled on my point of order, Madam Chair.

[*English*]

The Chair: Hold on.

[*Translation*]

Mr. Rhéal Éloi Fortin: I'd like you to rule on my point of order regarding whether the notices of meetings are valid. I can read you the rules, if you like. We weren't given 48 hours' notice, so we can't meet tomorrow morning. I want to make that clear. I am on duty all night for votes, but I can't stay up 24 hours a day, five days in a row.

The Chair: The 48 hours' notice is given as a courtesy. It's not a rule. It's not something committee chairs have to follow.

Mr. Rhéal Éloi Fortin: I'm going to send it to you, in that case.

Thank you, Madam Chair.

The Chair: If you have something else to raise, we can discuss it after.

[*English*]

Mr. Frank Caputo: May I address what you just said, please, Madam Chair?

The Chair: Oh, I don't know. Ask Mr. Moore if he will let you go before him.

● (1545)

Mr. Frank Caputo: Well, ultimately, you're the chair. I'm sure Mr. Moore won't mind.

The Chair: No. Listen, I don't want to get between you two, so please, the floor is yours.

Mr. Frank Caputo: He has a mean left hook, Madam Chair, but I'm up to the challenge.

My question is this. I get that everybody has an interest in Bill C-40, and we've all heard capable witnesses and we have departmental officials here. I understand that.

The minister was set to be here on the estimates. That, itself, is also quite serious, so what I'm asking is, why don't we have the minister here? Secondly, was there any consultation that was undertaken in that circumstance? I certainly wasn't consulted on that.

The Chair: Do you want me to respond, then?

Mr. Frank Caputo: You're welcome to. I would prefer to just have a dialogue.

The Chair: Why is the minister not here? I've already replied to that. I have nothing more to add.

Mr. Frank Caputo: With respect, you said that we had to go on to Bill C-40.

The Chair: We hadn't concluded Bill C-40, so that's correct: We had to conclude that first.

Mr. Frank Caputo: Your view was that.... You mentioned at least three times that the Conservatives had a lot to say. That's fine, but the minister also has a lot to say, and we also have questions for the minister on behalf of Canadians, so my question again is, why was Bill C-40 put ahead of the minister, and what consultations were made in making that decision in your capacity as chair?

The Chair: The consultations that were made were my consultations, in looking at the schedule, the meetings that we have, the witnesses we have arranged and the order of things I have to have finished. I need to have Bill C-40 concluded before I go to anything else, because that was agreed to before by everyone.

Mr. Frank Caputo: I'm sorry. If I understand you correctly, Madam Chair, your position is that the committee has said we will not be dealing with anything, including the minister, until Bill C-40 is done. Is that your position?

The Chair: That's absolutely correct.

Mr. Frank Caputo: Maybe my colleagues can help me out. I don't recall our saying that we would pre-empt the minister as well on that.

Was there an agreement to that?

The Chair: Mr. Caputo, that was the reason we scheduled both Bill C-321, which I reported on yesterday, clause-by-clause having been successfully concluded at this committee, and Bill C-40. Those two needed to be dealt with and were on the order of business to be concluded.

It didn't make any difference to the minister's availability and his appearances as to which date he appeared, because as long as he appears..., and I'm sure he's still willing to appear.

If we can continue with our business and do what we need to do, I am sure we can call him again to appear.

Mr. Frank Caputo: When does he have to appear by for supplementary estimates? I don't know the rule on that.

The Chair: That's over and done with. That would have been a week ago, I think. There was a motion that it be, at the latest, on December 7.

Mr. Frank Caputo: That's a motion that the minister appear?

The Chair: That's correct. The minister had agreed to appear. The minister was scheduled to appear. There was no issue there. The issue was that we did not get to any business. We actually did absolutely no business that was scheduled to be done at the last meeting.

Mr. Frank Caputo: I'm aware of that. Is there a time by which the minister must appear, based on our motion and based on reporting on supplementary estimates?

The Chair: The supplementary estimate reporting is concluded. The time expired a few days ago.

I'll get someone to explain that to you, but that is in fact—

Mr. Frank Caputo: If Mr. Maloney can elucidate, I'm happy to cede my questions, Chair.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): Maybe I can shed some light on this.

We all know why we're continuing Bill C-40 today. I agree with everything Mr. Brock said earlier, and I've lived by that code my entire life. I don't know that it was necessary to bring Mr. Garrison into this. That was a comment made off the record, but be that as it may....

We want to get all these things done, and we want to get all these things done as quickly as possible. There have been a number of points of order raised. The chair has ruled on them.

I suggest that the easiest way to move forward and address all of these issues, be it Bill C-40, bringing the minister back at another time or dealing with the meeting tomorrow, which can be avoided if we get Bill C-40 done today.... I suggest we get to the matters at hand, and then get through them as quickly as we possibly can today. There aren't that many amendments that have been put forward.

Another thing I liked to do when I was practising, Mr. Brock, was to be brief and get to the point as quickly as possible. I always found that the adjudicators were very grateful for that, and I think that if we can apply that practice here today, we can accomplish all the things we've raised as concerns today.

Madam Chair, given that you've ruled on the points of order already raised, I suggest that we move on and start dealing with clause-by-clause consideration of Bill C-40.

● (1550)

The Chair: Mr. Garrison.

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

I would like to apologize to committee for my outburst and provide just a little context.

I had just come from the House, where, when I was asking a question very important to me on hate crimes against the gay community, I was heckled by a member of the Conservative party with, "What about the Jews?"

I found that extremely troubling. People will know around this table that I am among the most collegial and among the most respectful—at least I think that's my reputation. I'm not a heckler in the House.

That was what was behind that, but I also want to say that respect also means respect for the work of the committee and not bringing other political agendas from outside this committee to frustrate the work of the committee. When that happens, it frustrates me greatly.

On the bill we have in front of us, Bill C-40, indigenous people and racialized people, but in particular indigenous women, have been waiting for years for a better way to challenge the miscarriages of justice that have taken place in this country. When we have heard from all the parties that they are, in principle, in favour of this bill, it's very frustrating for some members of the committee to be prevented from getting to the work of the committee, so I am frustrated. I will admit that. I don't believe I'm being disrespectful by being frustrated with not being able to make progress on a bill we all agree on.

I too hope that we can move through this today. I'm prepared to stay here as long as it takes, obviously, to do this, but that wouldn't be about the injustices that people have suffered in our justice system. That would be about another political agenda, and that's what I find frustrating.

Thank you.

Mr. Larry Brock: Madam Chair, on a point of order, I want to thank Mr. Garrison for that. I apologize to you as well, sir, if you in any way took my comments the wrong way. I wasn't aware of what you experienced in the House, so I do apologize for that.

I'm really confused, Chair. I know ministerial time is very precious. For the last two years I have been frustrated in my ability to speak with various ministers, so we always look for opportunities to have ministers appear at committee. We agreed, I believe as a committee, if not at the subcommittee level, to have Minister Virani appear on or before today's date, December 7.

Obviously a unilateral decision was made, without consultation with committee members, which bypassed his appearance. I'm confused as to why Bill C-40 and clause-by-clause have taken priority over the minister, when we probably agreed at the subcommittee level that both should be priorities for this committee.

I want to draw everyone's attention to the first page of Bill C-40, which I copied off the computer earlier today. There's a recommendation under Bill C-40 that is as follows:

> Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled "An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation"

This requires the allocation of taxpayer money, and the allocation of taxpayer money is at the root of what appearances and discussions on the supplementary estimates flow from. Again, I could be the only one who's confused on this issue—and if I am, I apologize—but I thought that, given the circumstances and given the recommendation in this bill, as in other bills where there's an allocation of taxpayer money, a priority should be given to the minister. That concerns me.

What also concerns me, Madam Chair, is your statement that the supplementary estimates process has been completed without any input from any committee member at the justice level. I'd like to know how that happened, because I had a number of questions for Minister Virani on the allocation of money for Bill C-40, among other issues, in relation to the content of Bill C-40 clause-by-clause, and I'm missing out on this opportunity.

As I said, I've always had great difficulty.... I will throw a recommendation for consideration to Marco Mendicino, a colleague of ours, a former minister, who always had an open door policy. I never had any difficulty speaking with former minister Mendicino on any particular issue then—

● (1555)

The Honourable Marco Mendicino (Eglinton—Lawrence, Lib.): Or now.

Mr. Larry Brock: —or now, and quite frankly, I wish all ministers of the Crown had that sort of mentality, because it certainly brokers mutual discussions on important areas.

In my view, I need clarification as to whether or not we've completely lost the ability to question Minister Virani on the supplementary estimates.

The Chair: There's a list, so you're all on it.

Mr. Moore, do you still want to say something?

You're followed by Mr. Housefather.

Hon. Rob Moore: Thank you, Madam Chair. I think Canadians would like to know why the minister is not here. Not to belabour the point, but violent crime has gone up by 39% in the last eight years. Gang homicides are up by 108%. Gun crimes are up by 101%. That's all in the last eight years.

We have an accountability mechanism here whereby the minister appears. We made a decision as a committee that the minister would appear today. Initially it was going to be for two hours. Then that was reduced to an hour. Now, it is no time at all. That decision was made unilaterally.

I think we need to revisit that, Madam Chair. We do need to have the minister appear here. It's our job to hold the government accountable for these and other things, and it's the minister's job to appear before us.

Madam Chair, Mr. Brock actually covered quite a bit of what I was going to say, believe it or not. We debate our agenda, and we make decisions, usually, on a consensus basis. I had moved that the minister should appear. There's nothing out of the ordinary with that motion. Every committee would have a similar motion, that a minister appear on the supplementary estimates. We agreed, and there wasn't much debate at the time, I recall. There was pretty quick agreement that the minister would appear no later than December 7, today.

We also had the opportunity to deal with Bill C-40. We briefly dealt with Bill C-40 on Tuesday. We didn't get through it. It was slow going. It was very slow going on Bill C-40, but we do have next week to deal with it. We try to do a best guess on how long something's going to take, but when it comes to clause-by-clause, I have often seen bills go over the course of an entire meeting or two meetings. I've seen clause-by-clause go for three full meetings.

In this case, I would never have presumed that we'd be done Bill C-40 on Tuesday and then have the minister on the 7th. The agreement that was made by this committee was that, whatever happens on Tuesday, the minister's going to be here on the 7th, today, to be accountable.

The minister has appeared in the past. He should be here now. On a going-forward basis, when the committee makes a decision, I think we need to....

Nothing in my view warranted a change in the schedule. I know a change in the schedule was made. We've moved from scheduling the minister to Bill C-40. I don't see what warranted that, particularly when we are here next week. Unless there's something happening that I don't know about, we're here next Tuesday and Thursday.

On that point, Madam Chair, I'll leave it at that.

I want to reiterate that in my experience it's quite rare that a change in schedule would happen like that with such short notice. Also, to Mr. Fortin's point, I'm sure the very short-notice plan to meet all day tomorrow, Friday, on Bill C-40 probably took a number of people by surprise. It certainly took me by surprise. I don't mind.

I think Bill C-40 is interesting. It deals with a topic, and our witnesses were extremely interesting. I think there's a lot for us to flesh out. I think the government's proposal on Bill C-40 as it was drafted is wanting. I think we have amendments that we have put forward. There are other amendments that other parties have put forward to make changes to Bill C-40 as it was tabled. We'll get to all of that, but I think today we should have been dealing with the minister.

I can't ask the witnesses this, Madam Chair, so I guess I will ask you. When do we expect to have the minister here on the supplementary estimates?

Thank you.

● (1600)

The Chair: Thank you, Mr. Moore.

We're taking notes on all this.

Mr. Housefather.

Mr. Anthony Housefather (Mount Royal, Lib.): Thank you, Madam Chair.

I tend to be somebody like Mr. Garrison, I think, who is collegial and tries to be pragmatic. I think most of us in this committee, fortunately, are that way, so I just want to start by saying, because somebody made a comment about Jews, that Randall Garrison has been the most solid ally I have ever had in the NDP in standing up for the Jewish community in Canada. I want to put that on the record.

Second, on this issue, my understanding in committees that I've always been on is that clause-by-clause on bills supersedes other meetings. When you move to clause-by-clause on a bill, you continue clause-by-clause on a bill until you finish clause-by-clause on that bill. I personally thought that there was clearly an understanding here at the end of the last meeting that we would then continue with clause-by-clause on Thursday. I thought that was fully understood. Certainly, it was my full understanding.

The minister, I think.... I will answer Mr. Brock's question. The deadline for the committee's voting on the estimates passed before today. It doesn't mean that you can't ask every question you want of the minister. We often entertain ministers after the deadline for that ends. It would be no different if you had him today or next Tuesday on that question.

My recommendation—since, I think, none of us wants to be here tomorrow—is that we move through the clause-by-clause on this bill, which is supposed to be on our agenda, before we finish today. There are only five amendments proposed. The Conservatives, with all the flaws in the bill that Mr. Moore mentioned, proposed only one amendment. Let's try to get through that. I think we can, if we really try. Then we will have the minister at the next meeting, on Tuesday, and we won't have to worry about Friday meetings that may or may not be in order.

Thank you.

The Chair: Thank you very much, Mr. Housefather.

Was there anyone else? Mr. Van Popta...?

No. I'm sorry.

Did you have a motion at the end of what you said?

Mr. James Maloney: Yes. He moved that we should go back to clause-by-clause.

The Chair: That's what I thought I heard.

Mr. Anthony Housefather: I thought I was clear. If you want me to make it a motion, Madam Chair—I thought you had the authority to do that—then I move that we move to clause-by-clause now.

The Chair: Do you want to vote on it by a show of hands, or do you want the clerk to call it?

Mr. Anthony Housefather: I think, Madam Chair, that you have the authority to tell the committee. You started the meeting by saying that we were on clause-by-clause. I don't think we actually need a motion for this. I think you can move straightaway.... If I were the chair right now, I would move right away to clause-by-clause and I would call clause 2, which is the clause we were debating in the previous meeting. Then we would continue the debate that we were having on clause 2, with the speakers list that was there. That would be my recommendation.

The Chair: I'm going to take that recommendation, Mr. Housefather, since you've been doing this for many years, and I am going to move to clause 2.

● (1605)

Hon. Rob Moore: Madam Chair, on a point of order, then, Mr. Housefather moved a motion. I disagree with his motion, number one, because we're obviously discussing things that are important to the committee right now, on topic with what we were supposed to be talking about today.

I want to point people's attention to the motion that we passed and to think of how this has been undermined with recent events: “November 9th, 2023, the Committee invite the Minister of Justice to appear for no fewer than 2 hours”. There was consensus on that: no fewer than two hours.

Regarding—

Mr. James Maloney: I'm going to make a point. Mr. Housefather's motion was that we move to clause-by-clause, which, if I'm not mistaken, is a dilatory motion that does not allow for debate. We have to go right to a vote.

An hon. member: It's not dilatory.

The Chair: Actually, that's what I've been told here. Yes, we have to go to a vote.

Hon. Rob Moore: Madam Chair, for a motion to adjourn, we would go to a vote.

The Chair: Yes.

Hon. Rob Moore: Are motions not debatable now?

The Chair: No, not this particular one. We will have a vote on the motion and then deal with whatever afterwards.

Hon. Rob Moore: Are we going to debate the motion?

The Chair: No. It's non-debatable.

Do you want a recorded vote?

Some hon. members: Yes.

Hon. Rob Moore: What is the motion again?

The Chair: The motion is that we proceed with clause-by-clause for Bill C-40.

(Motion agreed to: yeas 7; nays 4)

The Chair: The motion is adopted.

I want to correct something before we go to clause 2. I have two members of Parliament here virtually today, and both are females, so I'm not alone. Both have considerable legal and litigation experience. I want to ensure that we have that on record.

[*Translation*]

Mr. Rhéal Éloi Fortin: Madam Chair, given the situation at the beginning of the meeting, I didn't ask you whether the audio tests had been successfully completed. You're signalling that they were, but I see that Mrs. Brière doesn't have her headset on.

The Chair: She can vote without a headset. It's fine.

Mr. Rhéal Éloi Fortin: I'm not sure I understand. Are you saying that she's not going to speak?

The Chair: That's correct. She doesn't need one if she's not going to speak.

Mr. Rhéal Éloi Fortin: All right. Thank you, Madam Chair.

[*English*]

The Chair: We're going to clause 2.

Mr. Frank Caputo: On a point of order, Madam Chair, we had two points of order. Do they just evaporate into the ether at this point? Neither of them was heard.

The Chair: I already answered them.

Okay, tell me. What is it that you want, again?

Mr. Frank Caputo: With all due respect, he was speaking about the requirement in the motion that the minister appear and why that didn't happen. It was not a permissive motion. It was a mandatory motion that he appear by that date. We didn't even hear Mr. Van Popta's point of order.

That's my point. What happens? People raise points of order and they aren't heard.

Hon. Rob Moore: Madam Chair, I have a point of order. I would like to raise it now, as is proper.

The motion was that the minister appear “for no fewer than two hours regarding the Supplementary Estimates” and that the meeting take place “as soon as possible, and no later than December 7”.

It's December 7 and the minister isn't here to—

Mr. James Maloney: I'm sorry, but I'm going to interrupt again.

Madam Chair, with all due respect, these points of order have all been spoken about, addressed and ruled on. We just voted to move to clause-by-clause. Hearing from Mr. Moore or anybody else on issues we already went over extensively today is out of order.

● (1610)

Hon. Rob Moore: Madam Chair, with all due respect to Mr. Maloney's comments, I don't have an answer to my point of order.

The question was, when is the minister going to abide by the motion we passed unanimously as a committee? This committee passed a motion that the minister be here today. The minister is not here today. My question, Madam Chair, is this: When is the minister going to be here? This is ignoring the will of this committee.

The Chair: The modified notice of motion was sent to all members and clearly indicates that we are doing Bill C-40.

We will be issuing an invitation to the minister to appear as soon as this committee can arrive at a point where we can have someone appear.

Hon. Rob Moore: On that point of order, I have no doubt we will get there.

The Chair: I hope so too.

Hon. Rob Moore: What was sent out was a notice of meeting. What we had was a unanimously passed motion. A motion supersedes a notice of meeting. We had a motion that all members, including both government and opposition members.... We all agreed to have the minister here today. That was a motion passed by this committee.

The minister agreed to be here, but he is not here. I don't know why the minister is not here. I don't see anything in what we're dealing with that would supersede our ability, as parliamentarians—government and opposition—to hold the minister to account for the department he is presiding over. That's our role here. You can understand why there's still an outstanding question in light of that fact.

I acknowledge the facts. One fact is that we passed a motion that the minister be here today, right now. Fact number two is this: The minister is not here.

The question I'm asking, by way of a point of order, is this: When is he going to be here?

The Chair: We will let you know once we contact the minister's office, after we deal with Bill C-40.

Mr. Larry Brock: I have a point of order, Madam Chair.

The Chair: Go ahead, please.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Madam Chair, I believe I have the floor.

Mr. Larry Brock: I'm sorry, colleague. Yes.

The Chair: Mr. Clerk, are you keeping an order?

Mr. Tako Van Popta: I've been trying to get in on this.

It's a simple question: What is the statutory deadline for the minister to come and speak to us on estimates? I understand there is a deadline. I was surprised to hear you say, Madam Chair, that the deadline has come and gone. I wonder why that would be.

Mr. James Maloney: With respect, Madam Chair, these arguments back up the point of order.

The point of order has been made clearly, over and over again. It's for you to rule on. In my opinion, you have already done this quite clearly and unequivocally. We should move on. Hearing further submissions in the form of arguments in support of a point of order that's already been ruled on is completely out of line.

Mr. Frank Caputo: I have a point of order on that. Mr. Maloney did not have the floor. My colleague had the floor. Mr. Maloney was not recognized.

Mr. Tako Van Popta: You weren't recognized. You just spoke out.

The Chair: We're suspended.

● (1610)

_____(Pause)_____

● (1615)

The Chair: I call this meeting back to order, please.

With respect to all colleagues, there was a motion. We voted on it and it is clear.

We will now proceed with clause-by-clause on Bill C-40. If you don't like what I've ruled on already and you wish to challenge the chair, please go ahead.

An hon. member: Is that like saying, “Make my day”?

Hon. Rob Moore: I'm not going to do it.

Some hon. members: Oh, oh!

The Chair: There will be no more clarification: I have responded to every single point of order. I will not take any points of order. I will now move to Bill C-40.

If you don't like my decision, challenge it.

Mr. Larry Brock: That's what I want to get clarified, because you made several decisions. I don't want to challenge several decisions, but I think the decision you made—or, from our perspective, did not make—with respect to the question put to you by my colleague, Mr. Moore.... I'm wondering if the chair wishes to reflect upon that.

Before you suspended, Mr. Moore articulated the question again to the committee and to you, Madam Chair, and I believe he was requesting a response. I could be completely mistaken on this, but I don't believe that you ever ruled when the question was originally put to you and then clarified, before we suspended.

Again, I want to reserve my right to challenge whatever ruling you have made. For the most part, I'm not in a position to challenge anything, but I think that out of respect for Mr. Moore and for everybody at this committee, perhaps Madam Chair could reflect upon giving a reason, or a ruling, with respect to Mr. Moore's question.

Thank you.

The Chair: We can still invite the minister to appear next week if the minister is available. That is clearly not a problem or an issue.

Mr. Larry Brock: Is he available next week?

The Chair: Well, I mean, I'm sitting here right now. It's something that one can find out. It's not a problem.

Mr. Larry Brock: Okay. Can I just ask a quick question on that?

Obviously, Madam Chair or someone from your office communicated with the minister to inform him that because of circumstances his presence was not required on today's date, notwithstanding our motion compelling him to attend. Was there a further discussion as to his availability before the House rises before Christmas?

● (1620)

The Chair: There was no discussion from the chair or from the clerk on that. There was no discussion. What we understood in this committee, me included, and other members who have spoken—obviously, not you—is that we need to finish Bill C-40 before the minister appears.

Mr. Larry Brock: I just want to be clear. We don't know for a fact of Minister Virani's ability to attend before we rise for the Christmas break. At this juncture, that has not been confirmed. Is that correct?

The Chair: That is absolutely correct.

Mr. Larry Brock: Thank you.

Mr. Tako Van Popta: I'm sorry, Madam Chair—

The Chair: Go ahead, Mr. Van Popta.

Mr. Tako Van Popta: I have a great deal of respect for you. You're a great chair, but you did not answer my question. What is the statutory deadline for the minister to appear?

The Chair: The minister can appear at any point in time that the committee requests the minister, but in terms of the supplementary estimates, in order to go back to the House, I was told that it was last Monday.

The clerk can explain that. I think Mr. Housefather already explained it. If that is not enough, I'm sure your staff can explain it as well.

Mr. Tako Van Popta: I'm not so sure.

Voices: Oh, oh!

Mr. Tako Van Popta: I have a very good staff, but—

The Chair: If you're really being honest and serious and you're not understanding, the clerk will explain. That's not a problem. We're happy to do that.

Mr. Tako Van Popta: What is the statutory deadline, and what are the consequences of our having missed it?

The Chair: There are no consequences that I'm aware of.

Go ahead, Mr. Clerk.

The Clerk of the Committee (Mr. Jean-François Lafleur): On the supplementary estimates (B), the last supply day is today. We have to count backwards on this for the time limit for the committee to report the supplementary estimates (B). It would have been last Monday at Routine Proceedings, of course. That's the time frame we have, according to, I believe, Standing Order 81(5).

Secondly, since we don't know what the last supply day will be ahead of time, it's difficult to establish or to have a date on which we are absolutely sure we can report to the House.

Given that, we can always have a study on the supplementary estimates, on the subject matter. The difference between a subject matter study and the one under Standing Order 81(5) is that we cannot vote anymore on each and every credit, because they have been deemed reported to the House.

Mr. Tako Van Popta: This is just for clarification. I'm not trying to be difficult.

The Chair: No, no. I understand.

Mr. Tako Van Popta: The consequences are that, having missed the deadline, this committee is deemed to have approved the supplements.

The Clerk: They're reported without amendments. Let's put it that way.

The Chair: It would be the same in each and every committee, obviously.

Mr. Tako Van Popta: I understand that. It's just that I want to know why we missed the deadline.

The Chair: I believe it's the opposition that decides—again, I've only been here since September 2021, and this is different from provincial—what the last opposition day is. That was decided, and it's today. We wouldn't have known that. Then you count backwards.

In any case, those dates are not within the purview of the chair of a committee.

Mr. Tako Van Popta: It's in your purview to change the meeting agenda.

The Chair: Yes. That's right. That's part of my administrative duty as the chair. It was done on the basis of the understanding we had that we needed to deal with Bill C-40 and not get any other witnesses.

Would you like to proceed, or do you have orders that you don't want to deal with Bill C-40?

Mr. Larry Brock: I think we're ready to proceed. Can we just verify who is on the speaking list as of now?

The Chair: No one. That's it. There's no one else on the speaking list.

(On clause 2)

The Chair: There are no amendments for clause 2.

Hon. Rob Moore: Madam Chair, I would like to speak to clause 2.

The Chair: Go ahead, Mr. Moore.

Hon. Rob Moore: On Bill C-40, clause 2, the analysts are here, and the witnesses from the department were here for two hours on Tuesday.

We appreciate your being here.

There aren't that many clauses in this bill, and there aren't that many amendments. However, this bill is a massive shift, I would argue, from the status quo, with the creation of a new commission and moving away some of the discretion held in Canada in the office of the Minister of Justice.

We have a history in Canada with those who have been wrongfully convicted. We have had miscarriages of justice. We also have a justice system that others in the developing world have looked at to emulate, so we certainly have a lot of good to work with.

We have to be careful when we make changes. I know that when we were in government, we made changes to improve the Criminal Code so that victims were protected, for example.

The concern I have with Bill C-40 has come up in the course of our witness testimony. This is specific to clause 2. We heard the U.K. experience. We also heard from North Carolina. I found the testimony of the witness from North Carolina very interesting. She explained to us that factual innocence underpins their system.

The reason I want to speak quickly to that is that it is what most Canadians would understand a miscarriage of justice to be, particularly wrongful conviction. It means that someone was arrested, charged for a crime they did not commit and exonerated some time afterwards. There was indeed a miscarriage of justice. They were convicted for something they did not do. They've been wronged. The system failed them. As well, the actual perpetrator of the crime is somewhere out there and needs to be caught.

I think that when a lot of Canadians hear about wrongful conviction or miscarriage of justice, that is what they imagine.

My concern is that this bill goes significantly beyond what those Canadians would imagine. It is trying to address, with a broad stroke, some issues within the justice system that could be addressed, but it should not be in a way that undermines our system and creates a parallel justice system. There's a danger of that.

I don't want to get ahead of myself, but as we look down the road at some of the amendments being proposed on Bill C-40, there's a significant broadening of the role of this commission. Underpinning even Bill C-40 itself, as it was originally presented to this committee, was a requirement that a person had at least appealed his or her decision. With some of the amendments that are coming, we are almost creating a parallel system. If you feel that you could be eligible, by some factor, for the wrongful conviction route, then, rather than appealing your decision, you would claim that there was a miscarriage of justice and go this other route. That creates major concerns.

At this very committee, in our study on the federal government's obligations to victims of crime, we had a witness who appeared. Many of you will remember her. What she said had an impact on me. You've probably heard me say it before. She was a victim of crime. She said that we do not have a justice system in Canada; we have a legal system. In her mind, those were two different things. She had been through our legal system. She had been victimized, number one, but then, going through the system, she felt she had been revictimized.

● (1625)

We have to be absolutely on guard, with Bill C-40, that nothing we do would add to that sense of revictimization for victims of crime in this country. They already have it tough enough. We've already studied and we've heard from them about how going to parole hearings revictimizes them, about how the way they're treated by the system revictimizes them, and about how the fear they have from appearing in court to provide testimony against the person who committed a crime against them revictimizes them. Victims of crime and their families are incredibly brave just to go through the process.

I know there are a couple of gentlemen here who have served as Crown prosecutors and have had to work with victims as they navigate the system and seek justice.

How many individuals, at the end of the day, say, “I don't feel justice has been served”?

With Bill C-40, there is a real danger that, if we don't get it absolutely right, we're going to have more of those stories and not fewer. Individuals who have been rightfully arrested, charged and convicted are going to avail themselves of this parallel system. This parallel system will involve further trauma to victims, which is why we have a threshold whereby commissions, whereby ministers....

We've seen examples of thresholds that would say that there is a reasonable likelihood that a miscarriage of justice occurred and that there is a strong possibility that a miscarriage of justice has occurred. Neither of those even come to the civil level of balance of probabilities, let alone the criminal level of beyond a reasonable doubt.

In this legislation—this goes to the root of the whole thing, and that's why I'm mentioning it at the outset—there is a requirement that a miscarriage of justice “may have occurred”. What kind of threshold is that? That threshold is embarrassingly low.

Of course, in any given situation, something may or may not have occurred. That is not a reasonable threshold. It's not a threshold that's used in North Carolina. It's not a threshold that's used in the United Kingdom. It's not even a threshold that's used in Canada. Our Minister of Justice has a threshold whereby he considers these miscarriages of justice, and the team within the Department of Justice considers them, and “may have occurred” falls far below that level.

Those are some of the concerns I have at the outset, as we look at clause 2.

I want to ask our witnesses if they could walk us through clause 2 in terms of how it amends the status quo, certainly where we are now, and how clause 2 frames what follows with Bill C-40.

● (1630)

Ms. Julie Besner (Senior Counsel, Public Law and Legislative Services Sector, Department of Justice): Yes, it's my pleasure.

Clause 2, as I was explaining the other day, deals with section 679 of the Criminal Code, which is the bail pending appeal provision. It was a recommendation, following the consultations, that the courts of appeal would be better placed to hear applications for release while the commission is considering an application, or after it has made a referral back to the courts, and that those applicants could make applications to the courts of appeal instead of to the superior courts of criminal jurisdictions.

They have been doing that under the common law, even though they've been applying the bail pending appeal test, which is the same test that applies if someone is seeking a conviction appeal. That's what Bill C-40 does.

Hon. Rob Moore: Thank you for that.

When you say the same—

The Chair: Can I recognize your colleague? He has his hand up.

Hon. Rob Moore: If I could just finish quickly, that just raised another question.

There has been much discussion around the standard around bail. Bill C-48 amends the bail provisions for certain offences. Bill C-75 brought in a presumption that involved individuals receiving bail, which many would argue shouldn't be there.

Is the test, then, identical to that for bail?

What do we make of moving this decision to the appellate court, which is removed from the facts of the case that would have been dealt with at trial? It's a level removed from that. What was the counter-argument, I guess, to just leaving it at the trial level?

● (1635)

Ms. Julie Besner: I mentioned that this recommendation came out of the consultations that occurred. The two retired judges who were responsible for conducting the consultations consulted with around 200 individuals and organizations. This is something that came out of those consultations. There was quite a bit of support and not too much opposition to it.

You asked the question about how it would apply before a court of appeal. A notice would have to be provided and an application put forward. There tends to be quite an extensive inquiry into whether someone could or should be released.

I can also specify that it's the applicant who has to establish that the miscarriage of justice application is not frivolous. They would have to satisfy the court of appeal that they would surrender into custody when required and that the detention is not necessarily in the public interest. It's an applicant's onus—

Hon. Rob Moore: I don't want to get ahead of myself on this, because we have other provisions.... We have amendments coming up that would take away the requirement contained in Bill C-40 that the applicant appeal a decision. This is why clause 2 is important.

Someone is convicted of an offence. They've gone before a judge and they've been found guilty and convicted. They're left with a possible decision at that point, in consultation with their lawyer, on whether to appeal their decision or apply under the provisions of Bill C-40 to the commission for a hearing on whether they meet the threshold of wrongful conviction or miscarriage of justice. The threshold that we contemplate setting is that "a miscarriage of justice may have occurred". These decisions will have to be made by individuals.

Under the current Bill C-40, as presented, there would be no decision. You can't avail yourself of the commission unless you've appealed the decision. How do we reconcile this shift—or does it have to be reconciled?—if we make a subsequent amendment that removes the requirement to appeal?

We hear evidence all the time about delays in the justice system. We have Jordan's principle. We're taking court of appeal time, potentially, to deal with these miscarriage of justice cases. All the evidence we've seen so far is that the applications are going to go up. Some of the evidence we've seen is that our applications are going to skyrocket.

I don't know that Canadians believe there should be a skyrocketing in the number of people alleging that they were wrongfully convicted, but how do we reconcile...? It's not fair to you, really, because we haven't dealt with that clause yet, but there's an interplay between the two. The court of appeal is going to be in a position to have the hearing on release when someone has made application to the commission. Also, it could be that the decision is appealed to the court.

How does the interplay work on that? What if someone goes with a wrongful conviction application and then decides to appeal their decision? Again, I don't want to get ahead of myself, because we haven't dealt with that clause yet, but given that one of the amendments came from the Liberals, the government, and one of the amendments came from the NDP, I have a feeling this bill is going to be substantially changed, possibly removing the requirement that someone appeal their decision. How do those two interact, if that should happen?

● (1640)

Ms. Julie Besner: Bill C-40—

The Chair: Mr. Moore, having heard what you said, would you like us to vote on clause 2, since there are no amendments, and move to the clause you're referring to? Would that make it easier for you and the committee?

Mr. Larry Brock: I have questions.

I want to truly understand clause 2, and at this point—

The Chair: That's fair enough. Thank you.

Madam Besner, I think you were prepared to shed a bit more light on that.

Would you like her to respond, Mr. Moore, or would you like to ask more questions first?

Hon. Rob Moore: I guess I would like, if there is something to add—if Ms. Besner has something to add, based on what I asked....

The Chair: Maybe I can ask Mr. Van Popta.

I know you have been patiently waiting. Perhaps you can also ask your questions and put on the table what clarifications you need as well.

Mr. Tako Van Popta: I'm anxiously awaiting an answer to a very good question from my colleague. I don't know if Ms. Besner wants to do that.

Mr. Larry Brock: I just have a suggestion, Madam Chair.

Maybe the two government officials can quickly jot down all the questions that I know my Conservative colleagues will have. Then maybe we can suspend for a few minutes and then get all the responses at the same time. That might be expeditious.

The Chair: I think that's a tremendously good idea. I agree.

Mr. Van Popta, it's over to you.

Mr. Tako Van Popta: Thank you so much, Madam Chair.

Thank you, witnesses, for being here.

We're looking at clause 2, which would amend subsection 679(7) of the Criminal Code. I'm just going to read the first part of it, just to put it into context. Subsection 679(7) of the Criminal Code would now read, if and when this bill passes:

> If the Miscarriage of Justice Review Commission established under subsection 696.71(1) notifies a person under subsection 696.4(5) that their application for review is admissible

and then certain things happen. It sets off a sequence of events. You've highlighted that. Thank you for the clarity on that.

My question is this: What happens if the review commission decides that the application is not admissible?

What avenue does the unhappy litigant—or I guess the person is a convict still, at that point—have under judicial review procedures? What's available? What's the standard for review?

It's been a lot of years since I studied administrative law in law school. I would just be curious as to what that is. I studied something about the U.K. procedures. I just want to do a comparative...of that.

Thank you so much for looking into that.

The Chair: Mr. Brock.

Mr. Larry Brock: Thank you, Madam Chair.

Ladies, thank you very much for being here.

As my colleague Mr. Moore has indicated, I'm a former Crown prosecutor. I did a fair number of appeals. I'm very familiar with the process, and I know the language. I'm a firm believer in clarity, and I know my colleague Mr. Caputo is a firm believer in clarity when it comes to language in any piece of legislation. In particular, I think the Criminal Code demands clarity.

The concern I have in clause 2 is that it is not clear at all what legal tests are being contemplated here. If I understand it correctly....

I believe the first question that was put to you, Ms. Besner, was to describe generally what this section means, and you gave us a response. Is it fair to say that this is purely a mechanism by which a convicted person—who has received consideration from the review commission that the application they have submitted is admissible—has the ability to seek release from whatever institution they may be in? Is that generally what clause 2 is suggesting here?

That's one question. I'm going against my own suggestions here. I have more. Perhaps you could just jot down my questions.

The lack of clarity is this wording in the third line in the new subsection 679(7) proposed in clause 2. It says:

> this section applies to the release or detention of that person—as though that person were an appellant in an appeal described in paragraph (1)(a)

That is, in my opinion, extremely ambiguous in terms of the conferring of the rights attributable to the convicted person whose application has been ruled admissible. I need to know why the drafters of Bill C-40 did not see fit to use the exact language that currently exists under subsection 679(7).

You, Ms. Besner, referred to it in terms of establishing that it is not frivolous—I believe you used that language—and that it isn't contrary to the public interest. There was a third aspect. I'm not sure what that third aspect was. I've opened up my Criminal Code here. Just give me a moment. It reads, “he will surrender himself into custody in accordance with the terms of the order”.

The second question is: Why wasn't that language clearly spelled out in clause 2?

The third question is in relation to the adjudicator of the release. In this particular case, the adjudicator would not be a judge, but rather, I believe, someone from the commission. I don't know if that is correct or if that's what's contemplated, but I would like to get that question answered.

I'm going to throw a hypothetical out to you as well. Let's say, for instance, that the convicted person was convicted of a homicide, which generally attracts the most stringent of release conditions if someone qualifies under the circumstances. I would like to know, again, if all of the provisions currently under subsection 679(7) would be available to the adjudicator who is contemplating a release.

The next question I have is, again, about using the language under section 679 of the code, where the first test is that the “application for leave to appeal is not frivolous”. Here's my question to you. Isn't that rather moot—the whole concept of a frivolous application—in light of the fact that the commission itself has deemed the review to be admissible?

● (1645)

I wonder why the drafters of Bill C-40 would use duplicitous language. Clearly, if the commission has ruled the application to be admissible, inherently they have ruled that the application is with merit and is not frivolous. However, the frivolous test is maintained under subsection (7). I'd like clarity on that.

I'd also like to get clarity on that hypothetical in terms of the availability of sureties: how they would present themselves and how they would give evidence to the adjudicator who is making that decision to continue the detention of the convicted person or the release of that convicted person.

Again, I'm always very much concerned about inherent delay. I know that Jordan's principle under the Supreme Court of Canada doesn't necessarily have the same rigid impact at the appellate level that it does at the trial level—the provincial or territorial level, a superior court or the Court of King's Bench—in terms of the prescribed timelines by which matters need to be completed.

I'm concerned about the inherent delay with this low threshold test, which in my view is going to increase the number of applications presented to the commission. There's a future clause that we are going to study in terms of whether or not to approve it, and the whole concept is to move these applications as expeditiously as possible.

Again, it's not very clear language. Were the drafters of Bill C-40 contemplating something that was reviewable by the commission in terms of taking a look at the progress? I know that the commission is mandated to inform the appellant along the way as to the status. That is not necessarily the case in a true appeal setting, where someone either is on their own or has the assistance of legal counsel.

I'd like to get some clarity on that question.

Thank you, Madam Chair.

● (1650)

The Chair: You're welcome, Mr. Brock.

I have Mr. Caputo next, followed by Mr. Garrison.

Mr. Frank Caputo: Thank you, Madam Chair.

I don't sound nearly as smart as Mr. Brock. I'll probably ask questions that might be a bit repetitive, but I'll ask them in my own way.

One thing is interesting to me here, and perhaps I'm wrong on this. When we look at bail when somebody goes to the court of appeal, it's that court that issues process on bail and that fixes bail. If they're convicted in Supreme Court or the Court of King's Bench, it's not that court; it's the court of appeal.

In this instance, I'm assuming that the court of appeal would fix bail on terms and conditions that it sees fit. However, it's doing it in respect of a process that it has absolutely no control over, because this is a parallel process, as I understand it.

Could there be issues arising by virtue of the fact that we have a court addressing bail, and then it's not a court—it's a tribunal of sorts, or a commission—that's addressing the issue of wrongful conviction?

Secondly, would it be helpful if there were enumerated considerations for bail when somebody is released on bail, on the basis that their conviction is being investigated? I believe the threshold is "reasonable grounds to believe that a miscarriage of justice may have occurred".

We haven't got to clause 3 yet. As we know—Mr. Fortin is smiling—that itself is going to be a very interesting question. What does "reasonable grounds to believe...may have occurred" mean? A possibility of occurrence is one thing. I mean, that's why we talk about reasonable doubt and whether the doubt is a reasonable one, and then the reasonable grounds factor into that.

What's the threshold, then? I think that an appellate court judge would probably want to know the likelihood of success of this appeal. If memory serves—I don't have my code on me—there are matters within the code that an appellate judge can consider. For instance, "I believe the likelihood of success on appeal...."

Now, at this point, too, we could look at the distinction between the court of appeal...because there, they've only filed the appeal, right? In this instance, they've actually surpassed an initial threshold.

In this instance.... I'll let you get your paper there.

The Chair: Mr. Caputo, please address your questions through the chair.

Mr. Frank Caputo: May I let her get her notebook in order, please, Madam Chair?

The Chair: That's not a question.

Mr. Frank Caputo: Well, I'm speaking to the witness, but I have to do it through you.

The Chair: That's exactly correct.

Mr. Frank Caputo: If I'm going to speak....

In any event, I think you have my point.

Through the chair, can I continue, please? Are the witnesses good?

Ms. Julie Besner: I'm listening.

Mr. Frank Caputo: I'm sorry. I lost my train of thought. Imagine that.

Would it be helpful if, on a review for bail, there were questions...? Pardon me. I think where I was going with that is.... One thing I believe the court looks at is the likelihood of success on bail. To be candid, I don't know or recall what that likelihood of success is. I don't think it's a super-high threshold. Is that something we should be considering, especially in the case of a life sentence?

Perhaps, when we deal with clause 3, this informs it. How high is that "reasonable grounds"...to believe there should be bail? I'm not sure whether.... Perhaps the witnesses may say to the committee, "Look, this is actually a higher threshold than...somebody in a court of appeal, who has to satisfy the justice sitting as the bail judge." I'm not sure if that could do it.

Through the chair, am I making any sense here?

An hon. member: No.

Mr. Frank Caputo: My colleagues say no.

I may have one other question here.

How about this? Should the duration of the review factor into whether bail is offered? By that I mean, when something gets investigated, we don't know how long it's going to take. An appeal, generally, is quite long. It's probably truncated if somebody's in custody. Even if someone's in custody, though, it's often a few months to a year or two.

Those are just a few questions.

Thank you.

● (1655)

The Chair: Thank you, Mr. Caputo.

I'm now going to ask Mr. Garrison to please ask his questions.

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

I don't have questions for the witnesses, but I'd like to put a few things on the record here.

One, I think it's important for everyone to understand that the same process of obstructing clause-by-clause is going on in four committees simultaneously. Therefore, I have a difficult time accepting the sincerity of members' questions, at this point.

Two, if members have questions about the wording of clauses, there's a process. That process in this committee is to submit amendments. The members chose not to submit amendments. They're asking questions about the wording and saying it should be changed to something else. That process is submitting amendments.

The Conservative members are also debating the threshold from which the commission can work. You have an amendment on that coming up. You submitted an amendment on that point, so, with respect, I say we need to do that under the section that actually amends that clause.

I have two more things that are more substantive.

One, Mr. Moore raised that the standard should be proving innocence. In Canada, we have the Charter of Rights and Freedoms, which guarantees the presumption of innocence, unless you're proven guilty beyond a reasonable doubt. Inserting a clause that requires proving innocence in this would be unconstitutional in Canada. It's different in the United States' legal regime, where presumption of innocence is not entrenched in their constitution but is a matter of case law and has limitations.

Finally, there have been many references to the amendments that I and Mr. Housefather put forward as ones that remove the requirement of exhausting appeals. Neither of these amendments does any such thing. They create an exemption whereby, if the commission felt there were reasons a person was unable to appeal, they would be allowed to take the application. No one on this committee is suggesting we do away with the requirement that people appeal before they can see the commission.

I would like people to be clear when they're talking about that. No one made that amendment. There's no such amendment on the table.

The Chair: Thank you, Mr. Garrison.

Mr. Moore.

Hon. Rob Moore: Thank you, Madam Chair.

I had a question, but I feel compelled to respond quickly to what Mr. Garrison said.

Number one, he mentions moving amendments. Conservatives did move an amendment. Some of my concerns stem from amendments that were moved by the NDP and the Liberals. When we were formulating our amendments, we didn't have the benefit of having those, so that's why I raised that question.

What's happening at other committees, I don't know, but I do know that this is the level of scrutiny that a bill of this magnitude should have. The idea that we would just blast through clause-by-clause on a bill that creates an entirely new commission, a different standard around the miscarriage of justice and different recourse.... In the context of our justice system now and the delays in it, I think it is appropriate to ask those questions.

The last time departmental officials and the minister were here was when they were introducing the bill to us. We had just seen the bill, and the minister was here to present it to us.

Now, we've had the benefit of witness testimony, and we have some questions about what's actually in the bill. That's part of our job. While in the past I would say people have probably commented on some things longer than necessary, on this bill I think these are all very valid questions.

I know that I, Mr. Caputo and Mr. Brock have presented a number of questions to the departmental officials, and if we could get some answers on those, I'd appreciate it.

● (1700)

The Chair: Thank you.

I just got some clear direction, and this is important, so I suggest that we all listen. If anybody wishes to challenge, please do so. We'll get legal here.

No amendments have been moved yet on this clause. They are deemed confidential until they are actually moved, because a member can withdraw them. I will not entertain any further discussion on any amendments until we get to amendments. I didn't realize that, so thank you very much for pointing that out to me. I did want you to complete your sentence, but when that came to my attention, I felt obliged to ensure that we're all aware of that rule.

Mr. Larry Brock: I have a point of order, Madam Chair.

The Chair: I don't know what point of order needs to be made on that, but go ahead, Mr. Brock. We have a few minutes left, so....

Mr. Larry Brock: Sure. I totally respect the information you shared with us, Madam Chair, with the assistance of your legislative clerks. I think it makes abundant sense, and I understand the position that you take, that you will not entertain any further questions from any member, given the lack of amendments to clause 2.

At the very least—and I support Mr. Moore's commentary about the relevancy of all the questions that were put to the government officials—I think we would be doing a disservice to Canadians and a disservice to this committee if we did not have those answers. I'd ask that the Chair direct our government officials to respect your particular ruling, Madam Chair, but also give us responses to all relevant questions that were put to them.

The Chair: Yes, you're allowed to ask questions, but you are not allowed to debate at all amendments that have not been moved. We're going to terminate it at that.

I will leave it to the Justice officials if they feel they have received questions that they can provide clarification for.

Let me just say this. As the chair of the committee since September, but of course having been on this committee for the last two years, I cannot agree more with each and every one of you who spoke in the beginning. Mr. Brock, Mr. Moore and all of you.... This has been the most cordial and respectful committee, and it should be, because it is the justice and human rights committee. If this is not, then what do we leave for others?

For that, I really want to thank each and every one of you, because I believe you are all here for the right reasons. We are all doing our best to respect each other, recognizing that we don't agree with each other's points.

That's fair. Is that correct?

Now, let me move on to the witnesses who are in front of us. I want to thank you, on behalf of all the members who are here on this committee. You have come today. You came before today. You will likely come back tomorrow, and maybe next week as well. Thank you for your patience, for your courtesy and for your professionalism in dealing with each and every member on the committee as you clarify and do the best job that I know you're here to do for Canadians.

Thank you very much for that.

I'll now let you respond, in the time we have left, to the questions that were raised. The floor is yours.

● (1705)

Ms. Julie Besner: Thank you.

On the first question, Bill C-40 proposes that the requirement to have exhausted rights of appeal be maintained. There are exceptions that are laid out with respect to whether an appeal was sought subsequently to the Supreme Court of Canada. As I understand it, that's all that's being considered and proposed at this time on that question.

With respect to, “What if the commission does not consider an application to be admissible?”, yes, an applicant could seek a judicial review of that decision based on.... It would be reviewable on the standard of reasonableness in the federal court, following an extensive body of case law that was recently updated in Vavilov. All of that law would apply.

It's unclear which legal test would apply for bail pending review. Section 679 of the code operates as its own...it's a section, so all the subsections within the section apply. In subsection (7), which is being amended, there's a cross-reference to paragraph (1)(a). Paragraph (1)(a) is a conviction appeal that then references what the test is, and that's set out in subsection (3).

I mentioned earlier that the applicant would have to establish that their miscarriage of justice application is not frivolous, that they would surrender into custody when required and that detention is not necessary in the public interest. With respect to the public interest, the case law has evolved quite a bit. It essentially has two components. It has a public safety component and it has a component that deals with confidence in the administration of justice. The courts of appeal apply that. They also apply that the higher the seriousness of the offence and the lower the strength of an appeal, the more the public confidence would be undermined if the applicant were released.

On the flip side of that, the lower the seriousness of an offence and the higher the strength of an appeal, the more the public confidence would be undermined if the person were detained. The courts of appeal.... That is the body of case law that they apply. This would apply in this context as well, because an applicant would be treated just as someone who is appealing their conviction.

A single judge of the court of appeal could hear the application. The notice that has to be provided varies in each different court of appeal, because they set their own procedures for notice. That has to be provided before a hearing will be scheduled. This bill doesn't change that.

You'll have to give me time. I have to go down the list.

The Chair: Take as much time as you need.

Ms. Julie Besner: With respect to a proposed release plan, consideration of sureties and other conditions, it would apply as it would in the court of appeal. That is just the standard. It would apply as if it were a conviction appeal.

I just outlined the considerations.

Mr. Larry Brock: One of my questions—

● (1710)

The Chair: They're still conferring.

Mr. Larry Brock: Oh. I'm sorry.

Ms. Julie Besner: On the hypothetical...of someone who has been convicted of a homicide, if that's the nature of the review that will be undertaken.... As I outlined a moment ago, the more serious the offence is.... If the strength of the appeal is low and the seriousness of the offence is high, the court of appeal would look at how greatly the public's confidence would be undermined if that person were released.

I can also say that there have been several cases considered recently by the superior courts wherein the minister entertained an application for review. There is a body of case law that has applied. I could follow up, if you like, for example, with a list of those decisions. It's well established throughout the country.

Mr. Larry Brock: There's one question that I don't think I received a response for. Madam Chair, through you, it was in relation to proceeding "as expeditiously as possible".

The question I put to the officials was, does this new process contemplate the Jordan guidelines? I prefaced it by saying that, generally, the appellate route does not follow the Jordan guidelines to a T. Again, I'm seeking clarity on the language "as expeditiously as possible" and whether it sets out any finite timeline.

I was concerned about that and needed some clarity on that issue.

The Chair: Ms. Besner, would you like to comment on that?

Ms. Julie Besner: There's no incorporation of Jordan's principle, specifically. There's the overarching requirement that the commission deal with applications "as expeditiously as possible" and provide notices and regular status updates to applicants.

It's been one of the main observations that the existing regime is very lengthy. It averages, often, a minimum of a year and up to six years. Other countries are able to resolve and consider applications in around a year, as in the U.K. In Scotland, I think they're able to do it in around seven months.

It's certainly one of the main goals of the legislation: processing applications more quickly. The means to accomplish this is by having a greater number of decision-makers. I think you all know that one minister of justice has many different priorities under their portfolio and is the only decision-maker. With the commission and a minimum of five—up to nine—commissioners and quite a bit more staff.... The intention is that they will have a greater capacity to handle applications more quickly, so people can have their matter referred back to the courts if it meets the referral test.

The Chair: Thank you.

Shall clause 2 carry?

Mr. Frank Caputo: We have follow-up questions.

The Chair: I didn't see any other hands.

Mr. Van Popta, go ahead.

Mr. Tako Van Popta: We made eye contact, so....

I'd like to thank Ms. Besner for a very concise answer to my simple question about judicial review.

I wonder if you could give us two references. Number one is the section number in either Bill C-40 or somewhere else in the Criminal Code that says what the judicial review process is. For number two, I think you referred to a case, but I didn't get the name of it. I would like those two things.

Where do I look for the actual judicial review and what triggers it? What's the case you referred to?

Ms. Julie Besner: I referred to the case of Vavilov.

The statute is the Federal Courts Act. That's the body that will consider judicial review of federal administrative tribunals, bodies and commissions.

Mr. Tako Van Popta: Thank you.

The Chair: Mr. Caputo.

Mr. Frank Caputo: I remember that, when I went through school, I didn't take administrative law—confession. Is Vavilov akin to what Baker was a number of years ago?

● (1715)

Ms. Julie Besner: I'm not familiar with Baker, but it's relatively recent. It was a federal court decision, then it went to the Supreme Court in 2019.

Mr. Frank Caputo: That shows you what I know, which is little.

Some hon. members: Oh, oh!

Mr. Frank Caputo: Mr. Maloney is going to read it tonight. That's great.

On the question of judicial review, theoretically, if somebody sought bail pending review by the commission—whether or not they got bail—but the commission ultimately denied that a miscarriage of justice occurred, or it just didn't go in their favour.... I think you probably know what I mean. Their application wasn't successful, and they applied for judicial review.

Could they then apply for bail in the same circumstances?

Ms. Julie Besner: I don't think they could, because of the way it's proposed in the bill regarding what the trigger is to make an application to the court of appeal for bail. A judicial review is not referenced.

Mr. Frank Caputo: Because it's not expressly contemplated—

Ms. Julie Besner: The commission has to first determine that the application is admissible and provide a notice. That creates the trigger to be able to apply for bail pending.

Mr. Frank Caputo: That's a very good answer. I never would have thought of that.

The Chair: I'm going to ask for unanimous consent to continue past the bells. We have another 15 minutes.

Mr. Larry Brock: I'm sorry, Madam Chair, but we cannot give consent.

The Chair: You cannot give consent, Mr. Brock. Why not?

Mr. Larry Brock: I said that I was sorry.

A voice: I was prepared to say, "Thumbs-up."

The Chair: You were.

Listen, I respect your apology. Thank you.

Colleagues, with no unanimous consent, I wish you luck voting tonight and look forward to seeing you tomorrow morning. We will have coffee and tea. Please bring your muffins.

The meeting is adjourned.